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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35956-5-III

STATE OF WASHINGTON, Respondent,

v.

BRANDON THOMAS TULLAR, Appellant.

APPELLANT'S SUPPLEMENTAL BRIEF

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I. QUESTIONS PRESENTED

Brendan Tullar has challenged the trial court's refusal to give his requested self-defense instruction and his attorney's withdrawal of his self-defense claim to the charge that he assaulted Jonathan Cook while both were incarcerated in the Okanogan County jail. After the parties' briefs were filed, this court observed that neither party had briefed the trial court's rationale that self-defense was inconsistent with mutual combat,¹ and requested supplemental briefing on the following questions:

1. Is self-defense available when the parties were incarcerated?

Short Answer: Yes. Washington law recognizes a fundamental right to self-defense, which extends to incarcerated inmates.

2. Is self-defense available where the parties orally agreed to fight and were on the way to the agreed-upon location?

Short Answer: Yes. Oral statements are not violent acts that render the speaker the primary aggressor. Agreements to fight in a jail lack force as

¹ At the outset, Tullar notes that criminal defendants are generally allowed to present inconsistent defenses. *State v. Martinez*, 2 Wn. App. 2d 55, 78 n. 65, 408 P.3d 721, review denied, 190 Wn.2d 1028 (2018) (citing *State v. Frost*, 162 Wn.2d 765, 772, 161 P.3d 361 (2007)).

a matter of public policy; and, in any event, Cook's actions were not consistent with the agreement or foreseeable from it.

3. If Mr. Cook did sucker-punch Mr. Tullar from behind before the fight started, does this fact affect the availability of the self-defense claim?

Short Answer: Yes. Mr. Cook initiated violence without lawful justification that presented an imminent risk of further injury, justifying Tullar in using necessary force to prevent further bodily harm under RCW 9A.16.020(3).

II. MEMORANDUM OF LAW

A. Incarcerated persons do not forfeit their natural, constitutional, or statutory rights to self-defense.

The right to self-defense has both constitutional and statutory underpinnings. All states recognize, to some degree, a statutory or common law right to use force in self-defense against another. Volokh, Eugene, *Self-Defense is a Constitutional Right*, The Washington Post (Dec. 26, 2014). And several state constitutions expressly recognize an inalienable right to defend one's life and liberty arising from natural law principles. *See, e.g.*, Iowa Const. art. I § 1; N.H. Bill of Rights art. II ("All

men have certain natural, essential, and inherent rights; among which are, the enjoying and defending life and liberty. . .”); *see also* Volokh, Eugene, *State Constitutional Rights of Self Defense and Defense of Property*, 11 Tex. Rev. L. & Pol. 399, 401-07 (2007) (enumerating constitutional provisions of 21 states recognizing a natural or inherent right to self-defense and noting a similar formulation in Samuel Adams’ 1792 report to the Boston Town Meeting concerning the rights of the colonists).

Unlike some states, Washington’s constitution does not expressly acknowledge a right of self-defense. However, it acknowledges the existence of non-enumerated rights retained by the people. Wash. Const. art. I, § 30. Additionally, it prohibits the government from depriving any person of life, liberty, or property without due process of law. Wash. Const. art. I, § 3. A person’s right to protect his own life and physical security has been understood historically to precede and arise independently from governments as a basic component of ordered society; therefore, these constitutional provisions retain and protect a pre-existing common law right to self-defense on the same footing as rights the constitution specifically enumerates.

Whether the U.S. Constitution's due process clause encompasses a right to self-defense is an unresolved question that has both affirmative and negative support. *Compare Taylor v. Withrow*, 288 F.3d 846, 851-52 (6th Cir. 2002) (holding that the right of a criminal defendant to assert self-defense is a fundamental right deeply rooted in tradition and history); *Rowe v. DeBruyn*, 17 F.3d 1047, 1052-53 (7th Cir. 1994) (concluding the right to self-defense is not a fundamental constitutional right arising from the Due Process Clause and that prisoners do not have a fundamental right to self-defense in disciplinary, non-criminal proceedings). However, the U.S. Supreme Court has recognized the Second Amendment's right to bear arms to be an individual right as a means to secure the fundamental, historically-recognized right of individual self-defense. *District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) (“[W]e find [the textual elements of the Second Amendment] that they guarantee the individual right to possess and carry weapons in case of confrontation.”); *McDonald v. City of Chicago*, 561 U.S. 742, 767, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (“Self-defense is a basic right, recognized by many legal systems from ancient times to the present day,” citing William Blackstone's commentary on ancient Jewish, Greek, and Roman law).

Collectively, these authorities support the position that the right to defend oneself from injury or death has deep roots that arise from natural law and human rights principles; it has existed in the common law for centuries, long preceding the founding of the United States. *See* Schachter, Oscar, *Self-Defense and the Rule of Law*, 86 Am. Journal of Int'l Law 259-60 (1989) (discussing philosophical foundations of self-defense as “an inherent and autonomous right.”). Consequently, self-defense should be understood as one of the unenumerated rights preserved to the people in the U.S. Constitution’s Ninth Amendment, and the Washington Constitution’s article I, section 30.²

Although Washington has not expressly acknowledged the right to self-defense in its constitution, it has done so by statute. In Washington, the use of force is lawful when used by a person about to be injured in attempting to prevent an offense against his person, provided that the force used is not more than necessary. RCW 9A.16.020(3). Lawful self-defense constitutes a complete justification to an assault. *State v. Rodrigues*, 21 Wn.2d 667, 668, 152 P.2d 970 (1944).

² This court has previously reached this conclusion in *State v. Hull*, 185 Wn. App. 1005, review denied, 184 Wn.2d 1003 (2015). *Hull* is an unpublished decision of Division III of the Court of Appeals and is not binding as precedent, but may be considered for its persuasive value under GR 14.1(a) to the extent the court deems appropriate.

Facially, the statute applies universally to any person about to be injured, with no express restrictions on its availability to any particular individual. Interpreting self-defense as universally available to all persons in Washington is not only consistent with the statutory language, but with the natural rights understanding of self-defense as arising from the fundamental human impulse to self-preservation.

One might argue that, as in the case of mutual combat, the State's interest in suppressing prison violence as a matter of public policy justifies disallowing self-defense in jail facilities. *See State v. Weber*, 137 Wn. App. 852, 859-60, 155 P.3d 947 (2007), *review denied*, 163 Wn.2d 1001 (2008) (discussing public policy interests disfavoring a consent defense to assaults occurring in prison). But other competing interests militate in favor of finding that incarceration does not extinguish self-defense rights.

Under such a rule, arrest for even a petty offense would carry a significant risk of severe physical punishments that, were they committed directly by the State, would unquestionably constitute a violation of the Eighth Amendment and article I, section 14's prohibitions against cruel and unusual punishment. *See generally Hudson v. McMillian*, 503 U.S. 1, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992) (holding that excessive physical force against a prisoner may constitute cruel and unusual punishment even

when no serious injury results). In the worst case scenarios, inmates would face the intolerable Hobson's choice of physical injury or conviction and further loss of liberty. *See State v. Bradley*, 141 Wn.2d 731, 744, 10 P.3d 328 (2000) (Sanders, J., dissenting).

If inmates lack the ability to protect themselves, the State will have to protect them instead. *See Weber*, 137 Wn. App. at 860 (“[P]ublic policy also imposes a nondelegable duty on those operating correctional facilities to maintain the health and safety of the prisoners incarcerated there.”). This would surely impose an unrealistic burden on already burdened corrections resources to monitor the inmate population for any hint of potential violence and to staff facilities sufficiently to immediately intervene in inmate disputes when the need arises.

Washington cases have recognized a right to self-defense in a jail setting by inmates against correctional officers when the inmate is in actual danger of serious injury. *Bradley*, 141 Wn.2d 731. In *Bradley*, the defendant was in jail for various offenses when a correctional officer sprayed pepper spray in his face and used a thumb to rub the spray in the defendant's eye to compel the defendant to return to his cell. *Id.* at 734. The defendant then swung at the officer and bit his wrist before being physically subdued. *Id.* In that case, the *Bradley* Court affirmed the

giving of a self-defense instruction that required the higher showing of actual harm, rather than apparent harm, applicable to self-defense claims against law enforcement officers making an arrest. *Id.* at 733. Thus, while *Bradley* does recognize different applicable standards of self-defense in a jail setting, the standards are not distinguished based upon the defendant's status as in custody or out of custody, but upon the combatant's status as a corrections or law enforcement officer.

No conceivable rationale exists why an incarcerated defendant could properly claim self-defense against a corrections officer who carries out the State's duty "to maintain the health and safety of the prisoners incarcerated there," and therefore presumably uses force minimally, infrequently, and for purposes of restoring order rather than malicious infliction of harm, but that same inmate may not claim self-defense against a fellow prisoner who lacks any such duty or cause for restraint. "Prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for anti-social criminal, and often violent, conduct." *Bradley*, 141 Wn.2d at 742 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)). Indeed, to the extent that self-defense deters violence by creating a risk of reciprocal harm to an aggressor, eliminating the right of self-defense between jail

inmates would simply grant a monopoly on violence to those inmates least concerned about, or deterred by, legal retribution.

Accordingly, neither the law nor good public policy supports restricting a prisoner's right to defend themselves against aggressive fellow inmates. Prisoners do not forfeit their fundamental rights at the jailhouse door, and commission of minor, jailable offenses should not subject individuals to the "Hobson's choice between death and criminal conviction." *Bradley*, 141 Wn.2d at 744 (Sanders, J., dissenting). In this case, Brandon Tullar's status as an inmate in the Okanogan County jail did not render an otherwise applicable self-defense claim unavailable.

B. A gratuitous agreement to fight under agreed conditions does not render self-defense inapplicable when the agreement is breached by initiating violence prematurely, unreasonably, and unforeseeably.

Words are not themselves violent acts, and therefore words do not justify violence. *See State v. Riley*, 137 Wn.2d 904, 911, 976 P.2d 624 (1999) ("A 'victim' faced only with words is not entitled to respond with force."). Facially, the use of force is justified only in response to threatened harm, not in response to insult, provocation, or invitation. *See* RCW 9A.16.020(3); *Riley*, 137 Wn.2d at 912 ("For a victim's use of force

to be lawful, the victim must reasonably believe he or she was in danger of imminent bodily harm. However, mere words alone do not give rise to reasonable apprehension of bodily harm.”).

A different result would be contrary to public policy disfavoring breaches of the peace. *See State v. Hiott*, 97 Wn. App. 825, 828, 987 P.2d 135 (1999) (recognizing that in general, assaults are breaches of the public peace and against public policy). Although arguments may escalate and become heated, even reaching a point where the participants express their desire to resolve their differences through violence, society’s interest in avoiding assaultive confrontations is furthered by always affording the participants an opportunity to withdraw. In the present case, even if Tullar and Cook agreed to fight and were proceeding to the agreed-upon location, Tullar had not yet acted on the agreement by commencing the fight. Notwithstanding the agreement, the parties may still have attempted to de-escalate their conflict or otherwise avoid physical confrontation, and it is in the public’s interest that they be afforded every opportunity to do so. Holding that Cook’s initiation of force was justified because Tullar said he would fight him would make it harder for a person who impulsively proposes violence to cool down, reconsider, and decide against proceeding.

Moreover, even to the extent there was an agreement to fight, Cook's actions in sucker-punching Tullar from behind before they had both reached the agreed location was a breach of that agreement. While consent as a defense to assault is disfavored, it may be available for particular acts in light of the surrounding circumstances and society's interest in the activity at issue. *State v. Baxter*, 134 Wn. App. 587, 598, 141 P.3d 92 (2006). Thus, some generally accepted athletic contests such as boxing and football, which occur under prescribed rules and with measures to protect the safety of the participants, allow participants to contact each other in ways that would be considered assaults in other contexts. *See Hiott*, 97 Wn. App. at 827-28.

However, in sports where violence is not an inherent feature of the contest, if the defendant's conduct is not a reasonable and foreseeable action in the course of the game, it will not be excused due to the parties' mutual consent to the contest. *State v. Shelley*, 85 Wn. App. 24, 31-32, 929 P.2d 489, *review denied*, 133 Wn.2d 1010 (1997). This conclusion is the result of the commonsense observation that "there is a limit to the magnitude and dangerousness of a blow to which another is deemed to consent" by virtue of participating in an agreed contest. *Id.* at 33. Thus, even if an agreement to fight under these circumstances were analogous to participating in a sport, the agreement to fight in a certain locale under

certain expectations does not excuse an unforeseeable sucker-punch from behind, before the locale has been reached and the contest commenced.

In the present case, in any event, the case law does not support the application of rules applicable to organized sporting contests to an agreement to fight in jail. *See Hiott*, 97 Wn. App. at 827 (game in which juveniles shot BB guns at each other was not equivalent to lawful athletic contests that are generally accepted by society). Because an agreement to fight in jail contradicts public policy, it is not the type of contract a court should enforce or grant any legal significance. *See Weber*, 137 Wn. App. at 860; *see also Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (“An agreement that violates public policy may be void and unenforceable.”). Tullar’s agreement to fight Cook therefore did not serve to incite or justify Cook’s premature attack on him as he entered Cook’s cell. Because Cook’s use of force was not legally privileged, Tullar had a right to defend himself against it under RCW 9A.16.020(3).

C. If Cook sucker-punched Tullar, he was the primary aggressor and a self-defense instruction was warranted.

“A ‘victim’ faced only with words is not entitled to respond with force.” *Riley*, 137 Wn.2d at 911. While an aggressor may generally not

claim self-defense because the victim's defensive force is not unlawful, words, even insulting ones, do not justify a forcible response. *Id.*

Here, regardless of who started the initial argument, under Tullar's evidence, Cook initiated the escalation to physical violence. Cook was not entitled to rely upon Tullar's words as justification to strike him. Once Cook chose to escalate the altercation from words to blows, he created a risk that Tullar would be seriously injured. Accordingly, under these facts, it should be for a jury to decide whether Tullar's response was reasonable and proportionate in light of the threat that Cook posed to his safety.

III. CONCLUSION

For the foregoing reasons, Tullar respectfully submits that he was allowed to plead self-defense while a prisoner in jail, that his agreement to fight Cook in Cook's cell did not encompass Cook's actions in striking him before the agreed fight commenced, that any agreement to fight in a jail lacks force as a matter of public policy in any event, and that Tullar's words of assent or insult did not justify or privilege Cook's violent response. Accordingly, Tullar requests that the court REVERSE his conviction and sentence for failure to give the proffered self-defense instruction and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 3 day of May, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial "A".

ANDREA BURKHART, WSBA #38519

Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Supplemental Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3 day of May, 2019 in Kennewick, Washington.



Andrea Burkhart

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May 03, 2019 - 2:59 PM

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