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Court of Appeals  
Division III  
State of Washington  
5/16/2019 9:50 AM

NO. 359565-III

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

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STATE OF WASHINGTON  
PLAINTIFF/RESPONDENT,  
V.  
BRANDON THOMAS TULLAR  
DEFENDANT/APPELLANT.

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SUPPLEMENTAL BRIEF OF RESPONDENT

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ARIAN NOMA  
Prosecuting Attorney  
237 4th Avenue N.  
P.O. Box 1130  
Okanogan County, Washington

509-422-7280 Phone  
509-422-7290 Fax

Arian Noma, WSBA: 47546  
Prosecuting Attorney

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## QUESTIONS PRESENTED

- A. Is Self-Defense available to Mr. Tullar as a defense where Mr. Tullar agreed to fight his opponent and both combatants were incarcerated
- B. If not, should it matter that Mr. Tullar's opponent allegedly sucker-punched him before the fight began

## ARGUMENT

**Is Self-Defense available to Mr. Tullar as a defense where Mr. Tuller agreed to fight his opponent and both combatants were incarcerated and victim sucker-punched Mr. Tullar first**

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. McCullum*, 98 Wn. App. 484, 488, 656 P.2d 1064 (1983). 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. *Id.* In order to raise self-defense before the jury, a defendant bears the initial burden of producing some evidence which tends to prove that the killing occurred in circumstances amounting to self-defense. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). 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 from the defendant's point of view as conditions appeared to him or her at the time of the act. *McCullum* at 488-489. Consent is not a defense to the charge of second degree assault between two incarcerated persons. *State v. Weber*, 155 P.3d 947, 137 Wash. App. 852 (2007).

In this case, the defense of self-defense was and is not available to Mr. Tullar. As explained in *State v. Callahan*, to prove self-defense, there must be evidence that (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor. *State v. Callahan*, 87 Wn. App. 925, 929, 943 P.2d 676, 678 (1997) (*Internal Citations Omitted*).

Unfortunately for Mr. Tullar, the record in this case does not support any evidence that Mr. Tullar was ever in any fear of imminent danger of death or great bodily harm. In fact, Mr. Tullar agreed to fight defendant. He proposed the agreement to engage in combat to Mr. Cook. He then told Mr. Cook to go into the cell

and remove his shoes to prepare. This evidence demonstrates a plan and does not indicate any fear. No fact finder would find that Defendant was ever in fear. Defendant strategically chose not to testify on his own behalf. The testimony provided by the defense witnesses, Mr. Cate and Mr. Adrian indicated that the defendant engaged in a mutually agreed upon fight and defendant was not defending himself.

Furthermore, the victim's injuries included a fractured eye socket resulting in the loss of 75 percent of his vision permanently. The victim stated that it was an agreed upon fight that he and defendant mutually agreed too. There was no evidence to support that Mr. Tullar was ever in fear of imminent death or other grave serious harm. The evidence actually proves the opposite conclusion that Mr. Tullar agreed to fight and then assaulted the victim.

Finally, even if Mr. Cook sucker-punched Mr. Tullar, there is no evidence that the punches placed Mr. Tullar in imminent harm of death or grave serious injury. Once again, the evidence indicates the contrary. The record demonstrates that even if these punches occurred they did not hurt, phase, or bother Mr. Tullar. He agreed to fight the victim and based upon the evidence, beat the victim to

the point that he suffered a right fractured eye socket, broken nose, and permanent loss of vision. Therefore, it matters not whether Mr. Tullar was sucker-punched because the evidence in this case indicates he agreed to the fight. Agreement to the fight automatically allows a reasonable juror to be able to infer that Mr. Tullar was never in fear of harm; an essential element of self-defense.

Assuming arguendo that the defendant initially believed that he was going to be harmed, and acting in self-defense may have been merited, once Mr. Cook was beaten to the ground and screaming that he was done and begged for Mr. Tullar to stop pounding on his face the defense of self-defense was no longer available to Mr. Tullar. This is because the self-defense can only use the amount of force reasonably necessary to defend. There was ample evidence presented to the jury for it to conclude that the Mr. Tullar was not acting in self-defense, and in fact, was brutally assaulting Mr. Cook once Mr. Cook screamed, yelled, and begged for defendant to beating his face. The jury could have also concluded that Mr. Tullar also assaulted Mr. Cook throughout the fight as consent to mutual combat does not excuse assault. But, based upon the record, what the jury could not do was conclude

that Mr. Tullar acted in self-defense because Mr. Tullar failed to meet the burden of proving that he was ever in fear of imminent death of serious harm.

Once again, when Mr. Tullar briefly spoke with the investigating officer he simply denied assaulting the victim and denied being involved in any fight. [RP 85- RP 86] “One cannot deny that he struck someone and then claim that he struck them in self-defense. Defendant was not entitled to self-defense instructions.” State v. Aleshire, 89 Wn.2d 67, 71, 568 P.2d 799, 802 (1977).

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

The person using 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 [and prior to]** the incident.

WPIC 17.02 (*Emphases Added*)

The accompanying “necessary” instruction explains:

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

WPIC 16.05

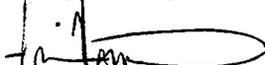
There was no testimony, or inference of the Defendant’s state of mind that would explain this conduct. *Cf. State v. George*, 161 Wn. App. 86, 97, 249 P.3d 202, 208 (2011). Because there was no testimony relating to essential components of self-defense, the trial court properly denied defense request for a self-defense instruction.

### CONCLUSION

For the aforementioned reasons, the State asks that this Court affirm the Defendant’s conviction.

Dated this 15<sup>th</sup> day of May, 2019.

Respectfully Submitted:



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Arian Noma, WSBA: 47546  
Prosecuting Attorney

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	COA No. 359565
Plaintiff/Respondent	)	
v.	)	CERTIFICATE OF SERVICE
Brandon Thomas Tullar	)	
Defendant/Appellant	)	
_____	)	

I, Shauna Field, do hereby certify under penalty of perjury that on the 16th day of May, 2019, I caused the original supplemental Brief of Respondent to be filed in the Court of Appeals Division III and a true copy of the same to be served on the following in the manner indicated below:

**E-mail:** Andrea@2arrows.net

Andrea Burkhart  
Two Arrows, PLLC  
8220 W. Gage Blvd #789  
Kennewick, WA 99336

U.S. Mail  
 Hand Delivery  
 E-Service via Portal

Signed in Okanogan, Washington this 16th day of May, 2019.



Shauna Field, Office Administrator

PROOF OF SERVICE

ARIAN NOMA  
Okanogan County Prosecuting Attorney  
P. O. Box 1130 • 237 Fourth Avenue N.  
Okanogan, WA 98840  
(509) 422-7280 FAX: (509) 422-7290

**OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE**

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