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**Court of Appeals**  
**Division II**  
**State of Washington**

NO. 49703-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON, Respondent

v.

JOSHUA STEWART BALL, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01301-7

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The trial court properly denied Ball's request for a self-defense instruction.**
- II. **The trial court properly denied Ball's motion for a mistrial and did not deny him his right to testify.**

### STATEMENT OF THE CASE

Joshua Ball (hereafter 'Ball') was charged by information with Assault in the Third Degree and Being in Actual Physical Control of a vehicle while under the influence. CP 21. The charges arose out of an incident that occurred on July 13, 2015 when police contacted Ball while he was passed out behind the wheel of his pickup truck in Vancouver, Washington. At trial, the State presented testimony from four witnesses: Bethany Frailey, Deputy Jason Hafer, Deputy Ryan Preston, and Deputy Wayne Phillips. RP 99-294. Ball called his doctor, Dr. Kathryn Kolibaba to testify in his case, and testified in his own defense. RP 312-537.

At trial, the evidence showed that Bethany Frailey is a Vancouver, Washington resident who was driving in her vehicle on Interstate 5 (I-5) in July 2015 when she called 911 due to a worrisome driver. RP 184-86. It was late night or early morning when Ms. Frailey was driving her sedan on I-5 northbound in Vancouver when a silver truck came from behind her, going fast, and nearly sideswiped her. RP 184-86. The truck's movement caused Ms. Frailey to veer her own vehicle into another lane to

avoid being struck. RP 186. Ms. Frailey saw the truck, continuing to drive fast, continue ahead of her, unable to stay in its own lane. RP 187. Ms. Frailey thought something was obviously wrong because the driver did not seem to have control of the car. RP 187. The truck then took the exit ahead of Ms. Frailey that she also was taking. RP 187. Ms. Frailey was heading to her house, so she did not intentionally follow the silver truck, but it was proceeding ahead of her along her route to her house. RP 188. Both the truck and Ms. Frailey got off I-5 at the 78<sup>th</sup> Street exit and headed south on Highway 99. RP 188-89. Ms. Frailey saw the silver truck about to turn into the Taco Bell parking lot. RP 189. Prior to reaching the Taco Bell parking lot, there were several other businesses the vehicles passed that had driveways and parking lots accessible from the southbound side of Highway 99. RP 189-90.

Ms. Frailey decided to follow the silver truck into the Taco Bell parking lot. RP 190. But the vehicle stopped at the light at the turn into the Taco Bell lot. RP 192. She saw one person in the truck, the driver, and the driver was hunched over with his head on the steering wheel. RP 190-91. Ms. Frailey called 911 at that time and indicated someone was passed out at the wheel at the light by Taco Bell. RP 192.

In July 2015, Jason Hafer was a deputy with the Clark County Sheriff's Office. RP 99. On July 13, 2015 at 2:46am he was dispatched to

a report of a possibly intoxicated driver on Highway 99 at 72<sup>nd</sup> Street. RP 101-03. At the time, Deputy Hafer was in a fully marked Crown Victoria patrol car, and was in uniform. RP 102. Deputy Hafer arrived at the scene two minutes later and saw a small pickup truck at the intersection, stopped, with a driver who was passed out or asleep. RP 103-04. Deputy Hafer took a photo with his work iPhone of the driver in the vehicle as he was passed out, admitted at trial as exhibit 2. RP 105, 148-49. Deputy Hafer identified Ball in court as the person who was driving the pickup. RP 105. Deputy Hafer observed Ball in the vehicle until another deputy arrived. RP 106-07. For those several minutes, Ball remained asleep. RP 107.

Deputy Wayne Phillips is also a deputy with the Clark County Sheriff's Office. RP 196-97. Deputy Phillips was working as a patrol deputy from 3:30pm until 3am into the morning of July 13, 2015. RP 198. He responded to a report of a person passed out behind of the wheel of a vehicle near the Taco Bell on Highway 99. RP 198. Deputy Phillips arrived at the scene at about the same time as Deputy Hafer. RP 198. The two deputies used their vehicles to block the truck in so that it couldn't move. RP 199.

Deputy Phillips and Deputy Hafer made a plan to approach the vehicle, one on each side, and turn the vehicle off and remove the keys so

that the vehicle could not be driven or moved. RP 109-10. Deputy Phillips approached the vehicle on the passenger side, and Deputy Hafer approached it on the driver's side. RP 111. Both deputies opened their respective doors, and Deputy Phillips reached across and grabbed the keys to shut it off. RP 111. Just then, Ball woke up, lunged forward and tried to grab the keys and turn the truck back on. RP 111. Deputy Hafer told Ball that he was the police, to relax, it's ok. RP 112. Deputy Phillips was able to turn off the truck and remove the keys from the ignition. RP 112. After his initial panic, Ball became very lethargic, staring off into the distance. RP 113. He had a blank stare on his face and had drool coming down his face. RP 113. Deputy Hafer smelled marijuana coming from the vehicle. RP 113.

Deputy Hafer attempted to ask Ball basic questions such as where he was going, where he was coming from, and why he was at the Taco Bell. RP 114. Ball either did not respond, or repeated the question back to Deputy Hafer. RP 114. At one point, when Deputy Hafer asked Ball why he was at the Taco Bell, Ball repeated the words "Taco Bell" in a questioning tone, and looked at the Taco Bell behind him, and then looked back at Deputy Hafer and said "that's a good question. Yes." RP 114-15. Based on Deputy Hafer's observations, he suspected that Ball was under the influence of an intoxicant. RP 121.

Deputy Ryan Preston, also of the Clark County Sheriff's Office, arrived and took the primary role in investigating the case. RP 122-23. Prior to becoming a sheriff's deputy, Deputy Preston worked as an EMT and then became a paramedic. RP 233-34. At the time of the incident involved in this case, and at the time of trial, Deputy Preston remained a nationally registered paramedic and holds a certification as an EMT. RP 234. Deputy Preston has also completed the drug recognition expert training program and has extensive training and experience in investigating DUIs. RP 236-37. Deputy Preston was dispatched to the scene for a potentially impaired driver who was passed out in his vehicle. RP 240. As Deputy Preston arrived, he saw Deputies Hafer and Phillips already there; Deputy Phillips was on the passenger side of the vehicle and Deputy Hafer was at the driver's door. RP 241. Deputy Preston made contact with Deputy Hafer at the driver's door. RP 242. As Deputy Preston spoke with Deputy Hafer, Ball tried to close the driver's side door of the vehicle, and Deputy Hafer grabbed the door and told Ball to keep it open. RP 123. Ball then grabbed a pack of gum and put a piece of gum in his mouth and started chewing it. RP 123. In the deputies' experience, intoxicated drivers often use gum to cover up the odor of intoxicants emitting from their breath. RP 125.

Deputy Preston told Ball to spit the gum out. RP 125. This statement from Deputy Preston seemed to snap Ball out of his lethargic state and he appeared to become annoyed, ramping up to aggressive. RP 125. Ball then asked them in multiple different ways where they wanted him to put his gum. RP 125. Ball spit the gum out upon Deputy Preston's request. RP 127.

When Deputy Preston made contact with the driver of the vehicle, whom he identified in court as Ball, he immediately smelled marijuana from the area of the cab of the truck; as he spoke with Ball, Deputy Preston noticed he had bloodshot and watery eyes. RP 243-44; 254. Ball was also very lethargic and slow to answer questions. RP 254. Deputy Preston was also informed by other deputies that prior to his arrival Ball had been unresponsive and drooling from his mouth. RP 242, 254. Deputy Preston also smelled the odor of marijuana from either Ball or his vehicle. RP 254. The physical observations Deputy Preston made were signs of intoxication. RP 255. Deputy Preston decided to ask Ball to step out from the vehicle to further his investigation into a potentially impaired driver. RP 255. Ball had a delayed response, but then he did exit the vehicle. RP 257. However, Ball's exit from the vehicle was unusual as he immediately locked eyes on Deputy Preston, directly staring at him, and started walking towards him. RP 128; 257. Deputy Preston has been trained in

pre-fight indicators and one pre-fight indicator is locking eyes on one person. RP 257. Another pre-fight indicator is when someone starts removing their clothes. RP 257.

When Ball locked his eyes on Deputy Preston, Deputy Preston took a step back to give himself more time to react. RP 257. Ball then started to unbutton his shirt. RP 257. Deputy Preston continued to step back to create more distance between himself and Ball. RP 258. Ball began to approach Deputy Preston. RP 258. Deputy Preston commanded Ball to stop and stay there. RP 258. Ball ignored the commands. RP 258. Ball was focused on Deputy Preston; Ball did not appear to be panicked, instead his actions and demeanor were aggressive. RP 260. When Ball was within two feet of Deputy Preston he closed both fists and swung a punch at Deputy Preston. RP 202-03, 261. The punch was directed at Deputy Preston's head. RP 130. Deputy Preston deflected the blow, wrapped his arm around Ball and was able to push him away. RP 261. Had Deputy Preston not taken measures to deflect the blow, Ball would have struck him in the head. RP 261. As Deputy Preston wrapped his arm around Ball, Ball throws more punches at Deputy Preston. RP 262. Ball successfully landed a punch on Deputy Preston, hitting him on his chest, right above the Velcro placard on his tactical vest that says "SHERIFF." RP 262. In punching Deputy Preston, Ball transferred some white substance onto

Deputy Preston's vest. RP 263. Exhibit 7 is a photograph of Deputy Preston from the night of the incident, that shows a white substance on his vest that came from Ball punching him. RP 263.

Because Ball was aggressive and punching Deputy Preston, the deputies were worried about the potential danger Ball posed and needed to subdue him. RP 264. Deputy Preston chose to use the least amount of force necessary to effect an arrest, so the deputies went "hands-on" and took Ball to the ground. RP 265. Deputy Phillips ran around from the passenger side of the vehicle to the driver's side to assist; when he arrived, he saw Ball struggling with the deputies. RP 203. Deputy Hafer tried to grab Ball's left arm from behind and tried to force Ball to the ground. RP 130. As Deputy Hafer grabbed Ball's left arm, Ball actively tried to pull his arm away from him; as Deputy Hafer tried to push Ball to the ground, Ball tried to remain standing. RP 131. The deputies were eventually able to get Ball to the ground. RP 131. As soon as Ball was on the ground, he got his right arm up underneath his body. RP 265. This poses a threat to the police as they worried Ball may be trying to get a weapon out to use against them. RP 265. Ball then started trying to move his left arm underneath his body, but Deputy Hafer used all of his energy to hold onto Ball's left arm and was able to pull his left arm out, despite Ball's resistance. RP 131, 265. None of the deputies struck any blows to Ball or

used any of their tools or weapons to gain compliance. RP 266. Deputy Preston used his hands to pry Ball's right arm out from under him, all the while giving commands to stop resisting. RP 266. Ball did not comply with his commands. RP 266. As Deputy Preston had a hold of Ball's arm and was trying to bring his wrist up to handcuff him, Ball grabbed a hold of Deputy Preston's hand, squeezing it, causing a cut to Deputy Preston's finger. RP 267. Exhibit 8 is a photograph that was admitted that depicts the cut Deputy Preston's received on his finger. RP 267. Eventually, with additional force, the deputies were able to handcuff Ball. RP 133, 268. However, even after he was handcuffed, Ball did not comply with the deputies' commands. RP 268. Ball was pushing against the deputies and kicking his feet. RP 204, 216, 268. One deputy had to physically restrain Ball's legs to keep him from kicking the deputies. RP 204, 268. The deputies also had to use a hobble, a strap that is secured around a person's ankles to restrain the person, in order to secure Ball. RP 205-06, 268-69. After the hobble was put on Ball, the deputies used it to carry Ball and put him in the backseat of Deputy Preston's patrol vehicle. RP 269.

As Ball was struggling with the deputies he was saying odd things. RP 134. Ball made peculiar statements about angels and demons and told the deputies they weren't Gods and would be judged for this. RP 134. He also used a series of expletives directed towards the deputies. RP 134-35.

Also, Ball told the deputies they couldn't do this to him, he was a cancer survivor, and that he had leukemia in his blood. RP 135.

After Ball was placed in the back of Deputy Preston's patrol vehicle, the deputies followed their crisis intervention training to de-escalate the situation. RP 270. Deputy Preston did not yell at Ball or do anything to "poke the bear." RP 270. Instead, he separated himself from Ball for a time. RP 270. However, Deputy Preston did eventually transport Ball to jail and on the drive to the county jail, Ball was very amped up, boisterous and angry. RP 271. At the jail, Deputy Preston had jail staff take over the booking process so that he could separate himself from Ball. RP 271-72. Deputy Preston did notice that Ball had a few very minor abrasions on his arm, which he characterized as "what you would expect from someone that's on the ground rubbing against the asphalt." RP 272. Ball had no injuries that required medical attention. RP 272.

Ball's oncologist, Dr. Kathryn Kolibaba, testified she had been seeing Ball as a patient since 2012 for management of his chronic myeloid leukemia. RP 314. Dr. Kolibaba indicated that people with chronic myeloid leukemia usually experience fatigue, anemia, risk for bleeding and bruising more often, and most are unable to work a full-time job. RP 314-17. Dr. Kolibaba indicated it's typical for patients with chronic myeloid leukemia to experience extreme fatigue to the point of being

unable to get out of bed for an entire weekend, or being extremely exhausted after a short activity. RP 318-20. Per Dr. Kolibaba, it's typical for these patients to become very sad about missing out on the fun parts of life and watching others participating in activities that they feel too tired to engage in. RP 319-20. Dr. Kolibaba had prescribed Ball a medication, bosutinib, starting on July 8, 2015, that had extreme fatigue with a quick onset as a side effect. RP 338-40. Ball had previously told Dr. Kolibaba that he had had issues driving due to fatigue. RP 341.

Dr. Kolibaba also testified that she was concerned that the medications Ball currently takes may affect "his ability to withstand and perform at his best in trial." RP 514. Specifically, she testified that Ball was on a high dose of prednisone that makes people sleepless, cranky, and causes heartburn. RP 514. Ball is also on tacrolimus, a medication that can cause a tremor, muscle cramps, and cloud memory and thinking. RP 515.

Ball testified in his own defense at trial. He indicated that during the day on July 12, 2015, he spent part of the day in Portland, relaxing, blowing glass, making music, and hanging out with friends. RP 362-63. The day of July 12, 2015 was really hot and so it was hard for Ball to do anything. RP 365. The heat affects Ball and his body because he doesn't believe his body regulates temperature well. RP 365-66. His friends wanted to go do something else, but Ball did not feel up to it, so he

decided to head home. RP 367. As Ball headed north to Longview from Portland, he got really tired; his eyes got heavy and he decided he needed to stop somewhere for a while to see if resting would help. RP 368. Ball was on I-5, and he tried to get off the road. RP 369. His eyes were getting heavy and he started to drift and noticed he got close to another car so that made him decide he needed to get off the freeway. RP 370. Ball decided to pull off and park in a parking lot somewhere to rest; he thought he parked in the Taco Bell parking lot. RP 371.

Ball agrees he was slow to respond and slow to act when officers approached him because he was surprised to see the officers and was trying to figure out what was going on. RP 373. Ball didn't understand when police asked him to get out of the car. RP 375. His body did not react normally; he was having anxiety and an adrenaline rush came over him. RP 375-76. Ball felt overheated and wanted to try to cool off the only way he knew how: get into the open air, take his clothes off, spin his arms around and do circles. RP 376-77. As Ball exited the car, he immediately tried to take his shirt off. RP 377. Per Ball, the police then "Rodney King'd" him by grabbing him from behind, slamming him to the ground. RP 377. Ball only wanted to get cooled down as fast as possible; he did not intend to hurt the police officer, and if he did it was unintentional. RP 380.

The majority of Ball's testimony occurred during the afternoon of September 13, 2016. RP 360-418. The court recessed until the next day and prior to Ball re-taking the stand on September 14, 2016, his attorney moved for a mistrial on the basis that Dr. Kolibaba sent an email several weeks prior to Ball's attorney expressing concern about Ball's ability to testify at trial due to his medications. RP 433-35. The motion was based on a perceived poor performance by Ball during his testimony on the afternoon of September 13, 2016. *Id.* The State opposed the motion for a mistrial, and the trial court denied the motion, noting there did not appear to be any "10.77" issues, and that the behavior Ball exhibited on the stand was "very consistent with the behavior that the officers provided...." RP 443. The trial court found there was no error that could be cause for a mistrial and instead suggested that the defense's tactical or strategic decision simply "backfired." RP 444. The trial court found that there was no legal basis for a mistrial, and that Ball was not placed in a position of being unable to present evidence or his defense. RP 444.

Ball asked that the trial court instruct the jury on self-defense pursuant to WPIC 17.02.01. RP 457; CP 55. The trial court denied this request. RP 462-63. The jury found Ball guilty of Assault in the Third Degree and not guilty of Being in Actual Physical Control of a vehicle while under the influence. RP 638; CP 83-84. Ball was sentenced to the low end of the

standard range and was allowed to serve his sentence on electronic home monitoring. CP 108-09. This appeal timely follows. CP 119-20.

## ARGUMENT

### **I. The trial court properly denied Ball's request for a self-defense instruction.**

Ball argues the trial court erred in denying his request for a self-defense instruction, claiming he was entitled to a self-defense instruction on the facts, and that the trial court used the wrong standard of review in deciding whether to grant Ball's request. The trial court properly denied Ball's request for a self-defense instruction as such an instruction was not appropriate given the evidence presented at trial. Ball's claim fails.

On appeal, a trial court's decision on whether to give jury instructions is reviewed for an abuse of discretion. *State v. Hathaway*, 161 Wn.App. 634, 647, 251 P.3d 253 (2011). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A defendant in a criminal case is entitled to have the jury fully instructed on his theory of the case, however he is not entitled to an instruction for which there is no evidentiary support. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The defendant bears the burden of

producing some evidence that his actions occurred in circumstances amounting to self-defense in order to have the jury instructed on self-defense. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). At trial, Ball asked the trial court to instruct the jury on self-defense pursuant to WPIC 17.02.01, which tells the jury when an individual may use force to resist an arrest. RP 457; CP 55. Specifically, the instruction Ball proposed stated:

It is a defense to a charge of Assault in the Third Degree that 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 County has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the 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.

CP 55. The rule for use of force in cases involving arrest requires that the defendant face a situation of actual, imminent danger and not just apparent, imminent danger. *State v. Bradley*, 141 Wn.2d 731, 738, 10 P.3d 358 (2000). A jury is only properly instructed on use of force upon a police officer if the person using the force was actually about to be seriously injured. *State v. Ross*, 71 Wn.App. 837, 840, 863 P.2d 102

(1993). Ball presented no evidence that he was actually in imminent danger; he therefore had no right to have the jury instructed on self-defense.

In the unpublished opinion<sup>1</sup> of *State v. Smith*, 186 Wn.App. 1029 (2015), this Court found the trial court properly denied the defendant's request to instruct the jury on self-defense involving a police officer when the only evidence that supported the defendant's claim he was about to be seriously injured was insufficient. *Smith*, 186 Wn.App. 1029, slip op. p. 3. There, the defendant was approached by a police officer attempting to stop him for jaywalking. *Id.*, slip op. at 1. The defendant refused to comply with the officer's demands and walked into a convenience store. *Id.* The officer approached the defendant, who turned around and put his balled-up fists up. *Id.* The officer then grabbed the defendant between his hands, and ran him towards the back of the store, trying to trip him up. *Id.* The officer got the defendant into a seated position, and then grabbed one hand to roll him over and handcuff him. *Id.* At this point the defendant punched the officer in the face causing an injury which required stitches. *Id.* At trial, the defendant testified he felt threatened by the officer and punched him

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<sup>1</sup> GR 14.1(a) allows for citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013 as non-binding authorities; such opinions may be accorded such persuasive value as this Court deems appropriate.

because the officer was violating his rights and in order to get the officer to let go of him. *Id.*

The defendant in *Smith* asked the trial court to instruct the jury on self-defense pursuant to WPIC 17.02.01, which provides a defense to assault if the defendant used lawful force when resisting arrest. *Id.*, slip op. at 2. The trial court found there was insufficient evidence presented that the defendant was in fear of “actual and imminent serious injury” by the officer’s use of “excessive force.” *Id.* The trial court denied the defendant’s request to give this instruction. *Id.* On review, this Court agreed with the trial court, finding that the defendant’s testimony at trial went to the appearance of danger and not the existence of actual danger. *Id.*, slip op. at 3. This Court found that under the standard set forth in *State v. Calvin*, 176 Wn.App. 1, 14, 316 P.3d 496 (2013), the defendant failed to present sufficient evidence to show he was actually about to be seriously injured or killed, and thus was not entitled to the self-defense instruction he proposed. *Id.*

The facts of *Smith, supra* are quite similar to those presented at trial here. Ball did not testify to any facts which support the argument that he faced actual and imminent serious injury or death when he was in contact with the police officers the night of his arrest. Ball testified about having a bodily sensation, somewhat akin to a hot flash, wherein his body

felt very hot and he felt anxious. RP 376. He felt an overwhelming need to get into the open air and cool off as soon as possible. RP 376-77. Ball testified to a feeling he was going to die because the “heat was so much more intense” when the officers took him to the ground. RP 377. Ball indicated if he hurt anyone it was unintentional. RP 377. This evidence, even when taken in the light most favorable to Ball, did not establish evidence that Ball was in actual and imminent danger of serious injury or death from the police officers.

An incorrect belief that harm is imminent is insufficient to justify the use of force against a police officer. *Bradley*, 141 Wn.2d at 743. The defendant must produce evidence of an officer’s excessive use of force before the claim of self-defense may be presented to the jury. *See, e.g., City of Seattle v. Cadigan*, 55 Wn.App. 30, 37, 776 P.2d 727 (1989); *State v. Westlund*, 13 Wn.App. 460, 466, 536 P.2d 20 (1975). The trial court below properly analyzed whether there was sufficient evidence, or any evidence, to support giving this instruction. RP 462-63. The trial court found that there was no evidence presented that Ball was in actual, imminent danger of serious injury from an officer’s excessive use of force. RP 462. The trial court used the appropriate legal standard for determining whether to give Ball’s requested instruction. The trial court did not engage in fact-finding or weighing of the evidence as Ball suggests on appeal;

instead, the trial court recited the evidence he did hear presented at trial and found, properly, that no evidence supported the claim that Ball was in actual danger of serious injury or death, as required to give the instruction. The trial court did not abuse its discretion and properly denied Ball's request to instruct the jury pursuant to WPIC 17.02.01. Ball's claim fails.

**II. The trial court properly denied Ball's motion for a mistrial and did not deny him his right to testify.**

Ball argues the trial court denied him his right to testify on his own behalf because the trial court denied his motion for a mistrial due to his use of medications which he claimed interfered with his ability to testify. Ball reframes this issue from one of whether the trial court properly denied his motion for a mistrial, and thus a question of whether the trial court abused its discretion, to one of denying him his constitutional right to testify, and thus a question, *de novo*, of whether the defendant's constitutional right to testify was infringed. Under any standard of review though, it is clear that the trial court's actions were proper and did not deny Ball a fair trial.

Ball's attorney moved the trial court to declare a mistrial, arguing that her client's behavior on the witness stand the day before showed that he "rapidly disintegrated," had "some mood swings" and some "significant concentration issues." RP 434. Ball's attorney argued that it

was clear Ball did not make a “good impression” on the jury and that she had misjudged how the medication he was on affected him. RP 434. Defense counsel further argued that Ball’s doctor felt that he would not be able to testify due to his medications. RP 433-34. The State objected to Ball’s motion, stating that Ball’s performance on the stand became more erratic when certain issues were raised during cross-examination, and that the State did not agree that the cause of Ball’s behavior on the stand was medical, but that it was strikingly similar to the behavior he demonstrated during the commission of the crime. RP 436. The trial court denied the motion, noting there did not appear to be any “10.77” issues, and that the behavior Ball exhibited on the stand was “very consistent with the behavior that the officers provided...” RP 443. The trial court found there was no error that could be cause for a mistrial and instead suggested that the defense’s tactical or strategic decision simply “backfired.” RP 444. The trial court found that there was no legal basis for a mistrial, and that Ball was not placed in a position of being unable to present evidence or his defense. RP 444.

A trial court’s denial of a motion for a mistrial is reviewed for abuse of discretion. *State v. Garcia*, 177 Wn.App. 769, 776, 313 P.3d 422 (2013). An abuse of discretion occurs only when “no reasonable judge would have reached the same conclusion.” *State v. Emery*, 174 Wn.2d

741, 765, 278 P.3d 653 (2012) (quoting *State v. Hopson*, 113 W.2d 273, 284, 778 P.2d 1014 (1989)); *Garcia*, 177 Wn.App. at 776. An appellate court will only overturn a trial court's denial of a mistrial motion when there is a substantial likelihood that the error affected the jury's verdict. *Id.* Further, a trial court should only order a mistrial "when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly." *State v. Johnson*, 124 Wn.2d 57, 76, 873 P.2d 514 (1994); *Garcia*, 177 Wn.App. at 776. In reviewing a trial court's denial of a motion for a mistrial, an appellate court applies three factors to determine whether the trial irregularity warranted a mistrial: 1) the irregularity's seriousness; 2) whether the irregularity involved cumulative evidence; and 3) whether the trial court properly instructed the jury to disregard it. *Id.* (quoting *Emery*, 174 Wn.2d at 765). These factors are difficult to apply to Ball's case as the claimed irregularity was the trial court allowing the defendant to exercise his constitutional right to testify during his trial. Generally, a trial irregularity involves improper admission of evidence, or prejudicial comments, or the jury seeing the defendant in custody. The State has been unable, after a diligent search, to find any case law that supports that a trial irregularity exists when a defendant performs poorly on the stand after exercising his constitutional right to testify on his own behalf.

But even if this was considered a trial irregularity, it was not so serious or so prejudicial that nothing short of a new trial could guarantee Ball had a fair trial. The trial court allowed Ball to present additional evidence from his doctor about the impact of the drugs on him and his ability to testify. This is akin to giving the jury an instruction on the testimony they heard. Furthermore, Ball's performance on the stand, whether it was erratic or odd, likely only helped him in his defense as the jury likely found significant similarities between Ball's behavior the night of the crime and on the stand. The jury's acquittal of the DUI charge is likely attributable to Ball's performance on the stand – this behavior and his doctor's opinion of the reason for the behavior likely gave the jury doubt that his behavior was caused by an intoxicant, which is represented in their not guilty verdict on the DUI. Thus it is clear that Ball's testimony did not prejudice him to the point that only a new trial would insure he received a fair trial.

Though it is clear the trial court did not abuse its discretion in denying Ball's motion for a mistrial, Ball claims on appeal that the trial court denied him his constitutional due process right to testify on his own behalf. Ball claims that his mental condition prevented him from effectively testifying and the trial court's refusal to declare a mistrial and allow him to testify at a later time before a different jury constituted a

denial of his right to testify. However, Ball cites to no authority that supports his argument. Ball's reliance on *State v. Hill*, 83 Wn.2d 558, 520 P.2d 618 (1974) and *In re Detention of Haga*, 87 Wn.App. 937, 943 P.2d 395 (1997), *rev. denied*, 134 Wn.2d 1015, 958 P.2d 316 (1998) is misplaced.

In *Hill*, the trial court ruled prior to the defendant's deciding whether to offer testimony in his trial, that two prior reversed convictions would be admissible to impeach him. *Hill*, 83 Wn.2d at 564-66. Because of this ruling, the defendant chose not to testify. *Id.* That ruling was improper. *Id.* Our State Supreme Court found that the defendant's decision on whether to testify was not free and voluntary and that he was compelled to remain silent so as to prevent impeachment. *Id.* Thus the trial court's improper ruling on the admissibility of impeachment evidence forced the defendant to choose not to testify, something he would have otherwise done. *Id.*

In *Haga*, the defendant in a sexually violent predator commitment trial affirmatively indicated he wanted to testify, however his attorney told the court he did not want his client to testify because he doubted whether Haga would tell the truth. *Haga*, 87 Wn.App. at 939-40. The trial court denied Haga's request to testify and said he would not let Haga override his attorney's decision not to call him as a witness. *Id.* On appeal, this

Court found that the trial court impermissibly denied Haga of his right to testify. *Id.*

Neither of these cases relied upon by Ball have any bearing on the issue he raises in his case. In both *Hill, supra*, and *Haga, supra*, the defendants did not testify in their trial despite their desire to testify. In Ball's case, he did testify. He simply did not testify as well as he wanted to. Ball's argument can be boiled down to the claim that he was not competent to testify therefore he was unavailable to testify so he could not be guaranteed his constitutional right to testify in his own defense. To sustain this claim, Ball must show that the record supports that he was not competent to testify.

RCW 5.60.050 prohibits those who are incompetent from testifying at trial. The statute states,

The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050. Under this statute, an individual is competent to testify if, at the time of his testimony, he understands the nature of the oath and is capable of giving a correct account of what he saw and heard.

*McCutcheon v. Brownfield*, 2, Wn.App. 348, 355, 467 P.2d 868 (1970).

Even someone who has been formally adjudicated as insane may be capable of testifying if the person understands the nature of the oath and is capable of giving a correct account of what he saw and heard. *State v. Allen*, 67 Wn.2d 238, 241, 406 P.2d 950 (1965); *State v. Pethoud*, 53 Wn.2d 276, 278, 332 P.2d 1092, *cert. denied*, 79 S.Ct. 734, 359 U.S. 949, 3 L.Ed.2d 682 (1958).

In fact, situations similar to the defendant's have previously occurred in trials and been found to be proper. In *State v. Froehlich*, the trial court admitted evidence that a witness who was declared competent to testify had mental defects that contributed to inability to recall and demeanor on the stand. *State v. Froehlich*, 96 Wn.2d 301, 306-07, 635 P.2d 127 (1981). The trial court was allowed to exercise its discretion in admitting evidence of the psychiatric condition of a witness and the effect that condition had on the witness's testimony at trial. *Id.*

Like the witness in *Froehlich*, nothing showed the defendant was not competent to testify. At the beginning of Ball's testimony he was sworn under oath. RP 360. He was able to engage in a question and answer format of direct testimony for a significant period of time. RP 360-81. As the prosecutor stated in the argument on Ball's motion for a mistrial, Ball only became agitated and erratic during cross-examination when the prosecutor confronted him with certain facts that made his

claims seem less likely. RP 381-415. And this was after the trial court had offered defense breaks if they wanted. The defendant chose to testify, chose to exercise his constitutional right, and he was not incompetent. Further, the trial court was willing to make accommodations for him to enable his testimony such as breaks, even suggesting the next day that the trial could be continued another day to arrange for testimony from Ball's doctor if necessary.

However, possibly most pertinent is that Ball did not indicate he had any problem testifying during the main portion of his testimony. Ball testified during the afternoon of September 13, 2016, and his testimony continued during the morning the following day. His attorney asked him during redirect if his medications were causing him problems testifying and he said he had some problems with "mind clarity. Decision, response, I guess." And then when asked if he had the same problem the day before he said his problem the day before was a "hot flash." RP 489. There was no evidence given that Ball was unable to continue testifying that next morning, and in fact Ball seemed to indicate that he had a different problem the afternoon prior – that he had experienced a hot flash, which made it difficult to testify.

Defendants are entitled to "fair, not perfect, trials." *Garcia*, 177 Wn.App. at 784-85. Ball received a fair trial. He was allowed to testify.

He was accommodated so that when he became erratic and upset during cross-examination, the trial court ended his testimony for the day and he was able to return the following morning to finish his testimony. The trial court also allowed defense to recall a medical witness to discuss how Ball's medication affected him and thus allowed Ball's attorney to argue that Ball's behavior on the stand was a side-effect of the medication he took. Ball received a fair trial. Ball's claim of constitutional error is without merit.

#### CONCLUSION

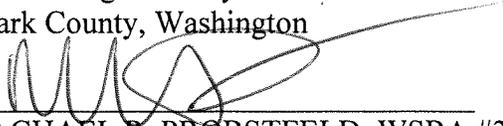
The trial court properly denied Ball's request for a self-defense instruction as Ball did not present sufficient evidence to support it, and the trial court did not interfere with Ball's constitutional right to testify. Ball received a fair trial and his conviction should be affirmed.

DATED this 9<sup>th</sup> day of October, 2017.

Respectfully submitted:

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# CLARK COUNTY PROSECUTING ATTORNEY

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