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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.

BRIEF OF APPELLANT
(AMENDED)

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A. **ASSIGNMENT OF ERROR**

Assignments of Error

1. The trial court erred in refusing to dismiss the charge for insufficient evidence.
2. The trial court erred in not allowing the defense to present evidence that the Defendant acted in self-defense.
3. The trial court erred in not allowing the Defendant to testify to her training in self-defense.
4. The trial court erred in not giving the jury the defense proposed instruction on self-defense, set forth in CP 35.
5. The trial court erred in using the term "lawful force" in Instruction No. 5 to the jury without further defining that term.

Issues Pertaining to Assignments of Error

1. Where the evidence showed the officer allegedly assaulted did not have the right to detain the Defendant, did the trial court err in refusing to dismiss the charge due to insufficient evidence? (Assignment of Error No. 1)
2. Did the trial court, in not allowing the defense to present evidence of the degree of force used by a police officer in arresting the Defendant after she allegedly assaulted the officer, err or

abuse its discretion in not allowing evidence relevant to a claim of self-defense by Defendant? (Assignment of Error No. 2)

3. Did the trial court err or abuse its discretion in not allowing the Defendant to testify to details of her training in self-defense? (Assignment of Error No. 3)

4. Did the trial court, in excluding defense evidence of the degree of force used by a police officer in arresting the Defendant after she allegedly assaulted the officer, and that the Defendant's action was an automatic response from training, deny the Defendant her due process right to present a defense?

(Assignments of Error No. 2, 3)

5. Did the trial court err in refusing to give the defense proposed instructions on self-defense? (Assignment of Error No. 4)

6. Is the term "unlawful force" in Instructions to the Jury No. 5, defining assault, without further definition, impermissibly vague, in violation of the Due Process Clause? (Assignment of Error No. 5)

B. STATEMENT OF THE CASE

Mersadeze Riojas was convicted as charged of Assault in the Third Degree following a jury trial in the Superior Court of Walla Walla County. The charge was based on having allegedly assaulted City of Walla Walla police Officer Mike Moses. CP 1-2, 52.

Prior to trial, the defense notified the State that the general nature of the defense was self-defense. CP 25. The State moved in limine to exclude any evidence or argument concerning self-defense. CP 23-24.

The State argued that self-defense should not be allowed in a charge of an assault upon a police officer, because there was no evidence of an unlawful detention, or that the defendant was under threat of serious bodily harm from the police officer. RP 34, line 13, through RP 37.

The Superior Court judge noted that no testimony had been taken on the issue. RP 37, line 24, to RP 38, line 19. However, the judge noted: "Frankly, I don't see much merit to this defense." RP 38, lines 22-23.

And I know we haven't taken testimony yet, but my concern is that you are going to regale the jury during voir dire, opening statement, cross-examination, with essentially this theory of self-defense, and then at the end of the case I'm going to deny your request for an instruction on self-defense. Because it is not in the facts. And but the jury will have heard the whole thing. And I think that's what troubles me.

Because it's really not a proper defense. You're allowed to make it. I legally point out that it's not a proper defense, but it's an open invitation for jury nullification. That concerns me.

RP 38, line 23, to RP 39, line 9.

The Superior Court ordered that “the Defendant shall not introduce a claim of self-defense before the jury ...” CP 27-28.

The judge did indicate the defense could make an offer of proof out of the presence of the jury, and move for reconsideration of the ruling. RP 42, lines 13-24.

Testimony at trial included the following:

City of Walla Walla Police Officer, **Ignacio Colin**, was on duty during the early morning hours of July 20th. He was dispatched around 1 a.m. to a call about possible underage drinking and a fight. When Colin arrived at a vacant building at 920 Jefferson Street, multiple officers were on the scene. The building was fenced all the way around, and there were about eight cars inside the fence. RP 81-82.

Colin could hear screaming, yelling, and bottles breaking from inside the warehouse. It sounded like several females. The roll-up door came open and a young lady came out and jumped off the loading dock, landing on her stomach. Her name was Bailey Culver. The Defendant, Ms. Riojas, came running out behind Ms. Culver. She also jumped off the loading dock, and went down, and Officer Colin put his hands on her and stood in front of her to block her, because he believed she was pursuing Ms. Culver. RP 83-84.

Ms. Riojas made a second move to get up, and Colin warned her that she would be arrested, if she went after Ms. Culver. According to Colin, Ms. Riojas calmed down and he walked her over to her vehicle. According to Colin, in response to his questions, Ms. Riojas said Culver had gone after her friend, so she was going after Culver. RP 84-85.

According to Colin, Ms. Riojas appeared to be "highly intoxicated." As Officer Mike Moses, approached, she then volunteered that Ms. Culver had been chasing her with a knife. RP 86.

Colin left the Defendant with Officer Moses, and as he walked away, he could then "again hear Ms. Riojas escalating." He could hear "loud voices" and looked back. He saw Ms. Riojas being placed on the ground by Officer Moses. He was telling her she was under arrest for assaulting a police officer. She was resisting as she was escorted to a patrol car, stating: "You are hurting me." RP 87.

When Colin had put his hands on Ms. Riojas, she had not become upset or taken any physical action in response. RP 92, lines 15-25.

When Officer Colin was asked whether Officer Moses had put the Defendant in a hair hold and slammed her to the ground, the Superior Court judge sustained the prosecutor's objection. RP 94, lines 4-14.

In a colloquy, out of the presence of the jury, defense counsel argued that it was *res gestae*, and to prevent the State from sanitizing the facts by testifying that the Defendant was merely placed on the ground by Officer Moses. The Judge questioned how anything after the alleged assault could be relevant. RP 95.

Defense counsel argued it went to whether the acts of the Defendant were unreasonable and intentional, and why the Defendant was saying she was being hurt, testimony that was elicited by the State. RP 95-96.

The deputy prosecutor responded that: "It was relevant to demonstrate her state of mind, that she was just angry that night." RP 96, lines 19-20.

The Judge ruled that he was "not going to allow cross-examination with 'he really slammed her, didn't he.' You know, let the officers factually describe what happened. And we're going to let it go at that." RP 99, lines 17-20.

Defense counsel asked the Judge to be able to ask Officer Colin if the Defendant's statement "you're hurting me" was not in reference to the manner in which she was taken down and handcuffed. RP 104, lines 16-20. The Judge responded: "But my point is that its evidentiary value or probative value is outweighed by the prejudicial effect." RP 104, lines 23-25.

City of Walla Walla Police Officer, **Michael Moses**, had responded to the call, and noticed the gate around the building was open, there were a lot of cars and there were open containers of alcohol, and an odor of alcohol. RP 108. He heard female voices screaming, and glass breaking against the wall of the building. RP 109.

Moses saw Ms. Culver come out of the building, followed by the Defendant. RP 110.

As Officer Colin was finishing up with Ms. Riojas, Officer Moses approached and Ms. Riojas said the other girl had a knife, and also denied fighting. When he asked the Defendant why she was chasing the other girl if there was no fighting, she commented that the officers were white and to believe whatever they wanted. She then said, "Whatever, f - - - this." And then started to walk away. RP 110-11.

Moses told her she was not free to leave at that time. RP 112.

The Defendant said, "F- - - you" and continued to walk towards her vehicle. RP 113, lines 17-18.

A. Kind of ran forward a little bit and with my left hand grabbed her upper right arm.

Q. Okay. And then what happened?

A. She swung around facing forward and then hit me on my face.

Q. Okay. Was it with a fist or open hand?

A. I'm not sure. I'm not sure.

Q. Okay. Where did she hit you?

A. Right on my mouth.

Q. So do you recall if she was using her other arm to hit you as well?

A. Well, I grabbed her right, she used her left.

RP 114, lines 2-13.

The Defendant was then placed under arrest. RP 114.

When Officer Moses had grabbed her arm, he had "squeezed hard." RP 125, lines 21-23. RP 126, lines 1-2.

The Defendant then spun around and swung at him with an open left hand. RP 131, lines 17-20. RP 132, lines 20-21.

Moses agreed that the striking of him by the Defendant was pretty much an “instantaneous thing ...” RP 132, lines 22-4.

The Superior Court sustained an objection to defense counsel asking Officer Moses if he placed the Defendant in a hair hold in arresting her. RP 133, lines 10-15.

Moses pulled the Defendant to the ground in arresting her. RP 133, lines 22-25.

The Superior Court sustained an objection to a defense question to Officer Moses as to whether the reason for the Defendant's spinning and striking his face “was because of your grabbing her arm?” RP 134, lines 7-12.

The Superior Court sustained an objection to this question by the defense to Officer Moses: “Does your report reference anything that happened to Ms. Riojas?” RP 136, lines 19-22.

The Superior Court sustained an objection to this question by the defense to Officer Moses: “Sergeant Moses do you know whether or not the arm that you grabbed her with do you know whether or not that arm was bruised?” RP 136, line 24, to RP 137, line 3.

After argument outside the presence of the jury, the Judge then indicated he would allow that question, “[b]ut no further.” RP 137-38, RP 139, lines 1-11.

Officer Moses testified he did not know whether or not the Defendant's arm was bruised by the way that he grabbed her arm. RP 140, lines 4-6.

Walla Walla City Police Officer, **Jeremy Pellicer**, testified that he saw the Defendant swinging with both arms at Officer Moses. He didn't see if she was making contact or not. He saw Moses grab her and tell her to stop hitting him. RP 142, line 24, to RP 143, line 4. RP 144, line 2.

The Superior Court sustained an objection to a question to Pellicer by the defense: "... you were able to see what Sergeant Moses did to her; is that right?" RP 147, lines 20-24, RP 148, line 1. Before the objection was made, Pellicer answered: "Partly." Id.

The Superior Court sustained an objection to defense questions to Pellicer as to whether he photographed injuries the Defendant complained of sustaining during the arrest, from being taken down to the ground by Officer Moses. Pellicer described the injuries in an offer of proof outside the presence of the jury as "road rash." RP 148, line 17, to RP 154.

Abel Avila testified in an offer of proof outside the presence of the jury that he saw Ms. Riojas talking to Officer Colin and that the officer had got her to relax. RP 197-98. Then, when Officer Moses began talking with her, she walked away and Avila saw Moses grab her.

A. Well, she swung her arm to get his arm away from her. And then Officer Moses and her started struggling, and that's when the other officer approached her to help Officer Moses, and they like slammed her on the ground.

Q. They slammed her on the ground?

A. Yeah.

Q. Can you describe what you mean by "slammed on the ground"?

A. Well, she, they lifted her up about maybe a foot off the ground. I thought they used over-excessive force when they slammed her, because it was two officers and she is a female, so –

Q. When they slammed her on the ground did they slam her on her bottom, knees, face?

A. It was on her face.

RP 199, lines 6-21.

The trial judge indicated Mr. Avila would not be allowed to be "talking about excessive force afterwards." RP 212, lines 16-20.

In the presence of the jury, Mr. Avila said that he saw the Defendant walking away, that Officer Moses grabbed her, and that when he did so, the Defendant appeared to be “grabbing to get his hand off of her and she just swatted away his hand.” He saw her hand contact the lip area of Officer Moses. RP 227, lines 13-25, RP 228, lines 1-3.

Mersadeze Riojas, the Defendant, testified she has just turned 21 years of age a month and one week before the night of the incident. She was had obtained her dental assistant certificate, and was planning to study further to become a dental hygienist. RP 234-36.

The Defendant testified she consumed three or four “Bud Lights” that evening. RP 239, lines 18-23.

She had taken several different courses in martial arts or self-defense. RP 254, lines 17-24. When the defense attorney asked her what kind of self-defense classes, the State objected, and the objection was sustained. RP 254, line 25, RP 255, lines 1-3.

Out of the presence of the jury, defense counsel argued that it was not offered on self-defense, but to show she had been trained what to do if someone grabs her. To show that it was a “spontaneous or automatic reaction that was not intentional assault,

and that's where we're going with this. No more talking about self-defense." RP 255-56.

THE COURT: Okay. Mr. McCool, this witness will be able to describe what she did. But reference to self-defense classes or instinctive, or moves that you make in response to grabbing, that's not going to be admitted. She's confined to describe what she did at the time it happened.

If you want to make an offer of proof make an offer of proof.

RP 256, line 24, to RP 257, line 6.

Q. Ms. Riojas, in your martial arts classes were you trained about what happens if somebody grabs you from behind?

A. Yes.

Q. What kinds of maneuvers were you trained to do if somebody grabs you from behind?

A. You basically try to pull away, distance yourself. But if they are holding on to you, you like have to hit their arm down.

RP 257, lines 11-19.

Ms. Riojas also testified in the offer of proof she believed her reaction to being grabbed on July 20th was in part due to her training and experience. RP 258, lines 11-14.

The Superior Court judge ruled the evidence was denied.

RP 258, line 18.

In the presence of the jury, the Defendant testified that when she walked away from Officer Moses, she was going back to the building where her friend was, who had her keys. Her friend was not drinking and was the designated driver. RP 263-64.

When Officer Moses grabbed her arm, he was rough and she felt pain. She was very surprised by the action. "I had an automatic reaction. He grabbed me so I went like that (indicating) to get away." RP 264, lines 10-23.

Ms. Riojas is 5 '2" tall. RP 265.

The defense proposed a jury instruction on lawful force, which also indicated that burden was on the State to disprove lawful force:

It is a defense to a charge of Assault in the third degree that the force used, attempted, or offered to be used was lawful as defined in this instruction.

The use of, attempt to use, offer to use force upon or toward the person of another is lawful when used, attempted, offered, by a person who reasonably believes that she is about to be injured or in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using or offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State 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 has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.02

CP 35

The Superior Court did not give the instruction proposed by the Defense.

The Court's Instruction to the Jury No. 5 read as follows:

An assault is an intentional touching or striking or cutting or shooting of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not assault, if it is done with the consent of the person alleged to be assaulted.

CP 44

C. **ARGUMENT**

1. The trial court erred in refusing to dismiss the charge for insufficient evidence.

In *State v. Barnes*, 96 Wn. App. 217, 220, 978 P.2d 1131 (Div. 3 1999), Mr. Barnes was stopped on belief there was a warrant out for him, but there was no warrant. He arrested for obstructing for conduct during this stop. The search incident to arrest turned up crack cocaine and a crack pipe. Police did not charge Mr. Barnes with obstructing. He was charged with a drug offense.

The Court of Appeals held that his initial seizure was unlawful. *Barnes*, 96 Wn. App. at 224. That left the question of whether the arrest for obstructing, for which he was not charged, was lawful.

A citizen must comply with an officer discharging lawful official duties. RCW 9A.76.020. The determination of whether the arrest for obstructing was lawful depends on whether the police were carrying out lawful duties. *Id.* at 23, 935 P.2d 1294. An unlawful detention is by definition not part of lawful police duties. The court is reversed and the information is dismissed.

Barnes, 96 Wn. App. At 224

Here, an element of Assault in the Third Degree, is that “Mike Moses was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties” at the time of the alleged assault. Instruction No. 7 to the Jury, CP 46. The same element as for the obstructing arrest in *Barnes*.

The “duty” being carried out by Officer Moses was to talk to the Defendant about her activities that evening, then grab her arm after she walked away, when the Defendant had already been investigated by Officer Colin.

Both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution guarantee a right to be free from unreasonable searches and seizures apart from a few well-established and delineated exceptions. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). These include searches made during a valid investigative stop. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002).

It appears the State was justifying the act of Moses grabbing the Defendant’s arm as part of a “*Terry*” stop, under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

A *Terry* stop is a **brief** detention based on an officer's reasonable suspicion of criminal activity. *Terry*, 392 U.S. at 20-27, 88 S. Ct. 1868. If the initial stop is justified, the officer may make a limited search for weapons if he or she reasonably believes that his or her safety or the safety of others is endangered. ... To justify the initial stop for *Terry* purposes, the State must show that the officer had a reasonable, articulable suspicion, based on objective facts, that the person stopped had committed or was about to commit a crime. *Terry*, 392 U.S. at 21, 88 S. Ct. 1868;

State v. Day, 130 Wn. App. 622, 626, 124 P.3d 335 (2005). (Emphasis added.)

But this was not a “brief” detention. Officer Colin had already briefly detained the Defendant due to the circumstances.

Q. Officer Colin you indicated that you had advised Mersadeze not to pursue the other girl and she calmed down and didn't do that. You walked her to her car and that took a matter of minutes, correct?

A. Yes.

Q. At that point did you have your full curiosity satisfied as to what was going on?

A. I would say, yes.

RP 106, lines 11-18.

The *Terry* stop was over when Officer Moses came up to talk to the Defendant. There is no authority in law for a second officer then making a second purported “*Terry*” stop on the same facts.

Otherwise, it is simply not the "brief" detention permitted as a narrow exception to the requirement for probable cause to make a seizure.

In *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L.Ed .2d 317 (1984), the United States Supreme Court refined the definition of "custody." The court developed an objective test -- whether a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest. *Id.* at 441-42, 104 S. Ct. 3138. Washington has adopted this test. See *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1988).

In *Berkemer*, the United States Supreme Court also held that a **brief** Fourth Amendment seizure of a suspect, either in the context of a routine, on-the-street *Terry* stop or a comparable traffic stop, does not rise to the level of "custody" for the purposes of *Miranda*. *Berkemer*, 468 U.S. at 439-40, 104 S. Ct. 3138. Because a routine traffic stop curtails the freedom of a motorist such that a reasonable person would not feel free to leave the scene, a routine traffic stop, like a *Terry* stop, is a seizure for the purposes of the Fourth Amendment. *Id.* at 436-37, 104 S. Ct. 3138. But the reasoning as to why they are not subject to *Miranda* is that the court recognized that because both traffic stops and routine

Terry stops are brief, and they occur in public, they are "substantially less 'police dominated' " than the police interrogations contemplated by *Miranda*. *Id.* at 439, 86 S. Ct. 1602. Thus, a detaining officer may ask a moderate number of questions during a *Terry* stop to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for the purposes of *Miranda*. *Id.* at 439-40, 86 S. Ct. 1602.

This stop went beyond a brief *Terry* stop in terms of its duration and the fact that the officer grabbed the Defendant by the arm after one officer already determined he was through with his investigation. It was no longer brief under *Berkemer*, and it was "police dominated." The State did not even attempt to claim probable cause for a full custodial arrest, prior to the alleged assault, and therefore Officer Moses was not performing his official duties when struck by the Defendant. There was no basis for him to detain the Defendant after Officer Colin completed his duty.

In *Heinemann v. Whitman County of Wash., Dist. Court*, 105 Wn.2d 796, 808, 718 P.2d 789, (Wash. 1986), the Court noted, "in past decisions we have expressed our concern that ... pre-*Miranda* questioning be done in a non-coercive manner"

The actions by Officer Moses in demanding Ms. Riojas not walk off and grabbing her exceeded the non-coercive manner of a limited *Terry* stop.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. Green*, 94 Wn.2d 216, 222, 616 P.2d 628 (1980). As the United States Supreme Court noted, it is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). "[T]he reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue." *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting *Winship*, 397 U.S. at 364, 90 S. Ct. 1068).

State v. DeVries, 149 Wn.2d 842, 850, 72 P.3d 748 (2003)

A conviction without proof beyond a reasonable doubt is in violation of the Fourteenth Amendment to the United States Constitution. *Id.*, at 853.

Because Officer Moses was making an unlawful detention, which is not part of his official duties, then the evidence was insufficient, as a rational trier of fact would have no basis to find he was performing

any official duties prior to the alleged assault. This Court should be reverse the conviction, and dismiss the charge.

2. The trial court erred in not allowing the defense to present evidence that the Defendant acted in self-defense.

The force by Moses after the alleged assault upon him was simply relevant evidence under ER 402.

ER 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

Evidence is relevant if it has any tendency to make the existence of any material fact more or less probable. ER 401: *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007).

The primary theory of defense attempted to be presented was that the Defendant had a right to defend herself from unreasonable force on the part of Officer Michael Moses. The trial court drew a

bold line between allowing evidence of Officer Moses grabbing the Defendant by the arm prior to the alleged assault, and not allowing evidence of the degree of force used by Officer Moses after the alleged assault.

Appellant submits that evidence of the force used by Officer Moses immediately after the alleged assault is relevant to determining what degree of force he was using immediately before the alleged assault upon him by the Defendant.

The defense proffered evidence that Officer Moses essentially “slammed” the Defendant to the ground after he was allegedly assaulted. RP 199, lines 6-21. And that she sustained “road rash” on an arm from that act by Moses. RP 148, line 17, to RP 154.

Was the degree of force used by Moses only because he had just been assaulted, or was it a continuation of intentional force being used by him since that time that the Defendant walked away from him? That should have been for the jury to decide.

In sum, we hold that, although a person who is being unlawfully arrested has a right, as the trial court indicated in instruction 17, to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officers if he or she is faced only with a loss of freedom.

State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294, (1997).

Was the Defendant faced with “only with a loss of freedom”? Evidence she was being subjected to an assault herself merely for walking away was systematically excluded by the trial court.

The phrase “unlawfully arrested” in *Valentine* is arguably *dicta*, as if an arrestee was being lawfully arrested but being subjected to great personal injury by the officer without reason, would the arrestee not have the right to prevent injury to himself beyond that necessary to effect an arrest? Further, any requirement in *Valentine* that the arrest must be unlawful for there to be a right to self-defense cannot be applied logically to a case of Assault in the Third Degree, as one element to convict is that the officer was performing his official duties at the time of the assault. Instruction No. 7 to the Jury, CP 46. And under *State v. Barnes*, 96 Wn. App. 217, 220, 978 P.2d 1131 (1999), an officer making an unlawful detention is not performing official duties (applied to an arrest for obstructing.)

In any event, this was not an arrest, as there is no evidence that Officer Moses intended to arrest the Defendant at the point he grabbed her arm, or that he had any probable cause to arrest.

If *Valentine* applies here, and the Defendant is required to show an unlawful detention, then that is shown as the facts demonstrate an illegal “second” *Terry* stop. And she therefore

should have been allowed to present evidence that she was being faced with more than loss of freedom, in terms of excessive force used by Officer Moses.

A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Fisher*, 165 Wn.2d 727, 759, 202 P.3d 937 (2009). When the trial court commits an evidentiary error, such an error justifies reversal if it results in prejudice. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Prejudice from an evidentiary error occurs where, within reasonable probabilities, the error materially affects the outcome of the trial. *Bourgeois*, 133 Wn.2d at 403. Harmless error occurs if the evidence is of minor significance compared with the overwhelming evidence as a whole or where other evidence establishes the same facts. *State v. Yates*, 161 Wn.2d 714, 766, 168 P.3d 359 (2007), cert. denied, 128 S. Ct. 2964 (2008).

Not allowing evidence which could have explained why Ms. Riojas reacted the way she did to being grabbed on the arm was hardly of "minor significance." The actions of Moses immediately after the assault could have been part of a continuous act on his part, demonstrating how hard the arm grab was and the fear Ms. Riojas would have felt. The trial court erred

and the Court should reverse and remand so that the Defendant can present her evidence of self-defense.

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

Self-defense was not the only helpful purpose to the Defendant's proffered testimony for her actions. Intent was still a critical issue.

An assault is an intentional act. Instruction No. 5 to the Jury, RP 44.

The defenses of accident and self-defense are not mutually exclusive as long as there is evidence of both. *State v. Callahan*, 87 Wn. App. 925, 931-33, 943 P.2d 676 (1997). Surveying Washington law on the matter, the court in *Callahan* cited as an example *State v. Fondren*, 41 Wn. App. 17, 701 P.2d 810 (1985). In *Fondren*, the defendant testified that he pulled out a firearm because he feared for his own safety and the safety of others, believing that displaying the firearm would stop the altercation. The defendant stated that when he and the victim scuffled, the gun accidentally discharged. The court held that the defendant's intentional use of force before the shooting provided sufficient grounds for a self-defense instruction. *Fondren*, 41 Wash.App. at 24, 701 P.2d 810; *Callahan*, 87 Wn. App. at 931, 943 P.2d 676.

State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410, (2010)

The trial court did not allow the testimony offered by Ms. Riojas that she had been trained, by attending several different types of self-defense classes, to hit someone's arm if grabbed. RP 257,

lines 11-19. Yet the trial court still would not admit her testimony that was her only way of explaining why her actions were not an intentional assault, apart from any claim of self-defense. RP 258. Her testimony as to her "automatic" reaction was heard in isolation, without the evidence of various self-defense classes. RP 265. The mere label "self-defense" as to the classes had nothing to do with the fact the trial court was not allowing self-defense evidence, it only explained why someone might perform an action without forming the intent required for assault.

The trial court abused its discretion in excluding this evidence, and the Court should reverse, and remand for a new trial.

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

The right to compulsory process guarantees defendants the right to present a defense and their version of the facts. *Washington v. Texas*, 388 U.S. 14, 17-19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

At some point, a court may so restrict a defendant's opportunity to present evidence to support a theory of the case that courts of review will step in and conclude that she was denied the

right to a meaningful defense. See *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010).

In *Jones*, K.D. claimed that her uncle, Christopher Jones, put his hands around her neck and forcibly raped her. In his first trial, Jones was acquitted of first degree rape, but the jury could not reach agreement on the lesser offense of second degree rape. The prosecutor then amended the charge to second degree rape. A second trial commenced, and in an offer of proof, Jones's attorney argued that Jones wished to testify that on the night of the incident K.D. used alcohol and cocaine and engaged in consensual sex not only with Jones but also with two other men. More specifically, Jones was prepared to testify that Jones and K.D. went to the King City Truck Stop where they met two men and one woman and that during a nine-hour alcohol- and cocaine-fueled sex party the two women danced for money and engaged in consensual sexual intercourse with all three males. The trial court found that evidence of the sex party was offered for the purpose of attacking the victim's credibility and was barred by the rape shield statute. The trial court therefore ruled that Jones could not testify to these claims or cross-examine K.D. about them, "despite Jones's protests that the ruling prevented him

from exercising his right to confrontation and his right to present a defense.” *Jones*, 168 Wn. 2d at 717-18.

The Supreme Court of Washington stated the issue as:
“Did the trial court violate the Sixth Amendment to the United States Constitution when it refused to let Jones testify about the alleged sex party?” *Id.*, at 719.

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). A defendant's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Id.*” The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and state constitutions.” *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Jones, at 720.

“These rights are not absolute, of course. Evidence that a defendant seeks to introduce ‘must be of at least minimal relevance.’” *Id.*, quoting *Darden*, 145 Wn.2d at 622.

In this case, evidence of the degree of force used by Michael Moses a split second after he first grabbed the Defendant by the arm, is “of at least minimal relevance,” and the denial of cross-examination and refusal to allow the Defendant or her witness to testify to the

degree of force was a denial of the Defendant's Sixth Amendment rights. It could have supported a self-defense instruction.

So, too, was Ms. Riojas history of undergoing several different self-defense courses, to support that her reaction was automatic, and not intentional.

In *Jones*, the Supreme Court of Washington reasoned that the trial court ruling essentially deprived the defendant in that case of any chance to give his version of the events. The rape shield statute did not apply to exclude the testimony because it was not about using past promiscuity, if any, to attack credibility, it was simply the defendant offering to tell what happened, according to him. The rape shield statute did not apply to testimony that "if excluded, would deprive defendants of the ability to testify to their versions of the incident." *Id.*, at 721.

This is not marginally relevant evidence that a court should balance against the State's interest in excluding the evidence. Instead, it is evidence of extremely high probative value; it is Jones's entire defense.

Id.

The Supreme Court of Washington in *Jones* held: "The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment." *Id.*

... error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

Id., at 724.

The Supreme Court in *Jones* held the error was not harmless and reversed and remanded for a new trial. *Jones*, at 725-26.

This Court should hold that the Superior Court denied Ms. Riojas her Sixth Amendment right to present a defense when it would not allow her to present her version of events by cross-examination of the officers, by her own testimony, or that of her witness.

She never got to simply tell her version of what happened. Immediately after being grabbed, she was slammed to the ground. It should have been for the jury to decide whether Officer Moses did so only because he was assaulted or whether he was already in the process of using excessive force on the Defendant. But the jury never heard about the level of force used immediately after the grabbing of the arm. It should have been for the jury to decide

if Ms. Riojas was only acting out of training, but they never heard about the training.

And this Court should hold that the error is not harmless, and reverse and remand for a new trial where the defense gets to present its version of events. A juror could have reached a different decision, having heard the excluded evidence.

5. The trial court erred in not giving the instruction on self-defense proposed by the defense.

A defendant is entitled to an instruction whenever there is substantial evidence to support it, with the evidence bearing on the instruction being viewed in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The refusal to give instructions on a party's theory of the case when there is supporting evidence is reversible error when it prejudices a party. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010).

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

In order to properly raise the issue of self-defense, there need only be some evidence admitted in the case from whatever source which tends to prove a killing was done in self-defense. *State v. Adams*, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982); ... Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of the jurors on that issue. See *State v. Roberts*, 88 Wn.2d 337, 345-46, 562 P.2d 1259 (1977); *State v. Adams*, supra. The trial court is justified in denying a request for a self-defense instruction only where no credible evidence appears in the record to support a defendant's claim of self-defense. *State v. Roberts*, supra 88 Wn.2d at 346. In determining whether sufficient evidence has been produced to justify a jury instruction on self-defense, the trial court must apply a subjective standard and view the evidence 98 Wn.2d 489 from the defendant's point of view as conditions appeared to him or her at the time of the act. *State v. Warrow*, 88 Wn.2d 221, 234-36, 559 P.2d 548 (1977).

State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).

Since the evidence, considering that which was erroneously excluded, supported self-defense, then the instructions did not allow the Defendant to argue her theory of the case.

The conviction should be reversed, and the case remanded for a new trial with the jury instructed on self-defense.

6. The trial court erred in using the term "unlawful force" in its instructions to the jury without further defining that term.

Instruction No. 5 to the jury defined "assault":

An assault is an intentional touching or striking or cutting or shooting of another person, with **unlawful force**, that is harmful or offensive regardless of whether

any physical injury is done to the person. A touching or striking or cutting or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with **unlawful force**, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with **unlawful force**, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not assault, if it is done with the consent of the person alleged to be assaulted.

CP 44 (Emphasis added.)

Instruction No. 5 was taken from WPIC 35.50. 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.” Jury instructions must not be misleading, and, when read as a whole, properly inform the trier of fact of the applicable law. *Douglas*, 128 Wn. App. at 562. To use the term “unlawful force” when that term applies to self-defense, which was not otherwise before the jury, is misleading. The jury may have

very well assumed since the Defendant was not allowed to present a claim of "lawful force," that "unlawful force" was a given.

Ironically, had the defense been allowed to present self-defense evidence, and had its instruction on self-defense been given, then the "unlawful force" language would have course been appropriate.

Since the trial court did not allow evidence of self-defense or an instruction on self-defense, then at a minimum, the trial court violated the Note on Use of the pattern instruction.

The "Comment" to WPIC 35.50 states in part:

... the court has criticized jury instructions that used the term "unlawful" without defining it. See *State v. Hardy*, 44 Wn. App. 477, 722 P.2d 872 (1986) (aggressor instruction for second degree murder); *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985) (aggressor instruction for second degree assault). If there is a claim of self-defense or other lawful use of force, the instruction on that defense will define the term "lawful." If there is no such evidence, the jury should not be left to speculate on what might constitute "lawful" conduct.

In *Hardy*, an "aggressor" instruction had been given:

Additionally, however, *Hardy* maintains that the phrase "unlawful act" in the trial court's instruction rendered it impermissibly vague since that phrase was not defined with respect to the particular circumstances of the case. We agree, and find that *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985) controls here and requires reversal.

44 Wn. App. 483.

In *Hardy*, the problematic jury instruction read as follows:

No person may by any **unlawful** act create a necessity for acting in self-defense or defense of another and thereupon kill, use, offer or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt the defendant was the aggressor and that the defendant's acts and conduct provoked or commenced the fight, then self-defense or defense of another is not available as a defense.

Instruction 23 (WPIC 16.04), *Hardy*, 44 Wn. App. at 479-80.

(Emphasis added.)

In *Arthur*, in dealing with an aggressor instruction using the term "unlawful" without further definition, the Court of Appeals noted that the Supreme Court in *State v. Hilt*, 99 Wn.2d 452, 662 P.2d 52 (1983) held unconstitutionally vague a statute which provides any person "admitted to bail ... and who knowingly fails without lawful excuse to appear as required is guilty of bail jumping." RCW 9A.76.170. The Court stated that the statute was "deficient in terms of providing guidelines to the meaning of lawful excuse. The phrase is nowhere defined and predicting its potential application would be a guess, at best." *Hilt*, at 455, 662 P.2d 52. And that in *State v. Richmond*, 102 Wn.2d 242, 683 P.2d 1093 (1984), the court held unconstitutionally vague the statute which provides "every person who ... willfully omits, without lawful

excuse to furnish necessary food ... shall be guilty of the crime of family desertion or nonsupport." RCW 26.20.030(1)(b). The court was unable to find any statutory or case authority that would specify and delimit the "lawful excuses" that could be asserted as a defense under the statute, and held the statute void for vagueness.

Richmond, at 248, 683 P.2d 1093. *Arthur*, 42 Wn. App. 124.

We see no distinction between the use of the phrase "lawless act" or "lawful excuse" and "unlawful act" in this instruction. The denial of the self-defense theory where the conduct of the defendant could be deemed accidental is not rational, reasonable, or fair. *Arthur* contended that the only act here which could be considered as provoking or precipitating the confrontation would have been the accidental collision with Thompson's car, but at that point he was withdrawing from the scene. Under the instruction given, if the jury were to find the collision accidental, they could determine that the act constituted reckless or negligent driving. They might also conclude that this was an unlawful act which provoked the incident leading to the stabbing. According to the instruction, they would be precluded from considering *Arthur's* claim of self-defense.

Arthur, 42 Wn. App. 125.

Self-defense was not allowed in this case. But the Defendant, in what little testimony she was allowed to present, still testified that the act was more or less an automatic reaction. RP 264, lines 10-23. Without guidance as to what "unlawful force" meant, the jury had

no standards by which to measure if an automatic response would still result in guilt.

As in *Arthur*, the problem with the assault definition in this case means: "The instruction is too vague and too broad." In *Arthur*, the judgment was reversed and the case remanded for a new trial. 42 Wn. App. at 124-25.

This Court should hold the term "unlawful" in the definition of assault to be unconstitutionally vague, and reverse the conviction, and remand for a new trial without the offending term in the definition of assault.

D. CONCLUSION

This Court should hold the evidence was insufficient, reverse the conviction, and dismiss the charge. Or alternatively, hold that the Superior Court erred in not allowing testimony by the Defendant as to self-defense, and her self-defense training, in not allowing a self-defense instruction to the jury, and in using the term "unlawful" in the definition of assault, without further definition, and reverse the conviction and remand for a new trial.

Respectfully submitted,

Dated July 22nd 2013



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CERTIFICATE OF MAILING

I hereby certify that on the 22nd day of July, 2013, I mailed a true and correct copy of the foregoing Brief of Appellant to James L. Nagle, Prosecuting Attorney, at 240 W. Alder, Suite 201, Walla Walla, WA 99362, and to Mersadeze Riojas, Appellant, at 2344 Hood Place, Walla Walla, WA 99362, postage prepaid.



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