

**FILED**

OCT 31 2013

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 313867

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

THE STATE OF WASHINGTON,

Respondent,

v.

MERSADEZE RIOJAS

Appellant.

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REPLY BRIEF

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## TABLE OF CONTENTS

A.	The trial court erred in refusing to dismiss the charge for insufficient evidence.	1
B.	The trial court erred in not allowing the defense to present evidence that the Defendant acted in self-defense.	4
C.	The trial court erred in not allowing the Defendant to testify to her training in self-defense.	5
D.	The trial court denied the Defendant the right to present a defense.	5
E.	The trial court erred in not giving the instruction on self-defense proposed by the defense.	6
F.	The trial court erred in using the term “unlawful force” in its instructions to the jury without further defining that term.	7

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<i>State v. Mierz</i> , 127 Wn.2d 460, 901 P.2d 286 (1995)	7
<i>State v. Valentine</i> , 132 Wn.2d 1, 935 P.2d 1294, (1997)	7
<i>State v. Williams</i> , 102 Wn.2d 733, 689 P.2d 1065, (1984)	2, 4

### FEDERAL CASES

<i>Adams v. Williams</i> , 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)	2
<i>Florida v. Royer</i> , 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)	2, 3

### CONSTITUTIONAL PROVISIONS

Art. 1, sec. 7	4
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### OTHER

Comment to WPIC 35.50	8
Note on Use, WPIC 35.50	8

A. The Evidence was Insufficient

The Appellant has argued that because her detention was no longer lawful at the point she struck Officer Moses, then he was not an officer performing official duties, rendering the evidence insufficient on that element. Brief of Appellant, Amended, pp. 16-22.

In Response, the State, at p. 9-10 of its brief, argues that there is no authority for the argument that “it is illegal for a second law enforcement officer to ask any further questions” and that the argument is contrary to common sense.

Appellant did not advance an argument that the detention was illegal because a second officer asked questions. Instead, Appellant has accurately cited the law that a *Terry* stop must be a **brief** detention. In this case, it was not a brief detention. Officer Colin questioned the Appellant in a *Terry* stop, and had finished with his investigation, RP 106, lines 11-18, when Sgt. Moses stepped in to needlessly continue the detention.

Under the State’s argument, a *Terry* stop can devolve into an endless series of interrogations by different officers, as long as each successive officer can think up a new twist to the questions. At some point, the detention is no longer brief, and is no longer valid under *Terry*.

The *Terry* standard only permits a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information." *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (emphasis added); *State v. Williams*, 102 Wn.2d 733, 737, 689 P.2d 1065, (1984).

Under *Terry*, the Court has generally approved pat-down searches for weapons, and brief, on-the-spot questioning, see, e.g., *Adams v. Williams*, supra, but disapproved of more intensive seizures without consent.

*Williams*, 102 Wn.2d at 737.

In *Williams*, the Washington Supreme Court discusses the parameters of a *Terry* stop as laid out by the United States Supreme Court. *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), was a case in which an individual at an airport matched a "drug courier profile." The police questioned Royer, and then held him in a room while his luggage was retrieved and opened. The U.S. Supreme Court held this exceeded the bounds of a lawful *Terry* stop.

The Court observed that the scope of a permissible *Terry* stop will vary with the facts of each case, but noted that it is "clear" that *Terry* requires that an investigative detention must be temporary, lasting no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed must be the least intrusive means reasonably

available to verify or dispel the officer's suspicion in a short period of time. *Royer*, 103 S.Ct. at 1325.

*Williams*, 102 Wn.2d at 737.

The *Williams* opinion also discusses *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983). In *Place* the U.S. Supreme Court stated that the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion. *Williams*, 102 Wn.2d at 737.

The State next argues, at p. 11-12 of its brief, without citation to any authority, that the *Terry* stop can be lengthened by questioning the suspect as a witness to or victim of a crime by another person. The State refers to the allegation by Appellant that Ms. Culver has chased her with a knife as “a new and uninvestigated allegation of a serious nature ... assault with a deadly weapon ... .” There is no indication in the record of any interest by police in investigating Bailee Culver for threatening anyone with a knife.

In fact, the State’s contention that Ms. Riojas was held at some point, against her will as the victim of, or witness to, a crime not committed by her, is a frank admission that she was no longer being detained under

*Terry*, but only under an invalid basis, at the point when Officer Moses grabbed the arm of the Defendant and when Officer Moses was struck.

In holding a purported *Terry* stop to be unconstitutional under Cons. Art. 1, sec. 7, the Washington Supreme Court stated:

Also, the detention was not related to an investigation focused on petitioner. Such relationship is essential. A citizen's right to be free of governmental interference with his movement means, at a minimum, that when such interference must occur, it be brief and related directly to inquiries concerning the suspect.

*Williams*, 102 Wn.2d at 740-41.

B. The trial court erred in excluding evidence of the force used in arresting the Defendant

The State argues, at p. 15 of its Brief, that the force used in arresting the Defendant for the "assault" does not reflect on the force used in detaining the Defendant by grabbing her arm. That should have been for the jury to decide. The evidence could have helped the jury evaluate how hard Sgt. Moses grabbed the defendant earlier.

C. The trial court erred in not allowing the Defendant to testify to her training in self-defense

In discussing this issue, the State focuses on the trial court's earlier ruling that the defense would not be allowed to argue "self-defense." Brief of Respondent, p. 16.

That was not the purpose of offering the evidence about the training. Assuming *arguendo* that "self-defense" did not apply, the mere label attached to the evidence proffered does not mean it was offered for the purpose of "self-defense." It was offered on the issue of intent, so the jury could evaluate whether someone who had been trained to react to being grabbed could make an automatic response, without the intent to commit an assault. RP 255-56. She had been trained to hit the restraining arm and grab the attacker's hand. RP 257-58. It should have been for the jury to decide whether the striking of Sgt. Moses by Defendant could have been from a poorly aimed attempt to automatically hit his arm and grab his hand.

D. The trial court denied the Defendant the right to present a defense

The State, at pp. 18-19 of its brief, contends that because the defense was able to make various arguments, the Defendant's claim that she did

not get to present her defense should be rejected. Being able to make various arguments is not a substitute for having the evidence before the jury to fully support those arguments. The defense could not argue as to how the self-defense training entered in specifically, because those facts were not in the record.

The State also indicates, at p. 19, the trial court's ruling was justified over concern for a defense of "jury nullification." Asking for evidence of the Defendant's intent to be admitted to defend against a charge of assault is not asking the jury to nullify the law. Nothing about testimony that the Defendant had training that made her automatically react to being grabbed would invite the jury to disregard the law, it would merely provide them with all the facts they needed in this case to apply the law on the intent needed to constitute assault, to this case.

E. The trial court erred in not giving the jury the defense proposed instruction on self-defense

The State cites case law indicating that there is no right to self-defense during an unlawful arrest unless there is an imminent threat of serious bodily harm. But there is a right of a person "to use reasonable and proportional force to resist an attempt to inflict injury on him or her

during the course of an arrest.” *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294, (1997). Along with the grabbing of the Defendant’s arm, the defense tried to present evidence of Sgt. Moses using unreasonable force within a short time frame of that, in the way the arrest was carried out, but that evidence was erroneously excluded by the Court.

Respondent cites *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995) on this point. However, “Mierz's argument on the State's motion in limine focused exclusively on his alleged right to use force to defend the coyotes, which were not legally in his possession.” *Mierz*, 127 Wn.2d at 476. Mierz did not contend he was being subjected to any force by the officers when they came to his home to seize coyotes in his possession, and he commanded his dogs to attack the officers. 127 Wn.2d at 465-66. Mierz only makes it clear that force cannot be used to defend against what is believed to be an unlawful search and seizure of property.

F. The trial court erred in using the term “unlawful force” in

Instruction No. 5 to the jury without further defining that term

Respondent argues that including the words “unlawful force” in Instruction No. 5 is only a problem where the trial court allows a self-defense instruction. Brief of Respondent, p. 22.

In fact, the "Comment" to WPIC 35.50 states in part: "If there is no such evidence [self-defense], the jury should not be left to speculate on what might constitute 'lawful' conduct."

The "Note on Use" for that pattern instruction explains: "Include the phrase 'with unlawful force' if there is a claim of self-defense or other lawful use of force." Both the Comment and the Note on Use are at odds with the suggestion of the State that there is no problem with including "with unlawful force" in the elements instruction. The jurors in this case were left only with their own speculation to determine what was meant by the phrase.

Respectfully submitted,

Dated October 30<sup>th</sup>, 2013

A handwritten signature in cursive script, appearing to read "William Edelblute", written over a horizontal line.

William Edelblute  
Counsel for Appellant  
WSBA 13808

CERTIFICATE OF MAILING

I hereby certify that on the 30<sup>th</sup> day of October, 2013, I mailed a true and correct copy of the foregoing Reply Brief to James L. Nagle, Prosecuting Attorney, at 240 W. Alder, Suite 201, Walla Walla, WA 99362, to Special Deputy Prosecutor Teresa Chen, P.O. Box 5889, Pasco, WA 99302-5801, and to Mersadeze Riojas, Appellant, at 2344 Hood Place, Walla Walla, WA 99362, postage prepaid.)

A handwritten signature in cursive script, reading "William Edelblute", written over a horizontal line.

William Edelblute