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Court of Appeals
Division III
State of Washington
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No. 37019-4-III

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

STATE OF WASHINGTON, Respondent

v.

JOSEPH ZAMORA, Appellant

APPEAL FROM THE SUPERIOR COURT
OF GRANT COUNTY
THE HONORABLE JUDGE ANTOSZ

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

- A. Mr. Zamora received ineffective assistance of counsel where counsel failed to challenge the violation of Mr. Zamora's constitutional rights guaranteed by the Fourth Amendment and art. I, § 7 of the Washington State Constitution.

LEGAL ISSUE: Where trial counsel does not challenge the unlawful seizure, which created violence where none would have otherwise existed, has he rendered ineffective assistance of counsel?

- B. Mr. Zamora received ineffective assistance of counsel where counsel did not object to the State's motion in limine to preclude all evidence of prior violent confrontations in which the officers were involved.

LEGAL ISSUE: Where trial counsel does not object to excluding relevant evidence crucial to the accused's defense, has he rendered ineffective assistance of counsel?

- C. Mr. Zamora's right to present a full and complete defense, guaranteed under the Sixth Amendment and art. I, § 22 of the Washington Constitution, were violated.

LEGAL ISSUE: Was Mr. Zamora's right to present a full and complete defense violated where the trial court denied him a meaningful opportunity to confront a witness to show bias and question credibility with relevant evidence?

LEGAL ISSUE: Did the trial court abuse its discretion when it excluded evidence of the *Garrity* statements?

- D. Mr. Zamora received ineffective assistance of counsel where counsel did not request a jury instruction on the definition of excessive force.

LEGAL ISSUE: Where the question for the jury was whether Mr. Zamora lawfully used force against excessive force by police officers, was he denied effective assistance of counsel where defense counsel requested no instruction on a legal definition of excessive force?

- E. The evidence could not sustain a conviction for assault in the third degree because the State did not prove Mr. Zamora unlawfully defended himself against excessive force by the police.

LEGAL ISSUE: Was the evidence insufficient to sustain the convictions where the State did not prove Mr. Zamora acted unlawfully when he believed the brutality and aggressive behavior

of the officer would cause him either his life or serious physical injury?

- F. The prosecutor committed misconduct in voir dire when he introduced irrelevant and inflammatory issues of illegal immigration, and juror fear of undocumented immigrants committing crimes against American citizens.

LEGAL ISSUE: A prosecutor violates a defendant's constitutional right to an impartial jury when he resorts to appeals to racial stereotypes or racial bias to achieve convictions. Where the prosecutor begins voir dire asking about illegal immigration and criminality of undocumented immigrants, is the defendant's right to an impartial jury violated?

- G. The trial court erred when it calculated Mr. Zamora's offender score.

LEGAL ISSUE: Where the criminal history shows two juvenile convictions in 1997 and then no convictions until 2004, does the trial court err when it includes the washed-out juvenile convictions in the offender score?

II. STATEMENT OF FACTS

Grant County prosecutors charged Joseph Zamora with two counts of assault in the third degree. CP 1-2.

On Super Bowl Sunday, February 5, 2017, Joseph Zamora stayed at his brother's home. RP 737. He became bored and walked through a vacant lot toward his niece's home. RP 287, 736. He walked in 12 inches of snow, carrying his video game case and a cowboy boot. RP 325, 744.

At a nearby home, Brandi Moncada let her dog out. RP 286. The dog barked toward cars parked at the curb near the vacant lot. RP 287. There were no streetlights, but Ms. Moncada made out the shadow of someone carrying a bag or a briefcase, by the cars. RP 287-88, 296. She could not tell if the person was a man or a woman. RP 303. She never saw the individual look into, touch, or press up against any cars. RP 289-90, 308.

She shouted it [the vacant lot] was private property, and the person needed to leave, or she would call the police. RP 289-90. The individual stared at her, turned, and slowly shuffled down the street. RP 301-02, 309. She called 911 to report "a suspicious person in our neighborhood... possibly car prowling." RP 302.

1. Mr. Hake¹ is Dispatched to The Call

Kevin Hake responded to the call of "a suspicious person" about 9:30 pm. RP 313-14. Hake testified the call "talked about a person....looking through vehicles, carrying a suitcase." RP 314. He arrived within 30 seconds. RP 317. He did not have a body camera, and although his vehicle had a camera, he reported it did not work. RP 317.

Hake saw a man carrying a suitcase, about 20 feet into the yards. The snow on the ground was eight to 18 inches deep. RP 319. He parked and shined his flashlight toward Mr. Zamora, yelling, "Hey, need to talk to you, come on over." RP 320, 450.

Contrary to the report from Ms. Moncada, Hake testified Mr. Zamora was "moving quickly...it was ...a good pace," and the area was well lit. RP 320; 452. Hake said Mr. Zamora made no glances or motions indicating he would run away. RP 451. He walked toward Hake and stopped about six or seven feet away. RP 320. Mr. Zamora had his left hand in his pocket with his thumb hooked on the outside of it. RP 455.

Within the first 60 seconds of the encounter, Hake asked Mr. Zamora where he was going, where he had come from, and for his

¹ At the time of the incident, Officer Hake worked for the Moses Lake Police Department. He left the department four months later. At the time of trial, he no longer worked in law enforcement and was introduced as Mr. Hake rather than Officer Hake. RP 311-12.

identification. RP 454, 503. Mr. Zamora silently stood and stared at him.

RP 451. Hake then made a call out over his radio, saying, "I've got one resisting." RP 499, 503.

He testified:

I didn't know what was going to happen. Something was different. The hair on the back of my neck was standing up. I have never been in a situation where I felt – I felt you could feel something was going to happen, I didn't know what it was. I was scared.

RP 323-24.

When I say, 'I've got one resisting,' I am in fear. I don't know what's going to happen. I'm not even entirely sure what's going on. But I am scared for my life at this point...I was scared to death...Yes, he's being aggressive, he - I didn't know what was going to happen. Something was different. The hair on the back of my neck was standing up. I have never been in a situation where I felt – I felt you could feel something was going to happen I didn't know what it was. I was scared.

RP 323-24.

He's looking through me like I am not even there. He never tries to run. He never tries to escape. He tries to go through me. And that's the only way I want. Because he tried to go through me, and I can finesse an arm off. I never felt that way in my life.

RP 504-05.

He elaborated, saying:

...I've never been in a position like that, I was scared, I was in fear for my life. Little did I know it was going to be a fight to the death, but something - - he was being resistant. He was resisting. Yes, it was passive resistance to begin with, but I - - something wasn't right.

RP 548.

He defined "passive resistance" to mean:

they're not being physically noncompliant or aggressive, that they're not - - they're not following commands, they're not listening, they're just - - it's all verbal-nonverbal behavior. ***He wasn't doing anything physical to begin with. He was just present and non-cooperative, non-responsive.*** That was passive resistance.

RP 549.

During the minute encounter, Mr. Zamora leaned forward to read Hake's name tag. RP 452. He turned to walk away, and Hake "literally stuck my arm out, told him to stop, that he wasn't free to leave." Hake testified he knew Mr. Zamora did not have to answer his questions, was not legally required to have identification on him, and was not committing a crime by not answering his questions. RP 551.

Mr. Zamora stopped and turned toward him. RP 454. Hake said he had been called in "for looking in vehicles". RP 455. Hake reported Mr. Zamora turned away from him, the boot he was carrying fell to the ground, and he put his hand fully in his left pocket. RP 455.

2. Hake Escalates

Hake thought Mr. Zamora was "doing something" with his hand. RP 457. Hake said Mr. Zamora was not under arrest. RP 460. He testified, "At that point I grabbed him - - he was facing away from me...I hooked both of his arms...around his elbows and pulled him, his arms free of his coat into my person, and that's when the struggle started from that point on." RP 326.

Hake knew the pressure on Mr. Zamora's elbows would be painful. RP 460. According to Hake, to break free from the elbow hold, Mr. Zamora "pushed into me and then kind of bowed his shoulders to break my grip on his elbows." RP 458-59. Mr. Zamora tried to turn. Hake attempted a leg sweep to bring Mr. Zamora to the ground. RP 462.

When asked why he put his hands on Mr. Zamora instead of clearing back and going to his vehicle, Hake answered:

He's gone repeatedly toward his pocket, I believed at this point he had a weapon, he hadn't tried to run. I'm not going to get shot retreating to my car. I'm not - - I didn't have a duty to retreat. I wasn't trained to...I'm sure we did drill that may have had some of that (training in how to retreat while maintaining eye contact). I wasn't a SWAT person. So, I didn't do a lot of stuff like that. My training was if you could find cover, you can use cover. You have - - like I said, I had a choice to make, and that was the one I made. RP 465.

3. Hake Continues the Escalation of Physical Force

After the unsuccessful leg sweep, Hake reported he shoved Mr. Zamora in the center of his chest as hard as he could, using both hands. RP 464. Mr. Zamora flew back six to seven feet and hit his head on the metal bumper of a truck. RP 465, 467. Within "less than a second," Hake "jumped on top of him and grabbed him by the left wrist with both hands." RP 344-45. They both slid under the truck. RP 344. Hake said he thought Mr. Zamora had a gun, and his choice was to either grab him by the wrist or pull his weapon. RP 344.

Hake wanted Mr. Zamora's hand out of his left jacket pocket. RP 468. He initially testified Mr. Zamora tried to strangle him with his lapel mike cord, and within two seconds, he punched Mr. Zamora twice in the face. RP 469, 472. He later admitted he felt no constriction, the loop was never around his neck, and movement of the cord from the front of his lapel would cause the cord to just move on the back of his head. RP 472.

Mr. Zamora did not swing his fists or try to punch Hake. RP 472. Hake grabbed Mr. Zamora by his coat, pulled him from under the truck, and wrestled his way on top of him. RP 472-73. He put Mr. Zamora in a chokehold, heard him gasp, and then no sound. He believed deadly force was authorized. RP 548.

Hake felt Mr. Zamora grab his utility belt and his holstered gun several times. RP 474. His gun had a three-point retention system meaning it took three separate and distinct maneuvers to remove the weapon. RP 483-84.

Hake admitted that were Mr. Zamora trying to get out from underneath him, he would have used the utility belt items as leverage to pull himself up; and it was possible someone would grab the holster without intending to remove the gun. RP 479-80. The firearm never left the holster. RP 485.

Hake shot pepper spray into Mr. Zamora's mouth and face. RP 492. Mr. Zamora bucked, turned over, crawled away, and tried to use snow to clean off his face with his right hand. RP 492-93. Hake unsuccessfully tried to chop Mr. Zamora's left arm so he would fall flat in the snow. RP 493. Hake punched Mr. Zamora in the face between three and six times. RP 493.

Mr. Zamora continued to buck to get Hake off of him. He reportedly hit Hake dozens of times on his shoulder and torso area and hit him with the lapel mike. RP 506. Hake testified he punched Mr. Zamora between 75 and 120 times. RP 506. The punches hit Mr. Zamora in the eyes, ear, nose, and rib cage. RP 507. He hit Mr. Zamora between the eyes with his ammunition magazine. RP 368, 515.

Hake took his gun out and stuck it in Mr. Zamora's ear and then his eye. RP 369. Mr. Zamora moved his head and bit down on the barrel of the gun. RP 370. Hake heard Mr. Zamora growl, so Hake shoved the gun as far down Mr. Zamora's throat as he could. RP 370. He kept the gun on Mr. Zamora until another officer arrived. RP 514. He then punched Mr. Zamora as hard as he could another 12 to 20 times. RP 375.

4. Officer Welsh Arrives

Officer Welsh responded to Hake's call, "I've got one resisting." RP 625. Although Hake testified he used a very calm voice, Welsh said

the tone was "frantic." RP 323, 625. Over the mike, he heard Hake say, "Put your hands behind your back, I'll fucking kill you, put your hands behind your back." RP 644.

When Welsh arrived, he saw Hake straddling atop Mr. Zamora. RP 627. Mr. Zamora was face down, kicking, and squirming. RP 628. (Pl. Exh. 6 at 4:47). Contrary to Hake's testimony, Welsh reported that Mr. Zamora was not on all fours, and he was not facing Hake. RP 642.

Welsh tried to get Mr. Zamora's arms out to apply handcuffs. RP 629. He hit Mr. Zamora in the back of the head at least a dozen times with a "hammer fist." RP 526, 630. He got both of Mr. Zamora's arms and pepper-sprayed him for approximately five seconds. RP 529, 631, 653. He could not handcuff him and went back to punching him with hammer fists. RP 631.

Six other officers arrived within minutes: Welsh and the other officers held Mr. Zamora down, hit him, used knee strikes, and kicked him. RP 532, 828. They deployed tasers, with more than one officer using a taser simultaneously. RP 377, 633, 692-93. The officers testified they used the tasers in "drive stun." RP 377, 632, 697. Drive stun is the use of a taser without the probes. The taser emits an arc that causes more pain to enhance pain compliance. RP 691-92.

It took the officers between three and four minutes to handcuff Mr. Zamora. RP 376. Officer Welsh retrieved a rope, made a lasso, and put it through the handcuffs and tied Mr. Zamora's feet. RP 637. While he tied him, Mr. Zamora landed one kick in the center of Welsh's chest. RP 638. Welsh said it did not hurt, and he was not injured. RP 650.

Officer Dodson testified he got Mr. Zamora's jacket off of him before hog-tying him and found a knife in one pocket. RP 711.

By the time Officer Ball arrived, Mr. Zamora was handcuffed and face down in the snow. He did not activate his body cam until after Mr. Zamora had been cuffed and hog-tied. RP 676. No one checked if Mr. Zamora was breathing or had a pulse, and no one put him on his side, so his face was not in the snow. RP 680-81. Officers called Mr. Zamora a "turd." RP 680. Officer Ramirez called an ambulance. RP 696.

5. An Eyewitness Describes the Encounter

The incident occurred in the front yard of Javier Torres. RP 822. Mr. Zamora's niece lived in the Torres home. RP 824. Torres saw the police car. RP 822. He said there was no fighting at the beginning of the encounter. RP 826. Although Mr. Zamora did not fight or resist, Torres saw Hake put his hands on Mr. Zamora and throw him to the ground. RP 826. He watched other officers kick, punch, and elbow Mr. Zamora as he was face down in the snow. RP 826. He heard Mr. Zamora say he could

not breathe. RP 839. He also reported he saw an officer using a chokehold on Mr. Zamora while he was hog-tied. RP 839.

6. The Paramedics Arrive

Firefighter Paramedic Garrett Fletcher responded to the call for an evaluation secondary to an assault. RP 840. Officers told him that Mr. Zamora “appeared to have been on a substance.” RP 847. Fletcher saw Mr. Zamora, hog-tied, lying flat on his stomach, with officers holding him down. RP 843-44.

At Fletcher's direction, officers moved Mr. Zamora into a seated position. RP 845. Mr. Zamora was not breathing and did not have a heartbeat. RP 844. Fletcher began CPR, bag-mask ventilation, and administered two defibrillations. RP 847. EMTs transported Mr. Zamora to the hospital, and a Life Flight crew later moved him to a Spokane hospital. RP 849-50.

7. Physician Testimony

Dr. Frank treated Mr. Zamora when he arrived at Moses Lake Hospital. RP 575. Mr. Zamora was unconscious, pale, cold, and intubated upon arrival. RP 576-77. He remained comatose the entire time he was in Dr. Frank's care. RP 585, 607. Dr. Frank used a defibrillator to shock his heart into a normal rhythm. RP 593. He also used medication to make Mr. Zamora's heart pump harder. RP 594.

Mr. Zamora's urine drug test was positive for methamphetamine, and amphetamine², and THC. RP 585, 598. He testified the half-life for methamphetamine is 12 hours. RP 574. This meant methamphetamine ingested within three days would qualitatively show positive. RP 612-14.

He diagnosed Mr. Zamora with a “V-fib cardiopulmonary arrest...severe hyperkalemia, severe acidosis.” RP 599. He testified it was more likely that something made his heart not work correctly, caused by multiple factors, including significant physical exertion while under the influence of methamphetamine. RP 601.

8. The Hospital Photos of Mr. Zamora

Mr. Zamora’s sister took pictures of Mr. Zamora when he was in the Sacred Heart Intensive Care Unit. RP 783-84. (Def. Exhibit 14, 15). The first photo, taken a day or two after he arrived in ICU, showed Mr. Zamora with facial bruising, a feeding tube, and an intubated orally ventilator. Exh. 14; RP 782, 784. The second photo, taken a month later, showed Mr. Zamora in his hospital bed with bruising on his body and a trach. Exh. 15.

² Amphetamine can be a result of the breakdown of methamphetamine, or as a result of ingesting Ritalin or Adderal. RP 586.

9. State Patrol Officer Engaged to Conduct Officer Involved Incident Investigation

Moses Lake Police Department call in Sergeant Anderson of the Washington State Patrol to investigate the alleged crime. RP 734-42. He did not speak with the 9-1-1- caller, nor did he speak with the individual in whose yard the altercation happened. RP 743-44. There were no reports of missing items from cars. RP 744. Anderson did not interview any of the police officers involved in the incident. RP 681. No officer filed a police report about the incident; Anderson's report of the incident was limited to a summary of the *Garrity* statements officers had to make. RP 232.

Mr. Zamora's brother told him that Mr. Zamora had been at his home earlier that day. RP 736. Mr. Zamora admitted that he had smoked methamphetamine two to three days earlier but could not recall if he had smoked any that day. RP 738. Mr. Zamora also acknowledged the knife taken from his pocket belonged to him. RP 741.

RULINGS AND CONCESSIONS

10. Hake Evidence

Former Officer Hake was in a period "stipulated order of continuance for dismissal," for assault fourth degree and disorderly conduct. RP 12. Defense counsel said he did not believe he could use the impeachment evidence because unless Mr. Zamora knew about the assault

charge, it was not relevant to his claim of self-defense. RP 12. The State moved to exclude evidence of prior violent confrontations in which the officers were involved. CP 90. Defense counsel did not object. The State understood Hake resigned from the police department but wanted an agreement that no evidence of what led to the resignation would be allowed. RP 30. Defense counsel did not object. RP 12.

VOIR DIRE

The prosecutor began voir dire:

...let's just take a general topic that seems to be in the media every day, and I'll ask you a general question, and that is some people say today in our society we have - - we don't have enough border security. Some people say we have too much or we don't need that. So, the question is which one do you feel like you're closer to?

RP 71-72.

When a juror stated he believed immigration was an "opportunity for a lot of great people to come to our country," a large physical wall was ridiculous, and native-born Americans also commit crimes, the prosecutor answered:

Sorry for this, and I don't mean to get off on a jag, could you make room for the possibility that someone who – a loved one or family member of somebody who was either killed or had problems with somebody that's been previously deported or criminally is wrong in the country, that that happens to them, and that they feel like we need more border security, can you make room for that?

RP 75.

At another point, he said:

Can you make room for the idea that when they hear that 100,000 people come across illegally a month, and of those we've got people from countries that - - countries on our list that aren't even allowed in the country are part of that group?

RP 77.

Other discussion followed about whether people locked their doors to keep unwanted people from coming to their home to do them harm. RP 78-84.

The following day the court asked defense counsel why he had not objected to the State's questions about "crimes being committed by what was described as illegal immigrants passing through the United States/Mexico border." RP 221. The court raised evidence rule 413 and cited numerous cases, concerned a jury would:

...think that with a Latino last name that he's here illegally? Why else would the questions be asked? Why else would there be reference to drug busts in Nogales, a number of illegal immigrants crossing over the border, 100,000 a month, unless he was, why else would the questions be relevant? That's what the jury might think.

RP 223.

Defense counsel said he had considered objecting but thought it might have been to the State's detriment to ask the questions, and he would address it in closing argument. RP 224. The prosecutor offered that he asked the questions because border security was a hot topic, and he was curious about it. RP 225. He was troubled by "this overarching complete political correctness about what people have to say and concerns, and I understand that. But it is a major concern that's imposed on Grant county,

as well. It's a significant problem. I'll be careful about any of that." RP 226. During opening statements, defense counsel said Mr. Zamora was a U.S. citizen, and this was not an immigration issue. RP 265.

GARRITY STATEMENTS AND RULING

11. State's Supplemental Motion in Limine

None of the officers involved in the incident filed a police report. RP 416. The officers did not participate in any interviews about their role in the seizure of Mr. Zamora. RP 233. The State sought to bar either party from referencing the internal affairs investigation into officers' conduct. CP 164; RP 330. It wanted statements the officers made to internal investigations to be called "statements recorded about the incident." CP 164.

Defense counsel objected. The only percipient witness information about the incident was found in the "*Garrity*³ statements." RP 233. The *Garrity* statements, given to Captain Williams, were used for the prosecution of Mr. Zamora. RP 235. Captain Williams appears to have conducted the internal investigation into the officer use of force. RP 330.

³ A *Garrity* statement is a statement made by a public employee during an internal investigation. The Fifth Amendment prohibits the government from using self-incriminating statements made by a public employee under threat of termination in a subsequent criminal prosecution. *Garrity v. New Jersey*, 385 U.S. 493, 499-500, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). The officer's statements were "compelled" and thus inadmissible against them because officers would have been terminated had they remained silent. *Id.* at 497-98.

Defense counsel argued they were relevant because it went to witness bias and credibility. RP 341, 407, 411, 420.

To present a complete defense, counsel wanted to ask the officers if (1) if they made a *Garrity* statement as part of the investigation (2) whether they knew what a *Garrity* statement was (3) if they knew the purpose of making a *Garrity* statement (4) who told them to make a *Garrity* statement, and (5) if the officers made themselves available for interview by Sergeant Anderson investigating the case against Mr. Zamora. RP 332-33, 338, 414-15, 419. Defense counsel did not intend to admit the *Garrity* statements themselves as evidence. RP 338.

The court held the *Garrity* statements themselves were inadmissible. RP 340. It further ruled that asking the officers if they knew what a *Garrity* statement was called for a legal opinion and speculation. RP 340, 433. The court determined that the officers were given a *Garrity* warning was not relevant and called for jury speculation. RP 433. Finally, the court held the investigation by internal affairs was a collateral issue⁴. RP 434. The court granted the State's motion in limine. RP 434.

JURY INSTRUCTION

The court gave jury instruction number 11:

⁴ It was not stated, but reasonably inferable the internal investigation was for the use of excessive force.

It is a defense to a charge of assault in the third degree that force used was lawful as defined in this instruction.

A person may use force to resist an arrest or detention only if the person being arrested or detained is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would under the same or similar circumstances.

The State has the burden of proving beyond a reasonable doubt that the force 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 guilty as to count one, count two, or both.

CP 237.

No party asked, and the court did not provide a jury instruction with a definition of "excessive force." During deliberations, the jury asked: "The jury would like to know if you can give us the State of Washington definition on excessive force and necessary force." By agreement, the court answered that it could not further respond to its request. CP 243; RP 974. The jury found Mr. Zamora guilty on both charges of assault in the third degree. CP 247-48.

CLOSING ARGUMENT

During closing argument, the State's counsel stated:

There was a witness that came in for defense, Javier Torres, that said that officers were kicking at him, that the defendant was just on the ground, that he'd think he said his hands were behind his back, just being very compliant, that officers were just, you know, they're all just kicking at him. That's not what the evidence supports.

And if you think about -- if you remember what Javier Torres said, the exact quote, when talking about police, Javier stated, "If it's a cop, I don't have nothing to do and nothing to say." This is a guy

who doesn't like the police. He -- you know, when Officer Hake is out there struggling with the guy, he just stays inside, closes his door, doesn't offer any help. Then obviously, you know, for someone to come into court and say that on the stand, "I don't want nothing to do with police, I got nothing to say to them," he doesn't like law enforcement.

RP 902-03.

OFFENDER SCORE

The judgment and sentence showed the following criminal history:

2.2 Criminal History (RCW 9.94A.525):

	<i>Crime</i>	<i>Date of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>Date of Crime</i>	<i>Adult or Juv. (A / J)</i>	<i>Type Of Crime</i>	<i>DV* Y/N</i>
1	Controlled Subst Violation: Mfg/Del/Poss with Intent	12/02/97	Lincoln County, WA 97-8-00006-1	02/20/97	J	N	
2	Controlled Subst Violation: Mfg/Del/Poss with Intent	12/11/97	Grant County, WA 97-8-00587-4	02/20/97	J	N	
3	Controlled Subst Violation: No Prescription	01/23/04	Grant County, WA 03-1-01051-3	12/07/03	A	N	
4	Malicious Mischief 2	08/31/04	Benton County, WA 04-1-00792-9	07/08/04	A	N	

6	Controlled Subst Violation: Mfg/Del/Poss with Intent	10/18/07	Thurston County, WA 07-1-01315-0	07/16/07	A	N	
7	Controlled Subst Violation: No Prescription	01/29/13	Lincoln County, WA 12-1-00029-5	02/23/12	A	N	
8	Attempt to Elude	08/05/14	Grant County, WA 14-1-00428-4	06/26/14	A	N	

CP 315-16. The two 1997 juvenile convictions were included in the offender score for a total of “7” points. CP 316. The court did not consider whether the two 1994 juvenile convictions should have “washed out.” Mr. Zamora makes this timely appeal. CP 333-35.

III. ARGUMENT

A. Mr. Zamora Received Ineffective Assistance of Counsel.

The Sixth Amendment to the United States Constitution and art. I, § 22 of the Washington Constitution guarantee the right to effective assistance of counsel. Ineffective assistance of counsel is a manifest error affecting a constitutional right and can be raised for the first time on appeal. RAP 2.5(a); *State v. Brown*, 159 Wn. App. 1, 17, 248 P.3d 518 (2010), *review denied*, 171 Wn.2d 1015 (2011).

A claim of ineffective assistance of counsel presents a mixed question of law and fact, which this Court reviews *de novo*. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Competency of counsel is determined based on a review of the entire record to decide whether the appellant received effective representation and a fair trial. *State v. Hicks*, 163 Wn.2d 477, 486, 181 P.3d 831 (2008).

Effective assistance of counsel requires an attorney to perform to the standards of the profession. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Where an attorney's conduct falls below a minimum objective standard of reasonable attorney conduct, and there is a probability that the outcome would be different, but for that conduct, a defendant has been denied his right to effective representation. *Strickland v. Washington*, 466 U.S. 668, 687-88, 80 L.Ed.2d 674, 104 S.Ct. 2052

(1984). Legitimate trial strategy or tactics cannot serve as the basis of ineffective assistance of counsel, but strategic decisions must be reasonable. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Where the record is adequate, an appellate Court is empowered to assure a constitutionally adequate trial by engaging in a review of manifest constitutional errors raised for the first time on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Here, the record is adequate to demonstrate there was no reasonable strategy or a legitimate tactic to explain counsel's failures (1) to challenge the increasingly intrusive seizure which resulted in a violent confrontation; (2) to object to excluding evidence of prior violent force incidents involving Hake and others; (3) to object in real-time to the prosecutor's invitation to bias and racism during voir dire and closing argument; and (4) to request a jury instruction definition of "excessive force" when that was the only defense for Mr. Zamora. *State v. Reichenbach*, 153 Wn.2d 126, 131, 101 P.3d 80 (2004); *McFarland*, 127 Wn.2d at 334-35.

1. Hake's Seizure of Mr. Zamora Was Unlawful

Mr. Zamora's attorney unreasonably failed to challenge the unlawful seizure. Individuals are protected from unwarranted searches and

seizures by the Fourth Amendment to the U.S. Constitution. Art. I, § 7 of the Washington Constitution provides greater protection to individuals than the Fourth Amendment guaranteeing that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

The law does not forbid officers from chatting with a citizen in a public place, asking for identification, asking where he is going, or even asking him to remove his hands from his pockets. *State v. Harrington*, 167 Wn.2d 656, 664-65, 222 P.3d 92 (2009); *State v. Guevara*, 172 Wn. App. 184, 288 P.3d 1167 (2012); *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). These social contacts do not implicate art. I, § 7 rights because they are consensual: a reasonable person under the circumstances would feel free to walk away. *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980).

Hake made a social contact for about 60 seconds, with no indication he was conducting a seizure. *See Guevara*, 172 Wn. App. 184⁵. *See Harrington*, 167 Wn.2d at 665⁶. Mr. Zamora complied with Hake's request to come toward him. As allowed, Hake asked where Mr. Zamora

⁵ A seizure occurred when the officer asked about illegal activity, attempted to control the defendant's actions, and the defendant would not have felt free to leave.

⁶ Officer contact was initially a social contact as the officer did not activate his police emergency lights or siren, and his patrol car was not in sight.

was going, where he had come from, and for his identification. Hake did not make a show of authority, or block Mr. Zamora's path, had not told him he was investigating a possible car prowling, nor had he told Mr. Zamora he was not free to leave.

Within that first minute, however, the first and most significant of several startling events occurred: Hake radioed to fellow officers, "I've got one resisting." This is astounding for several reasons. First, Mr. Zamora was not only not under arrest, but he had not even been constitutionally detained. Second, Mr. Zamora had done nothing aggressive. Yet, Hake reported he was terrified for his life.

In trying to explain his sense of peril, Hake said:

When I say, 'I've got one resisting,' I am in fear. I don't know what's going to happen. I'm not even entirely sure what's going on. **But I am scared for my life at this point...I was scared to death...Yes, he's being aggressive, he is looking through me, like I am not even there.** He never tries to run. He never tries to escape. He tries to go through me. And that's the only way I want. Because he tried to go through me, and I can finesse an arm off. I never felt that way in my life.

Although Hake said, "He tries to go through me," he clarified his frantic call for help was not because Mr. Zamora was physically noncompliant or aggressive, but because of Mr. Zamora's "passive resistance." In other words, Mr. Zamora felt free not to answer Hake's questions and simply walk away from the encounter. Hake's terror and

reaction is all the more astonishing because he had not told Mr. Zamora he was not free to leave.

After the first 60 seconds, Hake took his second startling action, which resulted in an unconstitutional seizure. A person is seized when through physical force or a show of authority, an individual's freedom of movement is restrained, and he does not believe he is free to leave or to decline a request due to an officer's use of force or display of authority. *State v. Stroud*, 30 Wn. App. 392, 394-95, 634 P.2d 316 (1981). This Court reviews de novo whether the facts show police conduct amounts to a seizure. *Harrington*, 167 Wn.2d at 662; *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996) (*overruled on other grounds by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)).

Here, there is no question the social contact escalated into a seizure implicating Mr. Zamora's art. I, § 7 constitutional rights. Hake said he "literally stuck my arm out, told him to stop, that he wasn't free to leave." This was the tipping point: Mr. Zamora was not free to leave. Hake attempted to control his movement and then asked about illegal activity. Mr. Zamora was seized. *Guevara*, 172 Wn. App. at 190; *State v. Johnson*, 8 Wn. App. 728, 738, 440 P.3d 1032 (2019).

2. Hake Did Not Have Reasonable Suspicion of Criminal Activity Grounded in Specific and Articulate Facts Justifying an Unwarranted Seizure

Because a warrantless seizure is presumed unreasonable, the State must show the officer had a reasonable suspicion the detained person was, or was about to be, involved in a crime. *State v. Acrey*, 148 Wn.2d 738, 746, 69 P.3d 594 (2003). That “reasonable suspicion” must be grounded in specific and articulable facts. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The facts go far beyond mere generalized suspicion or feeling that the person detained is "up to no good" or “doing something”; the facts must connect the particular person to the particular crime that the officer seeks to investigate. *State v. Bliss*, 153 Wn. App. 197, 204, 222 P.3d 107 (2009).

Where an informant's tip is the basis for suspicion, the State must show the tip has some indicia of reliability under a totality of the circumstances. *State v. Z.U.E.*, 183 Wn.2d 610, 620, 352 P.3d 796 (2015). The State must show some indicia of reliability, or there must be some corroborative observation. *Id.* The corroborative observation must be more than just “innocuous facts, such as an individual’s appearance or clothing.” *Id.* at 618.

Here, what began as a social contact resulted from an essentially anonymous 911 call that a “suspicious person” was possibly car prowling.

Her only “fact” was that someone she did not know was walking slowly, in the snow, by some parked cars. She provided no factual basis for her belief that anyone was car prowling. Also, she did not know if it was a man or woman, and could only say the person walking in the area carried a suitcase or a duffle bag.

The 911 caller’s assertion was insufficient to serve as a legal basis for the *Terry* stop. *See State v. Lesnick*, 84 Wn.2d 940, 944, 530 P.2d 243 (1975) (“While the police may have a duty to investigate tips which sound reasonable, absent circumstances suggesting the informant’s reliability, or some corroborative observation which suggests either the presence of criminal activity or that the informer’s information was obtained in a reliable fashion, *a forcible stop based solely upon such information is not permissible.*”). *See also, State v. Sieler*, 95 Wn.2d 43, 48, 621 P.2d 1272 (1980) (Reliability by itself does not justify an investigatory detention...[T]he State should not be allowed to detain and question an individual based on a reliable informant’s tip which is *merely a bare conclusion unsupported by a sufficient factual basis which is disclosed to the police prior to the detention.*).

All Hake knew was that a person in the area might be carrying a suitcase or duffle bag. Hake had no reasonable suspicion of criminal activity justifying a seizure based on the 911 call. And Hake had no

reasonable suspicion of illegal activity based on his corroborative observations. *Z.U.E.*, 183 Wn.2d at 623.

Hake's only "corroborative observation" was his hunch that "something was going to happen." RP 323-24. "An investigative detention cannot be predicated upon speculation or "mere hunches." *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010); *State v. Gatewood*, 163 Wn.2d 534, 542, 182 P.3d 426 (2008). The most Hake could articulate was that Mr. Zamora was "passively resisting" by not answering his questions. Hake testified he was "absolutely" allowed to use force in detaining someone "if they're being passively resistant." RP 549. This is constitutionally insufficient to justify a warrantless seizure.

In *State v. Richardson*, 64 Wn. App. 693, 825 P.2d 754 (1992), an officer patrolled in an area known for drug activity. He watched an individual who appeared to be a drug runner for hours. Eventually, the officer stopped him and another man asked to talk to them, had them empty their pockets, and searched them. *Id.* at 695. The Court found the men were seized. In analyzing the officer's suspicion, the Court noted the only things known to the officer at the time was that the men were in a high crime area and were in proximity to others independently suspected of criminal activity. The officer had not overheard any conversation or seen any suspicious activity taking place. The seizure was unlawful. *Id.* at

697. The facts here are incomparably less incriminating than the facts in *Richardson*. And the conclusion should be the same; the seizure was unlawful.

Based on nothing more than Hake's hunch that "something was not right," the third most startling event occurred when Hake grabbed Mr. Zamora by the elbows. He said he was concerned because Mr. Zamora's hand went into his pocket. The Court analyzed the same issue in *Harrington*.

There, the officer began a social contact and became "a little suspicious" when Harrington could not give the address of where he was going. The officer asked him to take his hands out of his pockets, but Harrington repeatedly put them back into the pockets. After requesting to search him for officer safety, the search yielded a meth pipe and a baggie. *Harrington*, 167 Wn.2d at 660-62.

The Court held the frisk was inconsistent with a social contact. Most essential and pertinent to this case, the Court reasoned, if the officer "felt jittery about the bulges in Harrington's pockets, he should have terminated the encounter...which [he] initiated- and walked back to the patrol car. Instead [the officer] requested a frisk." *Harrington*, 167 Wn.2d at 669. The lack of suspicion of crime or danger to the public or the police moved a social encounter to an unlawful seizure. *Id.*

Similarly, Hake had no specific and articulable facts to form a reasonable suspicion of criminal activity. For an investigatory stop to be reasonable and constitutionally permissible, upon less than probable cause, the stop is limited as to its length, movement of the detainee, and the investigative techniques employed. *State v. Bockman*, 37 Wn. App. 474, 480, 682 P.2d 925 (1984). Grabbing Mr. Zamora’s elbows from behind was far more intrusive than the officer in *Harrington* asking to search. Hake never testified he saw a bulge or some indication of a gun in Mr. Zamora's pocket.

Like the officer in *Harrington*, if Hake was worried about what was in Mr. Zamora’s pocket, he should have terminated the encounter and walked back to his patrol car. Instead, when Mr. Zamora broke free of his grasp, Hake shoved, tackled, beat, and pepper-sprayed him into submission.

By Hake’s own testimony, grabbing Mr. Zamora’s elbows because he feared for his life was objectively unreasonable. Hake was investigating a misdemeanor. He reported that Mr. Zamora had done nothing but stare at him, start to walk away, and put his hand in his pocket⁷. Hake escalated to a physical confrontation because Mr. Zamora was “being

⁷ Further, even if he suspected Mr. Zamora was under the influence of a drug, it is not illegal to walk down the street under the influence.

uncooperative” by not answering his questions. RP 502. “We do a disservice to the public and to the police by moving the so-called “social contact” into just another form of seizure, albeit without any cause or suspicion or danger to the public or the police.” *Harrington*, 167 Wn.2d at 670.

3. Evidence of the Assault Was Inadmissible

When a police officer violates a citizen’s constitutional right to be free from an unwarranted seizure, and a self-defense analysis is available, the evidence of the alleged assault should *not* be admissible. *State v. Cormier*, 100 Wn. App. 457, 462-63, 997 P.2d 950 (2000).

Here, Hake conducted an unconstitutional seizure and then instigated a physical confrontation where Mr. Zamora had good reason to fear for his life. Where an individual is unlawfully arrested, he has a right to use reasonable and proportional force to resist an attempt to inflict serious injury on him during the arrest. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997); *State v. Westlund*, 13 Wn. App. 460, 467, 536 P.2d 20 (1975).

The self-defense analysis was obviously available to Mr. Zamora. Mr. Zamora received ineffective assistance of counsel because counsel failed to challenge the seizure. The alleged assault should have been ruled inadmissible based on *Cormier* and *Valentine*. The argument of an

unconstitutional seizure was available to counsel and counsel's failure to challenge it cannot be reasonably explained as a legitimate strategy or tactic.

Failing to challenge the seizure was prejudicial. Mr. Zamora's conviction depended entirely on a finding he unlawfully defended himself from excessive force. Had defense counsel moved to challenge the illegal seizure, the Court should have granted the motion to suppress the alleged assaults.

Because the record is adequate on appeal, Mr. Zamora asks this Court to find the alleged assaults should have been suppressed, reverse the convictions, and dismiss all charges with prejudice.

B. Mr. Zamora Received Ineffective Assistance of Counsel Where Counsel Failed to Object to Admissibility of Evidence of Hake's Prior Violent Confrontations with Citizens.

Relevant evidence is admissible. ER 402. Where a defendant seeks to admit relevant evidence, the burden is on the State to show the evidence is so prejudicial it disrupts the fairness of the fact-finding process. *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence can only be excluded if the State's interest outweighs the defendant's need, and no State interest can be compelling enough to preclude evidence of high probative value when viewed in the light of art. I, § 22. *State v. Hudlow*,

99 Wn.2d 1, 16, 659 P.2d 514 (1983); *State v. Arndt*, 194 Wn.2d 784, 812, 453 P.3d 696 (2019).

An attack on a witness's credibility as it relates to the issues is always relevant. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). Hake's credibility was distinctly at stake. He was dispatched to investigate a possible gross misdemeanor, vehicle prowling. RCW 9A.52.100. He was the first and only officer on the scene and repeatedly stated he had never been in a situation where he was so frightened.

He was so terrified for his life that rather than walk away at the end of a social encounter, he escalated the situation without waiting for backup. With no physical provocation, he grabbed and then shoved Mr. Zamora as hard as he could and pummeled him with punches. Mr. Zamora had the constitutional right to question whether Hake had a history of prior violent confrontations with citizens and or unnecessary force restraint of individuals without legal authority.

In *York*, the testimony of an undercover investigator for the Sheriff's Department was crucial to the State's case, as he was the only eyewitness to the alleged crime. *State v. York*, 28 Wn. App. 33, 34, 621 P.2d 784 (1980). To establish a motive to fabricate the facts or adjust his testimony regarding drug buys to obtain money, the defendant sought to

elicit on cross-examination information about his previous employment as a sheriff from which he had been fired. On direct examination, the State brought out favorable aspects of the investigator's law enforcement background. However, the State moved in limine to exclude cross-examination on unfavorable elements of his background, which the trial court granted considering it a collateral matter. *Id.*

The Court found, "as a matter of fundamental fairness," the defense should have been allowed to examine the negative elements of the State's most important witness. *Id.* at 37. The Court pointed out the State's attempt to minimize the relevance of the witness's employment and firing was of sufficient importance to obtain pretrial suppression. *Id.* at 37. The credibility of the witness was not collateral, but rather at the center of the defense.

Here, the State elicited information about Hake's 13-year background with Grant County Youth Services, his completion of the juvenile services probation academy, and training in mental health. Of particular significance was testimony that Hake was a certified instructor in aggression replacement training intervention. RP 312. The jury also heard of his training in the Grand County Reserve Academy, and the Basic Law Enforcement Academy. RP 313.

The jury heard the favorable aspects of Hake’s law enforcement background, which would lend credibility to his observations. But, like *York*, none of the unfavorable aspects was presented. Hake’s previous incidents of violence were of sufficient importance to obtain pretrial suppression.

The *York* Court noted the credibility of the witness based on his “apparent unsullied background and the total lack of meaningful impeachment, was stressed heavily by the prosecution.” *Id.* at 36. Similarly, here, in closing argument here, the prosecutor emphasized Hake’s “amazing restraint”:

Now, we would not be here if the defendant would have simply cooperated with Officer Hake in this investigation, provided his identification as he was asked to do, not digging around in his pockets for a weapon, not trying to turn and walk away...The defendant chose to do meth...And as a result, as a consequence of that decision, he ended up with this super-human strength...And frankly, ***the defendant is alive today here with us in this courtroom because of the amazing restraint that Officer Hake showed on the night of February 5th of 2017. It was a deadly force situation. He could have shot and killed the defendant. ...Officer Hake showed restraint.***

RP 890.

Coupled with Hake’s training and experience in aggression replacement, the prosecutor’s argument led the jury to believe Hake was a

model of restraint. Under ER 608(b)⁸ Mr. Hake was entitled to cross-examine Hake on specific instances of prior violent conduct, to attack his credibility because it was probative of his character for truthfulness or untruthfulness. *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001).

Justifying his aggressive behavior, Hake stressed he was almost instantly in fear for his life and had never had such a situation. RP 324; 504. Mr. Zamora had the right to cross-examine how truthful that testimony was. The rules of evidence allow such cross-examination. Caselaw supports such cross-examination. There was no reasonable tactic or legal strategy by defense counsel for failure to oppose the motion in limine. Further, as in *York*, the evidence was significant enough that the State sought to have it precluded.

Counsel also provided ineffective assistance when in a pretrial hearing, defense counsel told the court he was aware that Hake had been charged in district court with for assault in the fourth degree and disorderly conduct. RP 12. Counsel said the evidence was only relevant if

⁸ **(b) Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

the State brought it up, and because Mr. Zamora did not know about Hake's assault charge, it was not relevant for his self-defense claim. RP 12.

Mr. Zamora's conviction rested on Hake's testimony that he had used the necessary force. Testimony related to Hake's history of violent conduct while on and off duty raises a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. Based on the preceding argument and authorities, the confidence in the outcome in this case is low. His counsel's failure prejudiced Mr. Zamora. This matter must be remanded.

C. Mr. Zamora's Right to Present a Full Defense Was Violated When the Trial Court Ruled Evidence About *Garrity* Statements Was Inadmissible.

The right to confront and cross-examine an adverse witness is guaranteed by both the federal and state constitutions. U.S. Const. Amend. VI, art. I, § 22. Violation of the right to present a defense is a constitutional error, and of such moment it requires reversal unless the State can show harmless beyond a reasonable doubt the violation did not contribute to the verdict. *State v. Jones*, 168 Wn.2d 713, 724, 230 P.3d

576 (2010). Confrontation clause violations are reviewed de novo. *State v. Jasper*, 174 Wn.2d 96, 108, 271 P.3d 876 (2012).

The right to confront grants a criminal defendant "extra-wide latitude" in cross-examination to probe motive or credibility."Any fact that goes to the trustworthiness of a witness may be elicited if it is germane to the issue. *State v. Lile*, 188 Wn.2d 766, 792, 309 P.3d 1052 (2017). The right to confront to test the perception, memory, and credibility of witnesses is essential to the accuracy of the fact-finding process and integrity of the justice system. *Darden*, 145 Wn.2d at 620.

The right to confront a witness requires (1) the evidence must be relevant and (2) the defendant's right to introduce the relevant evidence must be balanced against the State's interest in precluding evidence which is so prejudicial that it disrupts the fairness of the fact-finding process. *Hudlow*, 99 Wn.2d. at 16. Where the defendant can show the evidence is minimally relevant, it must be admitted unless the State can make a compelling state interest for excluding the evidence. *Id.* There must be a strong showing it is unfairly prejudicial. *Jones*, 168 Wn.2d at 720. Where the evidence is of high probative value, there is no State interest compelling enough to preclude its introduction. *Hudlow*, 99 Wn.2d at 16.

Limitations on cross-examination are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). A

trial court abuses its discretion if its decision is “manifestly unreasonable,” based on “untenable grounds,” or made for “untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (*accord*, *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Here, the trial court abused its discretion when it denied admission of any evidence or cross-examination about the *Garrity* statements.

Here, the court denied admission of the fact that each officer made a *Garrity* statement. The court denied Mr. Zamora the opportunity cross-examine the officers and ask: (1) did they make a *Garrity* statement (2) if they knew the purpose of a *Garrity* statement (3) if they knew who told them to make a *Garrity* statement (4) if they made themselves available to Detective Anderson to be interviewed about the incident. The information was relevant to the credibility of one or more officers. The Court denied admission and precluded cross-examination referring to the *Garrity* statements.

A *Garrity* statement is an investigative tool used when officers are investigated for misconduct. *Garrity*, 385 U.S. 493. Officers are required to make a statement about the incident with the guarantee it will not be used to prosecute them. Refusal to participate can result in termination of employment. For example, *Garrity* statements were made by Seattle police officers who had been implicated in a pay-off system, and "public

confidence in the integrity of the police department was shaken." *Seattle Police Officers' Guild v. City of Seattle*, 80 Wn.2d 307, 494 P.2d 485, 490–91 (1972). Similarly, in Spokane, two officers had been involved in an incident in which they allegedly used excessive force. Later, the same two officers shot and killed a man. The officers each made a *Garrity* statement as part of an internal investigation. *Cowles Pub.Co. v. State Patrol*, 109 Wn.2d 712, 748 P.2d 597 (1988).

Unlike the above-cited cases, the criminal investigation of Mr. Zamora was entwined with the internal affairs investigation into officer conduct. Detective Anderson relied on the *Garrity* statements in his investigation of Mr. Zamora. Each officer made a statement about the incident, alongside the union representative, at the direction of a "higher up" who required them to make a statement under penalty of loss of their job. RP 240; 419. No officer filed an official police report record of their actions that night. No officer agreed to an interview with either Detective Anderson or defense counsel.

Mr. Zamora sought to exercise his constitutional right to present a full and complete defense, a matter of fundamental fairness and due administration of justice. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis*, 415 U.S. at 316. The check on the right to a meaningful

opportunity to present a defense by narrow questioning of the officers' *Garrity* statements deprived him of a full and fair hearing, entitling him to a new trial. *State v. Mayo*, 42 Wash. 540, 548-49, 85 P. 251 (1906).

1. The *Garrity* Statements are 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 401; *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). All relevant evidence is admissible. ER 402. Relevant evidence may be excluded only if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

Cross-examination of officers' knowledge about completing a *Garrity* statement and its purpose was relevant evidence whose probative value was not substantially outweighed by unfair prejudice, confusion of the issues or misleading of the jury. To limit the relevant evidence, the State had to show the evidence was so prejudicial as to disrupt the fairness of the fact-finding process at trial, and the State's interest must be so compelling that it outweighs the defendant's need to present otherwise

relevant evidence. Here the State did not meet that burden, and the court erred when it limited the cross-examination.

The trial court here seemed focused on the statements themselves being hearsay. RP 339. Defense counsel argued that even without introducing the statements themselves, (thus avoiding the hearsay issue), the factors surrounding making a *Garrity* statement went directly to their mental state, credibility, and colored the entire investigation. RP 341.

The trial court ruled any question about whether the statement was a *Garrity* statement was irrelevant, inadmissible, called for jury speculation, and a legal conclusion by officers, and was a collateral issue. RP 433-34. This is an erroneous ruling. Because each officer participated in the *Garrity* statements to preserve their employment, and their credibility was at issue, most especially Hake, there was no compelling need shown to exclude the evidence, and it should have been allowed. *Jones*, 168 Wn.2d at 720.

And this did not call for a legal conclusion by officers, nor was it a collateral issue. The investigation was based on the *Garrity* statements. Officers could answer the questions based on their knowledge and understanding of why they made the statement rather than a police report without making a legal conclusion. If officers did not know who told them

to make the *Garrity* statement, they could answer truthfully. The evidence was relevant because it went directly to the credibility of the officers.

A jury assesses the credibility of each witness in making its decision. *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). Whether officers had been warned they had to make a statement or lose their job, and the statement could not be used to prosecute them bore directly on their credibility. If the jury questioned the officers' credibility, they may have chosen to believe that Hake instigated violence where none would have otherwise existed, and Mr. Zamora was indeed lawfully defending himself from serious injury or death.

The State cited to *Robinson v. State*, 354 Md. 287, 730 A.2d 181 (1999)⁹. RP423-24. Although not binding on this Court, the Maryland Court stressed that the internal investigation statements were significant because only the jury was entrusted with determining whether to believe any witnesses and which witnesses it will believe. *Id.* at 313-14. The Court reversed a lower court, finding that defense counsel could review the statements, and *the trial court should not have told the jury* there was nothing exculpatory for the defendant. *The officers were found to have acted appropriately. Id.* at 317.

⁹ The State also cited an unpublished/non-citable California case, *People v. Byrket*, 2017 WL 4534206. CP 166-176.

The trial court abused its discretion when it found the information around the *Garrity* statements was inadmissible. The State made no showing that the probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. ER 403. The limitation on cross-examination resulted in unfair prejudice to Mr. Zamora because he was denied an opportunity to present his defense. The jury was misled to assume the investigation was routine when it was not.

2. The Error Was Not Harmless

“A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

For an error of constitutional magnitude to be found harmless, it must be proven 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). An evidentiary error is not harmless where, within reasonable probability, it materially affected the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

Under either standard of review, the error here is not harmless. Mr. Zamora had a right to present relevant, admissible evidence in his defense.

The credibility of Hake was crucial to the State case. Without showing the full picture, Mr. Zamora's right to a full and fair hearing was denied.

Exclusion of the evidence of the fact of the *Garrity* statement cannot be proven harmless beyond a reasonable doubt. Even under the lower standard, the evidentiary error cannot be shown to be harmless. The State could not argue that the fact of the *Garrity* statements should have been precluded because it was so prejudicial as to disrupt the fairness of the trial. *Hudlow*, 99 Wn.2d 1. This matter must be reversed.

D. Mr. Zamora Received Ineffective Assistance of Counsel Where Counsel Did Not Request a Jury Instruction on the Definition of Excessive Force.

Jury instructions "allow each party to argue its theory of the case" and "must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Porter*, 186 Wn.2d 85, 93, 375 P.3d 664 (2016). A trial court must define technical words and expressions used in jury instructions unless the words or expressions are of either ordinary understanding or self-explanatory. *In re Det. of Pouncy*, 168 Wn.2d 382, 390, 229 P3d 678 (2010).

Here, the court instructed the jury that a person may use force to resist an arrest or detention *only if* the person being arrested or detained is

in *actual or imminent danger of serious injury* from an officer's use of *excessive force*. CP 237. The crux of the defense was the officer's use of excessive force. The jury understood that was the linchpin and asked the court for a definition of excessive force. The evidence warranted an instruction. The request for an instruction would likely have been granted.

The trial court said:

THE COURT: No. No. I was going to say you, you bring this in, this collective wisdom, that's the reason we have jury trials, is that. If that's the smallest element or unit, definitional unit we have for this term. So I'd also wonder if there was going to be testimony from an expert about excessive force. There was some talk about it. And I just didn't know what the appropriateness or authority would be to have someone give an opinion on that I'm trying to think now with Mr. -- the prosecutor, Mr. Mitchell, he's written a book about these issues, I've read his book and the book cites a lot of cases about what is appropriate or excessive force and some of those standards. Probably some of that would be in the civil area of the law.

RP 973.

As the jury was already deliberating, the court did not believe it could respond to the request for a definition because neither party would have the right or ability to argue from the instruction. RP 974. Defense counsel agreed, saying he would object if the court gave them an instruction at that juncture. RP 974. The court would have considered an instruction if it had been requested at the appropriate time.

The jury was left to its own devices to cobble together its own definition of excessive force, without any legal standard. The term does

not have an ordinary meaning, and it is not self-explanatory. Excessive force is a technical term, and there is a civil jury instruction that guides a jury into making a fair decision. WPIC 342.03 (see Appendix A).

“A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence.” *State v. Finley*, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). There was no tactical or strategic reason why trial counsel would have failed to request an instruction on excessive force.

Under *Strickland*, the second prong of the test is whether there is a reasonable probability that, except for counsel’s unprofessional errors, the outcome would have been different. *In re Pers. Restraint of Hutchinson*, 147 Wn.2d 197, 206, 53 P.3d 17 (2002). The jury was not given a definition of “excessive force” and had no basis from which to decide if the force used against him was excessive. This Court should not have confidence in the outcome of the proceeding.

Even if this Court were to find trial counsel waived the jury instruction issue, failing to request an instruction must nevertheless be reviewed under an ineffective assistance of counsel claim. *State v. Doogan*, 82 Wn. App. 185, 188, 917 P.2d 155 (1996); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). This matter must be reversed. *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003).

E. The Evidence Was Insufficient to Sustain the Convictions.

Evidence cannot sustain a conviction where after viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1069 (1992).

The use of force in self-defense against an arresting police officer is permissible when the arrestee faces an imminent danger of serious injury or death. *State v. Bradley*, 141 Wn.2d 731, 738, 10 P.3d 358 (2000); RCW 9A.16.020(3). If the defendant meets the initial burden of producing some evidence that his actions occurred in circumstances amounting to self-defense, the burden belongs to the State to prove the absence of self-defense beyond a reasonable doubt. *State v. Grott*, --Wn.2d --, 458 P.3d 750 (February 20, 2020).

Here, the facts are plain. A citizen walking down the street was in the yard of his intended destination. A police officer waves him over to talk, having been dispatched to check on a possible misdemeanor. The officer asks questions, which the citizen had no obligation to answer. The officer decides the citizen is passively resistant because he doesn't answer

the questions. The officer is upset by the way the citizen is looking at him. The officer makes a frantic call to other officers saying, "I've got one resisting." The officer later reports he was terrified for his life.

The citizen walks away from the social encounter. Rather than ending the contact, the officer stops the citizen with his arm and says he is not free to leave. He tells him, for the first time, he is investigating a possible car prowling. The citizen again turns to leave. The officer grabs the man by the elbows, jamming them together from behind. The officer's voice goes over the mic for other officers to hear him say: "Put your hands behind your back, I'll fucking kill you, put your hands behind your back." RP 644.

There is no scenario in which any citizen in that situation would not have fears he will be seriously harmed. The citizen bows his shoulders and breaks the officer's grip on one of his elbows. He does not hit or try to injure the officer. In breaking free with one arm, the citizen ends up facing the officer and has his free hand in his pocket. The officer wants that hand out of the citizen's pocket.

The officer is now so frightened, despite never seeing any kind of a bulge in the citizen's pocket, he contemplates pulling out his gun. The officer immediately shoves the citizen in the chest so hard he flies back six or seven feet and hits his head on a metal car bumper. The officer jumps

on top of him and pummels him with dozens of punches in the head, pepper-spraying him in the mouth and face, putting his gun in the citizen's eye, ear and mouth. The officer believes he may use lethal force to manage the citizen's bucking to get the officer off of him. The citizen punches the officer in his shoulders and side. The citizen hits the officer with the mic.

The violence continues by the officer and others until the citizen is finally handcuffed, hogtied, face down in the snow. According to the eyewitness, the officers kick the citizen while he is hogtied and call him a 'turd' (RP 680).

When the encounter began, when Hake first laid hands on Mr. Zamora to prevent him from walking away, Hake had no probable cause to suspect that Mr. Zamora posed a threat of serious physical harm to another. Hake overreacted, and the overreaction was unreasonable. There is simply no scenario under which Mr. Zamora was not in danger of serious injury or death when Hake. The State did not prove its case beyond a reasonable doubt. This matter must be reversed and dismissed with prejudice.

F. The Prosecutor Committed Misconduct When He Raised Irrelevant and Inflammatory Issues of Illegal Immigration, Border Security, and Juror Fear of Undocumented Immigrants Committing Crimes Against American Citizens.

A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003) (citing *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997)). Prejudice exists if there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Where, as here, a defendant does not object or request a curative instruction, he waives the error unless the reviewing Court finds the remark “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” *McKenzie*, 157 Wn.2d at 52 (quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997) (Brown II)).

Washington Courts condemn the injection of racial or ethnic stereotypes into criminal cases. *State v. Barber*, 118 Wn.2d 335, 346-47, 823 P.2d 1068 (1992). “A prosecutor gravely violates a defendant’s Washington State Constitution Article 1, §22 right to an impartial jury when the prosecutor resorts to racist argument and appeals to racial

stereotypes or racial bias to achieve convictions.” *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Remarks designed to arouse racial bias or prejudice simply should not be made by a prosecutor. The American Bar Association Criminal Justice Section Standards, Prosecution Function, Standard 3-5.8 Commentary.

Here, the prosecutor opened voir dire with a “general topic” of border security. Jurors were then asked questions about whether they had a personal concern that maybe somebody was in the country illegally and might do something to them or their family. The prosecutor even asked the juror who was not overly concerned whether he could make room for those who had a loved one killed by someone who had previously been deported or was criminally wrong in the country, wanting more border security. RP 75. To the juror who was not concerned, but locked his door at night, the prosecutor asked: "Can you make room for the idea that when they hear that 100,000 people come across illegally a month, and of those we've got people from countries that—countries on our list that aren't even allowed in the country are part of that group?" RP 76-77.

The prosecutor then focused on a juror who did not lock his door, whether he could "make room for the idea that somebody who you don't even know may just show up and try to rob you or come into your home?"

RP 79. The prosecutor then went into questions about whether jurors wanted to have locks or equipment to protect them from having people “unwanted” coming to your place. RP 82-83.

The trial court itself was concerned that defense counsel had not objected to the questioning. The court succinctly summed up the concern: concerned a jury would:

...think that with a Latino last name that he’s here illegally? Why else would the questions be asked? Why else would there be reference to drug busts in Nogales, a number of illegal immigrants crossing over the border, 100,000 a month, unless he was, why else would the questions be relevant? That’s what the jury might think. RP 223.

The court was correct and wanted defense counsel to put his reasoning for not objecting on the record. The only answer defense counsel had was that he thought he could address it in closing argument and that it might be to his advantage. RP 224. In opening statements, defense counsel told the jury the case was not an illegal immigration issue, but the seed had already been planted.

During closing argument, when referring to Javier Torres, the only non-law enforcement witness, with a Latino surname, the prosecutor stated:

And if you think about -- if you remember what Javier Torres said, the exact quote, when talking about police, Javier stated, "If it's a cop, I don't have nothing to do and nothing to say." This is a guy who doesn't like the police. He -- you know, when

Officer Hake is out there struggling with the guy, he just stays inside, closes his door, doesn't offer any help. Then obviously, you know, for someone to come into court and say that on the stand, "I don't want nothing to do with police, I got nothing to say to them," he doesn't like law enforcement.

RP 902-03.

This is the sin of *Monday*, where the prosecutor argued: "black folk don't testify against black folk." *Monday*, 171 Wn.2d at 674. Whether true or not, based on the voir dire, here the jury was invited to slip comfortably into an unconscious bias that Javier Torres wanted nothing to do with the police because he was an undocumented immigrant. *See State v. Walker*, 182 Wn.2d 463, 491 n.4, 341 P.3d 976 (2015). The appeal to undocumented immigrants and criminality is unacceptable.

Because defense counsel did not object to either instance of misconduct, Mr. Zamora must show the misconduct was so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been cured by an admonition to the jury. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). If the misconduct substantially likely affected the jury's verdict, this court must reverse because Mr. Zamora was denied his right to a fair trial. *State v. Suarez-Bravo*, 72 Wn. App. 359, 361, 864 P.2d 426 (1994).

The prosecutor's explanation for bringing up border security and undocumented immigrants and criminality was, "I'm just curious about

that.” RP 225. The prosecutor further explained the entire ordeal began because of a possible vehicle prowling- and the prosecutor “in no intimated or was suggesting to the jury that the defendant is not a citizen of the country or is here illegally.” RP 225.

Of all topics to raise with a jury, criminality by undocumented immigrants and discovering who locked their doors because of it, in the trial of a man with a Hispanic surname, was intentional. It was a thinly disguised call to view Mr. Zamora as different, as "other," and not "us." "When a prosecutor flagrantly or apparently intentionally appeals to racial bias in a way that undermines the defendant's credibility or the presumption of innocence, we will vacate the conviction unless it appears beyond a reasonable doubt that the misconduct did not affect the jury's verdict." *Monday*, 17 Wn.2d at 680.

The Court assigns the burden to the State to show the race-based misconduct was harmless beyond a reasonable doubt. *In re Gentry*, 170 Wn.2d 614, 623, 316 P.3d 1020 (2014).

In *Suarez-Bravo*, the Court held that even though the evidence may have been sufficient for conviction, the matter required reversal because there existed a substantial likelihood the jury’s verdict was affected by the prosecutor’s conduct. *Suarez-Bravo*, 72 Wn. App. at 368. This Court should come to the same conclusion and reverse this matter.

G. Mr. Zamora's Offender Score Must Be Corrected.

A sentence may be challenged for the first time on appeal.

Personal Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980). RCW 9.94A.525 sets the rules for whether a prior conviction is excluded from calculating the defendant's offender score:

(b) Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

According to the criminal history compilation, Mr. Zamora had five adult felony convictions beginning in 2003. The history shows two juvenile adjudications in 1997 for possession of a controlled substance with intent to deliver. CP 311-12. Possession with intent to deliver any controlled substance classified as Schedule I, II, or III, is a Class C felony. RCW 69.50.401(c).

Class C prior felony convictions shall not be included in an offender score if, since the last date of release from confinement pursuant

to any felony conviction, if any, or entry of judgment and sentence, the offender has spent five consecutive years in the community without committing any crime that subsequently results in a conviction. RCW 9.94A.525(c). This rule applies to both adult and juvenile prior convictions. RCW 9.94A.525(g).

Here, the 1997 juvenile convictions were subject to the five-year washout rule. The convictions should not have been included in the offender because Mr. Zamora was in the community crime-free for over five years. *State v. Moeurn*, 170 Wn.2d 169, 240 P.3d 1158 (2010).

This matter must be remanded for entry of the correct offender score of '6' and an adjustment of the sentence to the standard range of 22-29 months. RCW 9.94A.510.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Zamora respectfully asks this Court to reverse and dismiss his convictions with prejudice for insufficient evidence. In the alternative, he asks for remand for a new trial.

Respectfully submitted this 9th day of April 2020.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive, slightly slanted style.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on April 9, 2020, I mailed to the following US Postal Service first-class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Grant County Prosecuting Attorney at gdano@grantcountywa.gov and to Joseph Zamora/DOC#820126, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362.

Marie Trombley

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APPENDIX A

WPIC 342.03 Definition Of Unreasonable Force-Fourth Amendment

A seizure of a person is unreasonable under the Fourth Amendment if [a police officer] uses excessive force [in making a lawful arrest][and][or] in defending himself. Thus, in order to prove an unreasonable seizure in this case, the plaintiff must prove by a preponderance of the evidence that the officers used excessive force when (insert factual basis of the claim).

Under the Fourth Amendment, a police officer may only use such force as is objectively reasonable under all of the circumstances. In other words, you must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with 20/20 vision of hindsight.

In determining whether (Name of officer) used excessive force in this case consider all of the circumstances known to the officers on the scene [including but not limited to:

- a) Severity of the crime
- b) Circumstances to which the officer was responding;
- c) Whether Plaintiff reasonably appeared to pose an immediate threat to officer or others
- d) Whether Plaintiff actively resisted arrest [detention]
- e) Whether Plaintiff attempted to evade arrest [detention]
- f) The amount of time available to officer at the time he made the decision to use force, and what type and degree of force was necessary
- g) Whether there was a change of circumstances during which officer had to make a decision about the type and amount of force that appeared to be necessary
- h) Whether alternative methods of using force for arrest [detention] were available to officer at that time; and
- i) Whether the officer issued a warning to the suspect if feasible.]

MARIE TROMBLEY

April 09, 2020 - 3:22 PM

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