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Court of Appeals  
Division III  
State of Washington  
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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

---

BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

### A. Procedural History

#### 1. Charging

On January 4<sup>th</sup> 2018, the Defendant was charged in Okanogan County Superior Court with one count of Assault in the Second Degree. [CP 5] The charge alleged that on or about December 31<sup>st</sup> 2017, the Defendant assaulted Jonathan Cook, breaking Cook's nose and orbital socket. [CP 6]

#### 2. Omnibus Hearing

On January 29<sup>th</sup> 2018 at the pre-trial omnibus hearing, the defense put the State on notice that apart from a general denial offense, the defenses of "mutual combat" or "self-defense" may be raised at trial. [CP 12; *also included as Appendix A: Defendant's Omnibus Application*]

The State's omnibus application informed the defense that if the Defendant testified at trial, it would introduce his prior crimes of dishonesty. These included convictions for Taking a Motor Vehicle without Permission in the 2<sup>nd</sup> Degree, Theft 3<sup>rd</sup> Degree, Residential Burglary, Theft 2<sup>nd</sup> Degree, and Burglary 2<sup>nd</sup> Degree. The State also placed the defense on notice that "\*Note if self-defense is raised,

Defendant's assaultive criminal history is admissible, particularly an assault 4<sup>th</sup> conviction (assault on inmate) 7Z0037547." As well as Assault 4<sup>th</sup> Degree convictions from 2011, 2008, and an Assault 2<sup>nd</sup> degree conviction from 2010. [CP 11; *also included as Appendix B: State's Omnibus Application*]

## **B. Jury Trial**

### **1. Motions in Limine**

#### **State's Motions in Limine**

On the day of trial, the State's motions in limine again addressed the possible result of the Defendant raising self-defense. The State's first motion in limine asked for disclosure of the defense, and clarification of whether or not self-defense was being raised. The State expressed concern that the Defense would attempt to subvert evidence rules (by introducing prior bad acts pertaining to the victim, and then arguing the victim was the first aggressor), without permitting the State to introduce any evidence of the Defendant's substantial assaultive history or conduct a proper cross-examination of the Defendant. Defense counsel responded by stating that they may or may not raise self-defense during the course of the trial, and

may actually call the victim as one of their witnesses as a part of their case in chief. [RP 20 – RP 29]

The State's fifth motion in limine included a recitation of the Defendant's crimes of dishonesty that would be automatically admissible if the Defendant chose to testify. The State's seventh motion in limine related to the introduction of the Defendant's prior assaultive history. The motion read:

The State provided notice at omnibus that if Self-Defense were raised, then the Defendant's assaultive history is admissible. The State specifically indicated that if self-defense was raised, then his prior assault 4<sup>th</sup> from 2017 (Assault on an inmate in Okanogan Jail) is admissible in 7Z0037547. The Defendant also has assault history with dates of violation of 3/21/2011 and 8/20/2008 (Assault 4<sup>th</sup>) and 12/11/2010 (Assault 2<sup>nd</sup>). The State provided notice of intent to use these at omnibus if self-defense was raised. The State is still not entirely clear if the defense will essentially argue self-defense given the anticipated testimony of defense witnesses. If this testimony is presented from the defense witnesses, the State believes that these are admissible. [CP 32]

The Defense requested that the Court reserve a ruling on the issue pending testimony. [RP 38]

### **Defendant's Motions in Limine**

The Defendant's fourth motion in limine requested that the Court prohibit introduction of the Defendant's prior bad acts or allegations of

misconduct, specifically asking to exclude evidence of gang membership. [CP 33] The State responded by explaining that based on the State's conversations with the victim and review of the police report, that there was evidence that the Defendant assaulted the victim, at least in part, because the Defendant wished to be segregated from rival gangs that were expected to be transferred into his jail module. The court reserved on the issue, noting that it could be revisited during the Defendant's case-in-chief. [RP 49 - RP 50]

## **2. Trial Testimony**

### **Jail Guard Testimony**

Okanogan County Correction's Deputy Timothy Millward testified that he was at work on December 31<sup>st</sup> 2017, conducting hourly checks on inmates housed in the jail. At around 11.00 p.m. he looked into the cell of inmate Jonathan Cook, and observed that Cook's face was bruised and that his shirt was splattered with blood. It was apparent that he required medical attention, and Cook was moved into a different section of the jail. While he was moving Jonathan Cook toward another section of the jail, Deputy Millward noticed that inmate Brandon Tullar was looking nervously at his hands. [RP 60 – RP 64] Deputy Millward contacted other

Correction's Officers, including Correction's Deputy Randal Cline. They began looking for signs of blood on other inmates hands within the jail "module." [RP 71:17 – RP 72:5] Neither he nor Deputy Cline noticed any blood on the other inmate's hands. [RP 67:4 – RP 67:16].

Deputy Cline transported Jonathan Cook to the local hospital. A CT scan revealed that Cook had suffered a broken nose and fractured eye socket. [RP 105 – RP 106] Medical records documenting these injuries were admitted by stipulation. [CP 31]

Deputies Millward and Cline asked Jonathan Cook who it was that assaulted him. After initially hesitating, Jonathan Cook identified the Defendant, Brandon Tullar. The Defendant was one of among eight to ten inmates housed in that jail module. [RP 67:17 – RP 68:25; RP 108:8 – RP 108:20]

### **Investigating Officer Testimony**

A field Deputy, Deputy Sergeant Gene Davis was called to investigate this incident at the jail. Sergeant Davis photographed Cook's extensive injuries, and then took Cook's statement. [RP 74:16 – RP 82:7] Sergeant Davis recalled that Cook told him that earlier in the afternoon the Defendant had been taunting him, insulting his girlfriend, and trying to get into a fight. Sergeant Davis recalled that [Cook] "stated that Tullar is a

Norteno 14 gang member.” Defense counsel objected before Sergeant Davis finished the sentence, and the court immediately issued a curative instruction: “Ladies and gentleman of the jury, you’re to disregard that comment and that evidentiary statement just made – in relation to gang membership. You’re to disregard it and it’s not admitted.” [RP 78:21 – RP 79:10] When testimony recommenced, Sergeant Davis explained that Cook told him that Tullar stated that he didn’t want his DOSA [drug sentencing alternative sentence] revoked.

Sergeant Davis recalled that Cook told him that in the evening, around 10.00 p.m., the Defendant entered his cell and punched him in the back of the head. Cook said the punch came as he was seated on a stool reading Christian literature. Cook said that the Defendant elbowed him in the left eye and Cook ended up falling onto his bed. Cook told him that he tried to use his arms to block the attack, but the Defendant kept kneeling him in the nose, stomach, and chest areas. Cook told him that the Defendant continued the attack even when Cook fell onto his bed. [RP 79:24 – RP 82:9] Sergeant Davis did not see any unusual marks or bruising on Cook’s hands. [RP 84:13 – RP 84:22] Sergeant Davis photographed Cook’s injuries, which were admitted into evidence at trial.

Sergeant Davis testified that after obtaining Cook’s statement he entered Cook’s cell. He saw blood splatter on a the wall next to Cook’s

bed. He also saw blood droplets and blood smears on the floor of the cell. He photographed the scene. These photographs were admitted during the trial. [RP 82:12 – RP 84:12]

Sergeant Davis contacted the Defendant, and asked the Defendant why he assaulted Jonathan Cook. The Defendant replied that he didn't know anything about a fight or an assault. [RP 85:13 – RP 86:1] Sergeant Davis inspected the Defendant's hands and elbows. The Defendant's right elbow showed abrasions, and the Defendant's hands had some marks. Sergeant Davis photographed the Defendant's hands and elbows. These photographs were admitted into evidence. [RP 86:2 – RP: 87:8] Sergeant Davis could not recall seeing any signs of injury to the back of the Defendant's head.

### **Victim Testimony**

Jonathan Cook testified that he was housed in the Okanogan Jail on December 31<sup>st</sup> 2017. He knew the Defendant as they both had mutual friends that they would see during various times of incarceration. [RP 118:19 – RP 119:20] Cook recalled that in December 2017, both he and the Defendant were housed in the same jail module. He testified that as the New Year approached some of the inmates were expected to leave and would be replaced by others. [RP 120:01 – RP 121.11] The Defendant

began insulting Cook regularly, and provoking him. Cook believed the Defendant was trying to pick a fight with a weaker person in the jail. The fight would then require them to be “locked down” and segregated from the incoming, unfamiliar inmates. [RP 124:7 – RP 125:14]

Cook explained that on the day of December 31<sup>st</sup> 2017, he and the Defendant got into a fight. It started when the Defendant started pacing around nervously, and remarked that he wanted to prove himself because other people were coming in [to the jail module]. After Cook sarcastically told the Defendant that the Defendant was looking nervous, the Defendant told Cook to take his socks off and go get ready [to fight]. The two walked upstairs and entered Cook’s cell. Once there the Defendant punched Cook in the face. Cook received some minor cuts and a swollen ear from this fight.

Cook distinguished this earlier event, noting it was different from the evening assault. [RP 122:16 – RP 124:16] Cook explained that this earlier fight was essentially a mutual fight. The fight ended after the Defendant won. Cook stated that after he lost the fight, he strongly wished to avoid future conflicts with the Defendant. Cook speculated that because the Defendant prevailed with this fight, his confidence probably improved. [RP 134:9- 135:6]

Cook recounted that later that evening he was in his cell, generally preparing to sleep. He was sitting on a stool reading from a Christian pamphlet when the Defendant entered his cell. When the Defendant entered the cell, he said “Hey..Punk.” Cook stood up and the Defendant “sucker punched” him to the back of the head, causing Cook to fall and hit his eye on the stool. Cook stood up and attempted to defend himself by grabbing the Defendant. Cook hoped this would prevent the Defendant from gaining striking distance between them. The Defendant pushed Cook away and struck Cook using his elbows. These strikes caused Cook to fall to his bed. The Defendant then continued striking Cook while Cook pleaded with the Defendant to stop. [RP 126:7 – RP 129:11]

Cook said while this was going on nobody else was in the cell or the immediate area. The other inmates were downstairs still watching New Year’s Eve events on television. After the assault ended, Cook heard the Defendant openly worry that this would jeopardize his upcoming DOSA sentence in another county. The Defendant warned Cook that if he reported the assault, then the Defendant would have “his people” come after him. The Defendant briefly left the cell, and then returned. Cook asked the Defendant if he was going to assault him again. The Defendant replied “No. Just cleaning up the blood. Don’t say nothing...Don’t say nothing; it’s done.” [RP 131:10 – RP 131:16]

Cook explained that as a result of the Defendant's evening attack, his orbital socket and nose were broken. He had undergone two corrective surgeries and was scheduled to receive a third surgery, but currently he was effectively blinded in his left eye for life. Cook said that physicians hoped the upcoming surgeries would restore 25% vision to his left eye [RP 133:12 –RP 133:25; RP 135:8- RP 136:13]

#### **Clarification of Defense**

After the State rested, the defense announced they would no longer pursue an affirmative defense of self-defense. The defense then notified the court that they would not call the victim Jonathan Cook as a defense witness. The defense also announced that the Defendant would not testify. [RP 165:2 – RP 166:16]

#### **Defense Witness Testimony**

Ryan Cate testified that he was housed in the Okanogan Jail with the Defendant and victim, Jonathan Cook. He said that on New Years Eve he observed the two of them bickering back and forth. After the bickering he saw Cook remove his socks and follow the Defendant upstairs into Cook's cell. Cate state he saw Cook hit the Defendant on the back of the head several times and got the Defendant in a chokehold. He said the

Defendant slipped out of a chokehold and there was an “exchange of blows” until the fight ended. [RP 171:4- RP 176:19]. On cross examination, Cate admitted that he recounted this event about one month after it occurred, after the Defendant approached him with a copy of the police report and asked him to agree to a statement. Cate admitted to being housed in the same module as the Defendant for weeks after this event. [RP 176:24 – RP 179:13]

The next individual, Sam Adrian, testified that he was housed in the Okanogan County Jail with the Defendant and Jonathan Cook on New Year’s Eve. He stated he saw Cook and the Defendant arguing, and at after this argument both of them went into Cook’s cell. He said he was only half paying attention, but observed Cook punch the Defendant in the back of the head, and place him (the Defendant) in a headlock. He said things ended when (Cook) “got beat up.” On cross examination, Adrian admitted that Ryan Cate approached him with a pre-prepared statement, and Adrian signed it because he ‘agreed with it.’ Adrian acknowledged that in the months leading to this trial, he had remained housed with the Defendant, who was both taller and stronger than he was. Adrian explained that he was able to somehow see this incident occurring within Cook’s cell from the stairs. He failed to articulate how this was possible given the narrowness of Jonathan Cook’s cell entryway, and the supposed

presence of Ryan Cate between him and Cook and Tullar. Adrian then acknowledged his own extensive history of convictions for crimes involving dishonesty. [RP 187 – RP 197:2].

The Defendant did not testify, and there were no further witnesses.

### **Jury Instructions**

The trial court denied a proposed jury instruction “an act is not an assault if it is done with the consent of the person alleged to be assaulted.” [RP 202:17 – RP 205:23] After the finalization of the jury instructions, the defense then proposed adding a self-defense instruction. The defense argued Cook “threw the first punch” and therefore provoked the incident. The court denied this request, noting there was no testimony relating to the subjective belief of the defendant. The court further observed there was testimony from the defense witnesses that both Cook and the Defendant had taken off their shoes, supposedly in preparation for a mutual fight. [RP 208:9-RP 211:19].

### **Verdict and Sentencing**

The jury found the Defendant guilty as charged of Assault in the Second Degree. [RP 260] The State asked the court to sentence the Defendant to the high end of the standard range (84 months) because the

victim's injuries were consistent with the higher charge of Assault in the First Degree. The extent of the victim's injuries only became known after the passage of time between the initial charging and trial. The State observed there were no mitigating sentencing factors, only aggravating circumstances. [CP 53]

The State urged the court to not reduce the Defendant's sentence on the basis that the victim had a criminal history of his own (as the defense sentencing brief argued). The State observed that a victim should not be afforded less protection under the law because of their past. [RP 272] The court disagreed, stating that it *had to* and would look at the victim's prior criminal history at sentencing. The Court then sentenced the defendant to the midpoint of the standard range of 73.5 months.

## ARGUMENT

### A. The Trial Court's Denial of a Mistrial was Not an Abuse of Discretion

The defense argues on appeal that the trial court erred when it denied a request for a mistrial. This ruling was correct. The trial court properly denied this request and offered specific reasoning in support of the decision.

The court accurately assessed that while the investigating officer's statement to the jury (that victim Jonathan Cook told him that the Defendant was a Norteno 14 gang member) was probably improper, an objection was made timely, and a curative instruction was issued immediately. [RP 78:21 – RP 79:10] The Court appropriately accepted the State's explanation that the investigating officer was present during the motions in limine (and privy to the court's rulings in limine), but made an inadvertent mistake when testifying later that day. The Sergeant was recounting what the victim told him during the course of the investigation. [RP 99:1 – RP 100:19]

This reviewing Court determines whether or not a denial of a mistrial was proper under the "abuse of discretion" standard. *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390, 395 (2000). An abuse of discretion is found only when no reasonable judge would have reached the same conclusion. *State v. Garcia*, 177 Wn. App. 769, 776, 313 P.3d 422, 426 (2013) quoting *State v. Emery*, 174 Wn.2d at 765, 278 P.3d 653. See also *State v. Greiff*, 141 Wn.2d 910, 921, 10 P.3d 390, 395 (2000).

The issuance of a curative instruction is a powerful indicator that the trial court's ruling (such as denying the mistrial) was reasonable. "Jurors are presumed to follow instructions." *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014, 1021 (1989). In the instant case, the trial judge

immediately issued a curative instruction to the jury. There was no subsequent argument regarding the Defendant's alleged gang membership or mention of propensity or character evidence pertaining to the Defendant. *Cf. State v. Scott*, 151 Wn. App. 520, 530, 213 P.3d 71, 76 (2009).

Appellate Counsel incorrectly states that there was 'repeated' further introduction of gang evidence. The record reflects the only possible reference was victim Cook's fragmented, halting, and virtually unintelligible description of the jail conditions at the time of the assault: "He just said that there's...scraps...come winter, certain gang he's, that he...he's from..." [RP 122:2 – 122:08]. From the record it is not even clear that Cook was referring to the Defendant. The record indicates that this prosecutor and the judge silenced Cook before Cook could reference the Defendant and gang membership or activity. The record also documents that this prosecutor instructed Cook on the relevant rulings, but cut Cook off when it appeared that Cook might inadvertently violate the motions in limine. [RP 122:08 – 122:18].

The trial court's denial of a mistrial request was reasonable and not an abuse of discretion.

**B. The Trial Court Properly Denied Issuing a Self- Defense Instruction**

Because the Defendant did not present self-defense evidence he was not entitled to a self-defense instruction. The trial record is clear that the Defendant did not testify in his own defense, and nobody testified, or could testify as to what the Defendant's state of mind was when he attacked the victim. The Defendant never explained why he beat the victim about the face with his elbows for several minutes, breaking the victim's eye socket and nose.

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*).

Appellate Counsel's briefing mentions a number of cases involving involuntary intoxication defenses, transferred intent theory, and a case discussing the State's burden to disprove self-defense once an instruction is issued. [*Appellate Br. 18 – 20*]. Those cases are only tangentially

related to the issue of whether a self-defense instruction should be issued. However, the case cited by the defense of State v. Thysell is instructive. *Appellate Br. at 20.*

In Thysell, this Court essentially held that a self-defense instruction could be issued under a scenario where evidence of self-defense was introduced through the State's witness. In Thysell, although the defendant did not personally testify during the course of the trial, her testimony was admitted through the State's witness, the investigating officer. The investigating officer had interviewed the Defendant and recorded her account of the event. State v. Thysell, 194 Wn. App. 422, 424, 374 P.3d 1214, 1215 (2016). This investigating officer recounted to the jury the Defendant's full explanation of the event. This included the Defendant's account of how the fight was initiated, her reason for grabbing or striking the victim (that she did so immediately after the victim pushed her, and she grabbed the victim so that she (the Defendant) would avoid falling down stairs). The Defendant explained that she then hit the victim in response to the victim continuing to bite her hands and arms. The Defendant then stated that she called the police. Apart from the Defendant's explanation, the the investigation showed that the Defendant's wounds were greater than those of the victim's. *Id at 427.*

The instant case is dramatically different from that in *Thysell*. When the Defendant 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).

In the Defendant Tullar’s case, there was admittedly conflicting testimony as to how this incident started. Two individuals stated the Defendant challenged the victim to a fight and the victim was the first individual who struck the other. Those two individuals said that the Defendant then slipped out of a headlock. This account contrasted dramatically with the victim’s reporting of the event.

*Even if* there were conflicting stories on how the assault began, there was no explanation of why the Defendant elbowed the victim for a matter of minutes, to the point where the victim’s face was disfigured and he was blinded from the resulting trauma. The pattern jury instructions for self-defense, (and the associated definition of “necessary”) require that the defense present evidence of why he took certain actions:

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.

**C. The Defendant Received Effective Assistance of Counsel.**

The defense argues on appeal that trial counsel was ineffective because of a failure to consistently argue, and obtain a self-defense jury

instruction. The Defense further argues on appeal that trial counsel's arguments to the jury surrounding arguments of "mutual combat" had no value, and that the result of the trial would have been different but for these trial tactics.

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993).

When this reviewing Court considers the pleadings, motions in limine, and testimony from the defense witnesses, it is apparent the defense pursued a deliberate strategy. The strategy was to essentially reap the benefits of a self-defense argument without the risk of the Defendant being subjected to cross examination. The defense was well aware that if the Defendant was to testify, the State would seek to admit the Defendant's extensive history of crimes of dishonesty. If the Defendant was to testify that the victim was the first aggressor or that the Defendant used only necessary force, then the State would seek to admit the Defendant's extensive assaultive history, which included a recent jail assault. This was made clear to the defense at the omnibus hearing and

again during motion's in limine. [*Appendix B: State's Omnibus Application*, CP 11; and *State's Motions in Limine*, CP 32]

While shielding the Defendant from the obvious risks of cross examination, the defense attempted to extract harmful character evidence regarding the victim, such as the victim's assaultive history. See *Appendix A: Defense Omnibus*, CP 12; and CP 33; *Defendant's Motions in Limine*. The Defense argued specifically in limine for the introduction of the victim's prior felony convictions, reputation for violence, and specific instances of assaultive history for the purpose of showing that the victim was the 'first aggressor.' [CP 33 at 2]

The defense *did* inform the Court that self-defense was possibly going to be used. The Defense attempted to do this through the testimony of others, going so far as to have Ryan Cate transported from prison to Okanogan County for trial. [CP 14 and CP 16]. The defense persistently argued to include evidence consistent with self-defense, and in fact ultimately argued to include a self-defense instruction at the conclusion of trial. Appellate Counsel now argues that the lower court erred by not issuing the requested self-defense instruction, but then simultaneously argues that counsel was inadequate for not presenting a self-defense case.

This reviewing Court evaluates the reasonableness of counsel's performance from counsel's perspective at the time of the alleged error

and in light of all the circumstances. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004).

Here trial counsel faced a difficult array of known facts and circumstances. The victim had obviously been seriously injured within a section of the Okanogan County jail with few suspects besides the Defendant. The Defendant never cooperated with the investigation, except to say that no fight occurred, even though injuries on his elbows were consistent with the victim's account. There were no other identifiable witnesses besides the victim. The witnesses for the defense appeared under suspicious circumstances only after the Defendant acquired the investigative report and approached them in custody a month after the event. The Defendant had a documented history of assaulting individuals, including an individual in the jail one year prior. The Defendant also had significant theft-related history, and this would tend to discredit any anticipated testimony. Under the circumstances, trial counsel devoted considerable effort to present a self-defense case, without subjecting his client to devastating cross-examination. Ultimately the admitted evidence was insufficient to merit a self-defense instruction. However, this was despite persistent, clever, and ongoing efforts by competent counsel. There is no basis to find that trial counsel's performance fell short of objective standards.

**CONCLUSION**

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

Dated this 18<sup>th</sup> day of October, 2018

Respectfully Submitted:



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Leif Drangholt, WSBA #46771  
Deputy Prosecuting Attorney  
Okanogan County, Washington

# **Appendix A:**

## **Defendant's Omnibus Application**

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Okanogan County Clerk

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SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,  
Plaintiff  
  
vs.  
  
BRANDON THOMAS TULLAR,  
Defendant.

SUPERIOR COURT NO. 18-1-00010-4  
DEFENDANT'S OMNIBUS APPLICATION  
AND ORDER

COMES NOW the defendant and makes the applications or motions checked off below:

	Granted	Denied	Reserved		
				1	To dismiss for failure of the information to state an offense.
				2	To make more definite and certain by providing a Bill of Particulars.
				3	To sever defendant's case and for separate trial.
				4	To sever counts and for a separate trial.
				5	To join offenses.
				6	For change of venue.
				7	For a continuance.
x	x			8	For discovery of all oral, written or recorded statements made by defendant and all witnesses to investigating officers or to third parties and in the possession or control of the plaintiff.
x	x			9	For the discovery of the names and addresses of all plaintiff's witnesses.

1	x	x			10	To inspect all physical or documentary evidence in plaintiff's possession relating to this case.
2	x			x	11	To suppress physical evidence in plaintiff's possession because of (a) illegal search, (b) illegal arrest, and for return of the same.
3	x			x	12	For a confession hearing under CrR 3.5 if the State intends to use at trial any statements made by Defendant.
4	x			x	13	To suppress evidence of the identification of the defendant.
5	x			x	14	To take the deposition of witnesses.
6	x	x			15	To secure the appearance of witnesses at trial or hearing.
7	x	x			16	To inquire into the conditions of pretrial release.
8	x			x	17	For appointment of expert or for services other than counsel.
9					<b>TO REQUIRE THE PROSECUTION TO:</b>	
10	x	x			18	State (a) if there was an informer involved, (b) whether s/he will be called as a witness at the trial, (c) to state the name and address of the informer or claim the privilege, (d) to provide the defense with copies of any written agreements or contracts related to the informer's services to law enforcement in writing.
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14	x	x			19	Disclose all evidence within plaintiff's knowledge or in plaintiff's possession favorable to the defendant or which tends to negate defendant's guilt.
15						
16	x	x			20	Provide any record of prior arrests or convictions of the defendant known to or under control of the prosecuting attorney or sheriff's office.
17						
18	x	x			21	Disclose whether it will rely on prior acts or convictions of a similar nature for proof of knowledge or intent.
19						
20	x	x			22	Advise whether any expert witness will be called, and if so, supply (a) the name of the witness, qualifications and subject matter of testimony, and (b) report.
21						
22	x	x			23	Produce and have in attendance at trial all expert witnesses.
23	x	x			24	Supply any reports or tests of physical or mental examinations in the control of the prosecution.
24						

1	x	x			25	Supply any reports of scientific tests, experiments or comparisons and other reports to experts in the control of the prosecution, pertaining to this case.
2						
3						
4	x	x			26	Permit inspection and copying of any books, papers, documents, photographs or tangible objects which the prosecution (a) obtained from or belonging to the defendant, or (b) which will be used at the hearing or trial.
5						
6	x	x			27	Supply any information known concerning a prior conviction of persons whom the prosecution intends to call as witnesses at the hearing or trial.
7						
8	x	x			28	Inform the defendant of any information he has indicating entrapment of the defendant.
9	x			x	29	Hold a line-up.
10	x			x	30	Allow the defendant to pose for a photograph in the jail.
11	x	x			31	Permit the defendant to compel examinations, tests or comparisons of evidence in the prosecutor's control by experts of the defendant's selection.
12						
13	x	x			32	Indicate any electronic surveillance including but not limited to wiretapping of the defendant's premises or conversations to which the defendant was a party and any record thereof.
14						
15	x	x			33	Disclose all statements of co-defendants and to indicate whether or not all or portions thereof are intended to be offered for any purpose.
16						
17	x	x			34	Disclose all searches and seizures.
18	x	x			35	Disclose the relationship, if any, of the state's witnesses to the prosecuting authority.
19	x	x			36	Supply as soon as practical all additional discoverable information which subsequently comes into the hands or control of the prosecution.
20						
21	x	x			37	Make reasonable efforts to cause such discoverable material or information within the knowledge, possession or control of others to be made available to the defendant.
22						
23						
24						
25						

1 COMES NOW the defendant and further makes the following applications, motions and  
2 presentations and Responds to this Court's Pre Trial Compliance Order as follows:

3 ( x ) 38. The following defenses may be raised:

4 • GENERAL DENIAL;

5 SELF-DEFENSE;

6 MUTUAL COMBAT;

*State would ask for  
more specific notice of  
defense*

7 ( ) 39. Defendant claims incompetency, diminished capacity, or insanity, and ( ) is  
8 ( ) is not willing to submit to an examination by an expert selected by Plaintiff.

9 ( ) 40. Defendant will not stipulate to admissibility of any prior convictions.

10 ( x ) 41. Defendant will not stipulate to a continuous chain of custody of physical evidence  
11 from seizure to trial.

12 ( x ) 42. Defendant will not stipulate to testimony concerning any controlled substance  
13 identification.

14 ( x ) 43. Defendant reserves the right to interview ALL State's witnesses.

15 ( x ) 44. Defendant may call as witnesses: reserved pending complete discovery.

16 ( x ) 45. Defendant reserves the right to call State's witnesses identified by the State as if  
17 they were his/her own witnesses.

18 ( x ) 46. The following exhibits may be offered at trial by the defendant:  
19 reserved pending complete discovery.

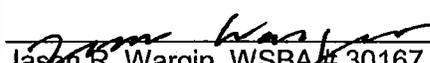
20 ( x ) 47. The results of the following scientific tests, experiments or comparisons may be  
21 offered by the defendant: reserved pending complete discovery.

22 ( x ) 48. Other: Defendant demands the right to be tried in civilian clothing and remain  
23 unshackled while in the presence of the jury.

24 ( ) 49. Other: Defendant requests Plaintiff to make a pre-trial settlement offer.  
25

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DATED this 29<sup>th</sup> day of January, 2018.

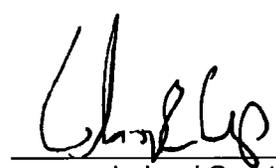
  
\_\_\_\_\_  
Jason R. Wargin, WSBA # 30167  
Attorney for Defendant

Copy received and approved for entry:

  
\_\_\_\_\_  
Leif Drangsholt, WSBA # 46771  
Deputy Prosecuting Attorney

**IT IS SO ORDERED.**

DATED this 29 day of Jan., 2018.

  
\_\_\_\_\_  
Judge / Court Commissioner

## **Appendix B:**

# **State's Omnibus Application**

19 (5)

FILED

JAN 29 2018

Okanogan County Clerk

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF OKANOGAN

STATE OF WASHINGTON,

Plaintiff,

vs.

Brandon Thomas Tullar,

Defendant

NO. 18-1-00010-4

OMNIBUS APPLICATION BY  
PLAINTIFF & COMPLIANCE  
STATEMENT

COMES NOW, the Plaintiff, by and through Criminal Deputy Prosecutor, Leif Drangsholt, and makes the Application or Motion checked off below:

- (X) 1. Defendant to state the general nature of his/her defense.
- (X) 2. Defendant to state whether or not he will rely on an alibi and, if so, to furnish a list of his/her alibi witnesses and their address.
- (X) 3. Defendant to state whether or not he/she will rely on a defense or insanity at the time of the offense.
  - (a) If so, Defendant to supply the name(s) of his witness(es) on the issue, both lay and professional.
  - (b) If so, Defendant to permit the prosecution to inspect and copy all medical reports under his control or the control of his attorney.
  - (c) Defendant will also state whether or not he will submit to a psychiatric examination by a doctor selected by the prosecution.

- 1 (X) 4. Defendant to furnish results of any scientific tests, experiment, or comparisons  
2 and the names of persons who conducted the tests.
- 3 ( ) 5. Defendant to appear in a lineup.
- 4 ( ) 6. Defendant to speak for voice identification by witnesses.
- 5 ( ) 7. Defendant to be finger printed.
- 6 ( ) 8. Defendant to pose for photographs (not involving a re-enactment of the crime).
- 7 ( ) 9. Defendant to try on articles of clothing.
- 8 ( ) 10. Defendant to permit taking of specimens of material under fingernails.
- 9 ( ) 11. Defendant to permit taking of samples of blood, hair and other material of his  
10 body which involve no unreasonable intrusion thereof.
- 11 ( ) 12. Defendant to provide samples of his handwriting.
- 12 ( ) 13. Defendant to submit to a physical external inspection of his body.
- 13 (X) 14. Defendant to state whether there is any claim of incompetency to stand trial.
- 14 (X) 15. For discovery of the names, phone numbers and addresses of Defendant's  
15 witnesses and their statements, reports, or the substance of their testimony for trial  
16 and hearings, including expert witnesses (and their qualifications) and defense  
investigator notes/reports.
- 17 (X) 16. To inspect any physical or documentary evidence in Defendant's possession.
- 18 ( ) 17. To take the deposition(s) of witness(es).
- 19 ( ) 18. To secure the appearance of witness(es) at trial or hearing.
- 20 ( ) 18. To secure the appearance of witness(es) at trial or hearing.
- 21 ( ) 19. Defendant to state whether his prior convictions will be stipulated to or need be  
22 proved.
- 23 (X) 20. State reserves the right to answer any motions reserved by the Defendant in  
24 writing.
- 25 (X) 21. **Defendant to state if he or she will stipulate to the admissibility of his  
26 or her statements into evidence at trial and waive a 3.5 hearing. If  
defendant does not stipulate, State requests a 3.5 hearing prior to trial.**
- 27 (X) 21. **Other: If defense seeks an interview with informant or any State's  
28 witnesses that requires the State's involvement; that any request be made at the**

1 time of omnibus, or in writing at least three weeks prior to trial, to allow the State  
2 time to schedule interview before trial.

3 PLAINTIFF'S COMPLIANCE STATEMENT  
4

5 1. A confidential informant ( ) was (X) was not involved.  
6

7 ( ) The State claims privilege as to the identity of the informant.  
8

9 2. Evidence in the State's possession favorable to the Defendant on the issue of guilt:  
10 None that has not also been made available to the defense.

11 *DEFENSE COUNSEL IS WELCOMED AND ENCOURAGED TO MAKE AN*  
12 *APPOINTMENT TO REVIEW THE STATE'S FILES TO ENSURE THAT*  
13 *ALL DISCOVERY HAS BEEN PROVIDED TO THE DEFENSE.*  
14

15 3. Reports of tests, physical or mental examinations, experiments or comparisons:  
16

17 4. Information concerning criminal convictions of any of Plaintiff's lay witnesses:  
18 TO BE PROVIDED NOT LATER THAN STATUS CONFERENCE.  
19

20 5. The State has in its possession the following evidence indicating entrapment of the  
21 Defendant: NONE  
22

23 6. If the Defendant testifies at trial the State may offer evidence of the following prior  
24 convictions:  
25

26  
27 Crimes of Dishonesty:

28 -Take Motor Vehicle w/o Permission 2<sup>nd</sup> 9/25/17

1 -Theft 3<sup>rd</sup> 12/29/15

2 -Residential Burglary/Theft 2<sup>nd</sup> 4/18/12

3 -Burglary 2<sup>nd</sup> 10/26/2011

4 -Theft 3, 3/21/10

5

6 \*Note if self-defense is raised, Defendant's assaultive criminal history is admissible,  
7 particularly assault 4<sup>th</sup> (assault on inmate)7Z0037547

8 -Asslt 4 3/21/11

9 -Asslt 2 12/11/10

10 -Asslt 4 8/20/08

11

12 \*note: reference to Defendant's DOSA status is relevant given his statement against  
13 interest. This is POCS conviction in 17-1-0055903 Chelan County Possession case.

14

15 ( ) No admissible convictions known at this time.

16

17 7. The State ( ) does (X) does not intend to introduce evidence of prior bad acts  
18 pursuant to ER 404. That evidence consists of the following:

19

20

21 8. (X) State reserves the right to introduce any additional 404 evidence at trial.

22

23 9. Other:

24

25 DATED this 3rd day of January, 2018

26

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BRANDEN E. PLATTER  
Prosecuting Attorney  
Okanogan County, Washington

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By: [Signature]  
Leif Drangsholt WSBA# 46771  
Criminal Deputy Prosecutor

IT IS SO ORDERED this 29 day of Jan., 2018

[Signature]  
JUDGE

Copy Received  
this 29<sup>th</sup> day of Jan., 2018

[Signature]  
Jason Wargin, WSBA # 30167  
Attorney

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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

I, Shauna Field, do hereby certify under penalty of perjury that on the 18th day of October, 2018, I caused the original 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 18th day of October, 2018.



Shauna Field, Office Administrator

**BRANDEN E. PLATTER**  
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**

**October 18, 2018 - 2:05 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 35956-5  
**Appellate Court Case Title:** State of Washington v. Brandon Thomas Tullar  
**Superior Court Case Number:** 18-1-00010-4

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- Andrea@2arrows.net
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---

Sender Name: Shauna Field - Email: sfield@co.okanogan.wa.us

**Filing on Behalf of:** Leif Timm Drangsholt - Email: ldrangsholt@co.okanogan.wa.us (Alternate Email: sfield@co.okanogan.wa.us)

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PO Box 1130  
Okanogan, WA, 98840  
Phone: (509) 422-7288

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