101469-4

Supreme Court No. (to be set)
Court of Appeals No. 38317-2-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JASON ALLAN JOHANSON,
Appellant.

PETITION FOR REVIEW BY THE APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHITMAN COUNTY
THE HONORABLE GARY J. LIBEY, JUDGE

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I. IDENTITY OF PETITIONER

Jason Allan Johanson, Appellant, asks this Court to accept review of the Court of Appeals opinion terminating review designated in Part II.

II. COURT OF APPEALS DECISION

Mr. Johanson seeks review of the unpublished opinion of the Court of Appeals, Division III, issued on October 18, 2022, attached. App. at 1-15.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review and reverse when Mr. Johanson reasonably defended himself against potentially deadly force used by police during an unlawful arrest?

2. Should this Court grant review and reverse when defense counsel failed to challenge the lawfulness of this arrest and failed to request a self-defense jury instruction?

IV. STATEMENT OF THE CASE

On April 14, 2021, Jason Allan Johanson attempted to ride a bus in Pullman, WA. RP at 141, 197. The driver informed him

that he could not ride the bus because he was not wearing a mask or face covering. RP at 141. Mr. Johanson became verbally agitated. RP at 141.

Three Pullman Police Department officers responded to the scene: Jared Haulk, Holden Humphrey, and Josh Bray. RP at 164, 183, 197. Officers Haulk and Humphrey approached Mr. Johanson and started to talk to him. RP at 170, 184. Throughout this encounter, Mr. Johanson swore, yelled, and appeared agitated. RP at 166, 171; Ex. 100. One of the officers testified that he was "threatening verbally, not physically" and was "upset about the mask mandate." RP at 165.

Officer Humphrey said that he wanted to "set some ground rules." RP at 170. He told Mr. Johanson: "Don't come towards me or my partners." *Id*. Mr. Johanson replied that he would defend himself if officers approached him. *Id*. A few minutes later, Officer Humphrey told Mr. Johanson, "If you don't wear a mask, you can't ride the bus." RP at 172. Mr. Johanson yelled,

"What fucking country do I live in?" and stepped off the curb in Officer Haulk's direction. *Id*.

Officer Humphrey moved toward Mr. Johanson with his arm stretched out. RP at 184-85. Mr. Johanson took a few steps back and then swatted at Officer Humphrey's arm, striking him. RP at 185; Ex. 100. Officer Humphrey testified that it "hurt" but he was not "seriously injured". RP at 185.

All three officers tackled Mr. Johanson to the ground, breaking his glasses. RP at 185, 206; Ex. 100. Mr. Johanson flailed and struck Officer Haulk in the lip. RP at 174. Officer Haulk testified that it stung for five to ten minutes. *Id*.

Officer Bray moved behind Mr. Johanson and placed him in a chokehold, or a "vascular neck restraint hold". RP at 212. Mr. Johanson was subdued in a matter of seconds. Ex. 100. At trial, Officer Bray testified that backing up or retreating was a choice but was not always the right choice. RP at 214-15.

The State charged Mr. Johanson with two counts of assault in the third degree. CP at 11-12. One count was based on

swatting Officer Humphrey's arm, and the other was based on striking Officer Haulk's lip during the arrest. *Id*. Mr. Johanson's attorney did not challenge the lawfulness of this detention and did not request a self-defense jury instruction. RP at 219-21.

A jury convicted Mr. Johanson of assaulting Officer Humphrey (swatting his hand) but acquitted him of assaulting Officer Haulk (hitting his lip). CP 84. Mr. Johanson was sentenced to 58 days incarceration, time served. CP 86. He appealed. CP 90-96. The Court of Appeals, Division III, affirmed his conviction. App. at 1-15. Mr. Johanson seeks review.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Police unlawfully arrested Mr. Johanson. In the course of this arrest, police used a chokehold; a dangerous and often lethal technique that is now outlawed. Mr. Johanson did not commit assault because he responded to this unlawful and potentially deadly arrest with reasonable and proportionate force. He also

received ineffective assistance of counsel because his trial attorney failed to challenge this unlawful detention and failed to request a jury instruction on self-defense.

Mr. Johanson respectfully asks this Court to grant review and reverse his assault conviction. This Court grants review under four circumstances:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, review is appropriate under subsections (3) and (4). This Court should grant review to clarify the issue preservation rule, RAP 2.5(a), and because the Court of Appeals erred under any legal standard.

A. This Court Should Grant Review to Clarify When a Constitutional Error is "Manifest" Under RAP 2.5.

Mr. Johanson argued on appeal that he was unlawfully detained during this police encounter. The Court of Appeals rejected this argument, concluding that "these challenges were not properly preserved and we decline to review them." App. at 8. The Court "preview[ed] the merits" of Mr. Johanson's arguments and held that "although the challenges implicate constitutional rights, any related error did not have practical and identifiable consequences at trial and is not manifest under RAP 2.5(a)(3)." *Id*. at 10, 15.

This Court should grant review to clarify the manifest constitutional error standard under RAP 2.5(a)(3). RAP 13.4(b)(3), (4). Constitutional errors "are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings." *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Under

this rule, a party may raise, for the first time on appeal, a "manifest error affecting a constitutional right." RAP 2.5(a)(3).

In some decisions, this Court has added another requirement. Appellate courts "must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). A constitutional error is only "manifest" if it "results in actual prejudice to the defendant." *Id*. at 602-03; *McFarland*, 127 Wn.2d at 333-34. To demonstrate actual prejudice, there must be a "plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007) (quoting *WWJ Corp.*, 138 Wn.2d at 603); *see also State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

This "preview the merits" standard is unnecessarily burdensome, contrary to public policy, and illogical. It creates an issue preservation rule that paradoxically reaches the merits

of the issue. Under this rule, a court can refuse to consider a claimed error on the merits because the court found that the error failed on the merits. This Court should reconsider this rule and abrogate *WWJ Corp.*

Instead, this Court should apply the test articulated in *State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988). The *Scott* Court specifically rejected the argument that courts must first look at the merits before considering a manifest constitutional error under RAP 2.5. 110 Wn.2d at 685. The Court of Appeals in that case, "apparently concerned that 'the rule is often construed too broadly', asserted its discretion to refuse review of constitutional errors when 'obvious and manifest injustice' has not occurred." *Id*. The *Scott* Court disagreed because "[t]his approach reflects a much narrower construction of RAP 2.5(a)(3) than we previously have adopted." *Id*.

Scott articulated a two-part test to determine if an error is reviewable under RAP 2.5(a)(3):

> The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that ***the error is truly of constitutional magnitude—that is what is meant by "manifest"***. If the asserted error is not a constitutional error, the court may refuse review on that ground. [Second] If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in *Chapman v. California, supra.*

Id. at 688 (emphasis added). In that case, the claimed error was not "truly of a constitutional magnitude" because "nothing in the constitution, as interpreted in the cases of this or indeed any court" required the jury instruction requested by the defendant. *Id*. at 689, 691.

In other words, a claimed error must unambiguously fall under the United States or Washington Constitutions, as interpreted by case law. Such an error is "manifest" and reviewable under RAP 2.5(a)(3). Courts should then consider the merits of the claim and whether the error was harmless beyond a reasonable doubt.

Here, the Court of Appeals applied the "manifest and obvious" test rejected by *Scott*. *Compare* App. at 9 ("we must determine whether the error is manifest or so obvious from the record that we can review it") *with Scott*, 110 Wn.2d at 685 (rejecting lower court's "obvious and manifest" interpretation of RAP 2.5(a)(3)). The Court correctly held that "[a]n unlawful seizure, detention, or arrest" is an issue of "constitutional magnitude under RAP 2.5(a)(3)" but erred by declining to review this issue after previewing the merits. App. at 9.

As explained below, Mr. Johanson was unlawfully seized, arrested, and assaulted. Police used lethal force by putting him in a chokehold and restricting his breathing. Mr. Johanson did not need to wait until he was actually choked to resist this unlawful arrest.

Under the test set forth in *Scott*, this error is manifest, or of a constitutional magnitude, because it implicates Mr. Johanson's rights under both the federal and state constitutions. U.S. Const. amend. IV; Wash. Const. art. I, § 7. This error was

not harmless beyond a reasonable doubt because the State cannot prove that Mr. Johanson committed assault when he proportionately resisted an unlawful arrest.

B. This Court Should Grant Review because Mr. Johanson Had the Right to Resist an Unlawful Arrest.

Even under the "preview the merits" standard, Mr. Johanson raises a manifest error affecting a constitutional right. RAP 2.5(a)(3). He was actually prejudiced because he cannot be convicted of assault when he had the right to resist an unlawful arrest. *O'Hara*, 167 Wn.2d at 99 (explaining actual prejudice test). This Court should grant review because this case raises a significant constitutional question about resisting arrest, an issue of substantial public interest. RAP 13.4(b)(3), (4).

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. A warrantless seizure is unconstitutional unless an exception applies. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

"Whether police have seized a person is a mixed question of law and fact." *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). A seizure occurs "when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Rankin*, 151 Wn.2d at 695. This objective determination requires looking at all the actions of the police officers. *Id*.

"An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person. The existence of an arrest depends in each case upon an objective evaluation of all the surrounding circumstances." *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (internal citation omitted).

Here, police arrested Mr. Johanson when (1) officers informed him that they would handcuff him if he approached and (2) officers moved in to handcuff him after he disregarded this

restriction on his freedom of movement and stepped off the curb. *See* Ex. 100. Mr. Johanson was flanked on two sides by police officers, and a total of three officers were at the scene. Ex. 100. Officers were giving Mr. Johanson orders, including limiting his freedom of movement, by telling him not to approach. RP at 170. Presumably the police officers were armed. At trial, police testified that Mr. Johanson was free to leave, but the videos show that they did not communicate this to Mr. Johanson at the time. RP at 178. A reasonable person would not feel free to leave under these circumstances. *See State v. Johnson*, 8 Wn. App.2d 728, 738, 440 P.3d 1032 (2019) (as long as a "reasonable person would feel free to disregard the police and go about his business, the encounter is consensual" and no seizure occurred).

Mr. Johanson's arrest was unlawful because it was not supported by probable cause. Courts use an objective standard to determine whether probable cause supports an arrest. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Probable cause exists "when the arresting officer is aware of facts or

circumstances" sufficient to cause a reasonable officer to believe a person committed a crime. *Id*. The burden is on the State to establish probable cause for an arrest. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

When police arrested Mr. Johanson, they had second-hand information that he committed a misdemeanor by refusing to wear a mask on public transit. RCW 70.05.120(4). This did not justify an arrest. "A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of an officer", with certain enumerated exceptions inapplicable here. RCW 10.31.100. "Under the plain language of the statute, only an officer who is present during the offense may arrest a suspect for a misdemeanor or a gross misdemeanor." *State v. Ortega*, 177 Wn.2d 116, 124, 297 P.3d 57 (2013).

A person has the right to use "reasonable and proportional force" to resist an unlawful arrest if he is faced with "serious injury or death". *State v. Valentine*, 132 Wn.2d 1, 20-21, 935

P.2d 1294 (1997). However, he does not have the right to resist if he is faced "only with a loss of freedom." *Id*. at 21.

In *Valentine*, this Court wrote that: "In Washington today the law provides those arrested with numerous protections that did not exist when the common law rule arose." 132 Wn.2d at 15. The Court used these rights and procedures to modify the common law rule and prohibit self-defense when a person only faces the loss of liberty. This Court wrote that in "this era of constantly expanding legal protection of the rights of the accused in criminal proceedings, an arrestee may be reasonably required to submit to a possibly unlawful arrest and to take recourse in the legal processes available to restore his liberty." *Id*. at 16-17 (quoting *Commonwealth v. Moreira*, 388 Mass. 596, 447 N.E.2d 1224, 1227 (1983)).

Mr. Johanson does not ask to change the rule articulated in *Valentine*. However, this Court should acknowledge that an unlawful arrest carries with it a far greater risk than the temporary loss of liberty. Here, Mr. Johanson swatted at a police

officer's hand, and for that he was placed in a chokehold or "vascular neck restraint". RP at 212. Chokeholds and neck restraints are now prohibited by Washington law. RCW 10.116.020. Officers had no reason to employ this potentially lethal force. Mr. Johanson displayed no weapon, and he was outnumbered three to one.

Under these circumstances, swatting away a police officer's hand was "reasonable and proportional force" to resist this unlawful arrest. *Valentine*, 132 Wn.2d at 6. The officer testified that it hurt when Mr. Johanson struck him, but otherwise he was not injured. RP at 185. On the other hand, Mr. Johanson was subjected to a chokehold. Mr. Johanson should not have had to wait until he was actually choked to resist this unlawful and deadly use of force.

C. This Court Should Grant Review because Mr. Johanson Received Ineffective Assistance of Counsel.

This Court should also grant review because Mr. Johanson's attorney was ineffective. A claim of ineffective assistance of counsel is an issue of constitutional magnitude that

may be considered for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(3)(a). Whether a criminal defendant received effective representation is a significant constitutional question and an issue of substantial public interest. RAP 13.4(b)(3), (4); U.S. Const. amend. VI; Wash. Const. art I, § 22.

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). Both requirements are met here.

Representation is deficient if counsel's performance falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). There is a strong presumption that defense counsel's representation is not deficient. *McFarland*, 127 Wn.2d at 335. However, a defendant rebuts this presumption when "there is no conceivable legitimate

tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, counsel performed deficiently by failing to challenge the lawfulness of Mr. Johanson's detention and arrest and by failing to request a jury instruction regarding self-defense. *See* 11 WPIC 17.02.01; *Valentine*, 132 Wn.2d at 20-21. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). To succeed on an ineffective assistance claim, the defendant must prove that the trial court would likely have given the jury instruction at issue if requested. *State v. Classen*, 4 Wn. App. 2d 520, 536, 422 P.3d 489 (2018).

Mr. Johanson's attorney should have challenged the lawfulness of this arrest because, as explained above, police unlawfully detained Mr. Johanson. Had counsel made this argument, the trial court likely would have permitted a self-defense instruction because 11 WPIC 17.02.01 accurately states

the law about when a person can use force to resist an unlawful arrest. *See Valentine*, 132 Wn.2d at 20-21. Reasonable counsel would have raised this issue.

Mr. Johanson was also prejudiced by his attorney's deficient performance. Prejudice occurs if, but for counsel's deficient performance, there is a reasonable probability that the defendant's sentence would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

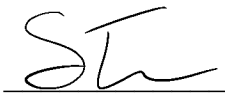
Police officers in this case unlawfully detained Mr. Johanson and unlawfully arrested him. They outnumbered him, and Mr. Johanson did not have a weapon, yet an officer still needed to place him in a potentially lethal chokehold. Mr. Johanson reasonably resisted by swatting at an officer's hand. Had counsel presented this argument and the self-defense instruction to the jury, Mr. Johanson likely would have been acquitted. Mr. Johanson was thus prejudiced by counsel's failings.

VI. CONCLUSION

Mr. Johanson respectfully requests that the Washington Supreme Court grant review and reverse the Court of Appeals.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 3,189 words, excluding the caption, signature blocks, appendix, and certificates of compliance and service (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on November 17, 2022.



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VII. APPENDIX

Court of Appeals, Division III, Unpublished Opinion
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. JASON ALLAN JOHANSON, Appellant.	)))))))))	No. 38317-2-III UNPUBLISHED OPINION

LAWRENCE-BERREY, J. — Jason Johanson appeals his conviction for assault in the third degree. He argues his use of force against the officer was constitutionally permissible because he was unlawfully seized, detained, arrested, or he reasonably feared serious injury. He also argues he received ineffective assistance of counsel. We disagree with his arguments and affirm.

FACTS[1]

In April 2021, Jason Johanson got onto a bus that was parked at the Pullman transit station. The bus driver, Benjamin Zylstra, informed Mr. Johanson that he needed to wear a facemask on the bus. Mr. Johanson responded, "It's not going to happen," and began yelling that the mask mandate is "Nazi bullshit." Report of Proceedings (June 28, 2021) (RP) at 147-48. He declared the COVID-19 virus is "a hoax" and that he is "17 moves ahead like chess." RP at 149-50.

Mr. Zylstra called and requested the transit manager to come out and speak with Mr. Johanson. The transit dispatch called the safety coordinator, whose job responsibilities include talking to unruly passengers. Meanwhile, Mr. Johanson yelled that Mr. Zylstra is "not a health official" and "not a scientist." RP at 150. He told Mr. Zylstra:

> You're nothing special. . . . Do you know that real pain is (indiscernible)? You're obeying the orders of satanic pedophiles. You'll fuck around and find out. You want to be a Nazi? You want to tell me I need a mask? They're just $5 at the store. You're not a health official; you're a bus driver. Now drive the goddamn bus.

RP at 151.

[1] The substantive facts are undisputed; all relevant interactions were recorded (either by dispatch audio or bodycam video) and are transcribed in the record as they were played at trial.

Dispatch asked if Mr. Johanson had a medical exemption to ride the bus without a mask, to which Mr. Zylstra responded, "I don't know if that conversation would be particularly productive at this moment." RP at 152. Mr. Johanson stated: "I already talked to authorities. Fuck around. I work for military intelligence. You are a goddamn brainwashed civilian. Now, hit the gas, bitch." RP at 153. Mr. Johanson said officers would show up "in a three man team." RP at 155. He then got out of the bus.

Soon after, Pullman Police Officer Jared Haulk arrived. A transit employee was speaking with Mr. Johanson. Officer Haulk began to talk to another employee, but heard Mr. Johanson screaming and decided to approach him. Bodycam footage captured their interaction:

> OFFICER HAULK: . . . Hey, Jason?
> MR. JOHANSON: What's up? How's it going?
> OFFICER HAULK: Hey, man, you know they have the rules for the masks, all right?
> MR. JOHANSON: Yeah, I will not (indiscernible) that issue.
> OFFICER HAULK: Then you can't ride on the bus.
> MR. JOHANSON: I work with military intelligence and Covid 19 is a hoax. And you're not going to deny me my constitutional rights that you supposedly swear and supposed to uphold. So you better decide if you're a patriot or a traitor.
> OFFICER HAULK: Okay, man. Well, this is it—you can't ride on the bus if you can't wear a mask.

RP at 168-69.

At this point, Officer Holden Humphrey arrived and approached Officer Haulk and Mr. Johanson. He asked:

> OFFICER HUMPHREY: Do they want him out of here or?
> OFFICER HAULK: Yeah, they just want him gone. They don't know if he's already trespassed or not.
> OFFICER HUMPHREY: All right.

RP at 187.

Then Officer Josh Bray arrived and approached. Mr. Johanson addressed the officers:

> MR. JOHANSON: . . . You better honor your fucking code. I work with military intelligence and you are a local PD, right?
> OFFICER HUMPHREY: That's right. All right, Jason, I'm going to set up some ground rules. If you take a step towards me, you're going in handcuffs so stay where you're at.
> MR. JOHANSON: Okay.
> OFFICER HUMPHREY: I'm going to set up those ground rules so we don't have any issues, okay? Don't come towards me or my partner.
> MR. JOHANSON: And if you approach me, I will defend my person—I am constitutionally obligated to. I have human rights beyond the Constitution. Do you understand what human rights are?
> OFFICER HAULK: Jason, do you have stuff inside the bus?
> MR. JOHANSON: I don't think so.
> OFFICER HAULK: Okay.
> MR. JOHANSON: I have a right to take the bus and go to the grocery store, right?
> OFFICER HAULK: Not right now you don't.
> MR. JOHANSON: Why not?
> OFFICER HAULK: If you don't wear a mask, you can't ride the bus.
> MR. JOHANSON: [Yelling] What fucking country do I live in?

RP at 187-88.

At this point, Mr. Johanson stepped off the curb and toward the officers. Officer Haulk yelled, "Stop." RP at 188. Officer Humphrey stepped toward Mr. Johanson and raised on open hand and said, "Stay away." RP at 188. Mr. Johanson then stepped back onto the curb but swatted Officer Humphrey's arm. A scuffle ensued. During the brief scuffle, Mr. Johanson's hand or fingers swiped Officer Haulk's hat and face. Officer Bray was able to handcuff Mr. Johanson. Officer Haulk's hat was damaged and his lip was a little numb for 5 to 10 minutes.

After his arrest, Mr. Johanson asked the officers, "Are you happy now, Nazis?" RP at 203. Officer Haulk said, "No, we've got you in handcuffs because you assaulted us." RP at 203. Officer Bray said, "Jason, you're out of your goddamn mind. You just hit an officer." RP at 203. The officers walked him toward the patrol car and asked whether they could get anything off the bus for him. They also read *Miranda*[2] rights from a preprinted card, to which Mr. Johanson said he understood. The following exchange then took place:

> MR. JOHANSON: . . . I don't think I harmed anybody, did I?
> OFFICER BRAY: No, but you did—you did hit them.
> MR. JOHANSON: I slapped somebody's hand when they approached me because I felt threatened.

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

> OFFICER BRAY: Okay.
> MR. JOHANSON: So I—you told me not to take a step towards you and I did.
> OFFICER BRAY: You did.
> MR. JOHANSON: So I fucked up.

RP at 207. Before Mr. Johanson entered the patrol car, he stated:

> It's a necessary thing. I had to create this conflict for a bigger purpose. This is chess, not checkers. I'm not going to let this be a (indiscernible) world order bullshit happen. You're not going to destroy my country; fuck China.
> OFFICER BRAY: I understand—I understand the frustration.
> MR. JOHANSON: I knew what I need to do for this country and for humanity.

RP at 210-11.

The State charged Mr. Johanson with third degree assault against Officer Humphrey (count 1, swatting his arm) and third degree assault against Officer Haulk (count 2, swiping his hat/lip). After a psychological evaluation deemed Mr. Johanson competent, the matter proceeded to trial.

Trial

The State called Mr. Zylstra and the three responding officers. The officers testified that Mr. Johanson was free to leave while they were trying to figure out if the transit system wanted to trespass him. They testified they would have let him go and notify him later if he got a trespass order. Officer Humphrey testified they never told Mr.

Johanson he was restrained and he could have walked away. They only handcuffed him to "stop him from assaulting us further." RP at 191.

On cross-examination, Officer Bray explained his use of force during the scuffle. He explained he approached Mr. Johanson from behind, "intending to put him in a vascular neck hold." RP at 212. He denied the restraint was a chokehold because the restraint does not cut off airflow or blood flow to the brain. The officer admitted wrapping his arm around Mr. Johanson's neck, but denied applying pressure.

Mr. Johanson called a person who witnessed the brief scuffle. She testified she was between 10 and 20 feet away during the scuffle and did not see Mr. Johanson throw punches at the officers.

In closing, the defense argued Officer Humphrey instigated the assault and that Mr. Johanson did not break the law by moving toward the police officers and therefore the officer had no excuse to grab him. The defense further argued that no witness saw Mr. Johanson hit an officer and that whatever contact Mr. Johanson made during the brief scuffle was unintentional.

The jury found Mr. Johanson guilty of assaulting Officer Humphrey (count 1, swatting his arm) and not guilty of assaulting Officer Haulk (count 2, swiping his hat/lip). The court sentenced him to time served, which was 58 days in jail.

Mr. Johanson timely appealed.

ANALYSIS

ISSUES RAISED FOR FIRST TIME ON REVIEW

Mr. Johanson contends the police unlawfully seized, detained, or arrested him, and that his use of force defending himself was lawful. For the reasons set forth below, we conclude these challenges were not properly preserved and we decline to review them.

We generally do not review issues not raised to the trial court. RAP 2.5(a). An exception to this rule exists when the claimed error is manifest and affects a constitutional right. RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). In analyzing whether a constitutional right is implicated, we do not assume the error is of constitutional magnitude; rather, "[w]e look to the asserted claim and assess whether, if correct, it implicates a constitutional interest as compared to another form of trial error." *Id.* To establish an error is manifest, an appellant must demonstrate that the constitutional error had practical and identifiable consequences at trial. *Id.* at 99.

Mr. Johanson acknowledges he is raising these arguments for the first time on appeal but urges this court to review them because the challenged police conduct impinged on his constitutional right to be free from unlawful restraint.

"No person shall be disturbed in his private affairs . . . without the authority of law." WASH. CONST. art. I, § 7. This provision protects the privacy interests held by citizens to be safe from governmental trespass absent a warrant. *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). A warrantless seizure is unconstitutional unless an exception applies. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). An unlawful seizure, detention, or arrest is therefore of constitutional magnitude under RAP 2.5(a)(3).

Still, we must determine whether the error is manifest or so obvious from the record that we can review it. *See State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). As part of this analysis, we "must preview the merits of the claimed constitutional error to see if the argument has a likelihood of succeeding." *Id*. at 603. Thus, we discuss the merits of Mr. Johanson's claims regarding the officers' conduct to assess whether his argument would have succeeded at trial.

The parties dispute whether Mr. Johanson was seized or detained, whether he was under arrest prior to swatting Officer Humphrey's arm, and whether Mr. Johanson was in danger of serious injury so that he would be justified in resisting. We address the issues in turn.

Mr. Johanson was not seized

Mr. Johanson contends the police unlawfully seized him when they surrounded him and told him not to take a step toward them. We disagree.

"Whether police have seized a person is a mixed question of law and fact." *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009). Under our state constitution, a seizure occurs "when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Rankin*, 151 Wn.2d at 695. This objective determination requires looking at all the actions of the police officers. *Id.*

Here, Officer Humphrey asked Officer Haulk if the transit employees wanted Mr. Johanson gone or arrested. Officer Haulk answered, "Yeah, they just want him gone." RP at 187. This was said a few feet away from Mr. Johanson. He therefore knew the officers were not there to arrest him and that he was free to leave.

But instead of leaving, Mr. Johanson angrily argued that he should be allowed to ride the bus without a facemask. It was at this time that Officer Humphrey set the ground rules and said if Mr. Johanson took a step toward them, he would be handcuffed. Mr.

Johanson said he understood. It was Mr. Johanson's ignoring of this instruction that led to him swatting Officer Humphrey's outstretched arm that led to the scuffle and arrest.

Looking objectively at what was said and what happened, we conclude that Mr. Johanson was not seized before he swatted Officer Humphrey's outstretched arm. Rather, he was free to leave.

The officers had reasonable suspicion to interact with Mr. Johanson

Mr. Johanson argues the police conducted an invalid *Terry*[3] stop. We disagree.

A *Terry* stop is a recognized exception to the requirement that seizures require a warrant or probable cause. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). These types of seizures are permitted if based on the totality of the circumstances known to the police officer at the inception of the stop, there are "'specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997) (quoting *State v. Gleason*, 70 Wn. App. 13, 17, 851 P.2d 731 (1993)).

Here, Mr. Johanson insisted on riding a public bus without a facemask. At the time, riding a public bus without a facemask was a crime. *See* RCW 70.05.120(4) (violation of a health officer's order is a misdemeanor); Wash. Sec'y of Health, Order

[3] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

No. 20-03 (Wash. June 24, 2020), http://mrsc.org/getmedia/d6167fa2-f2a3-427f-936b-f630098d859f/Secretary_of_Health_Order_20-03_Statewide_Face_Coverings.aspx (wearing facemasks required on public transportation). Further, Mr. Johanson was being disorderly and refused to leave. He could have been cited with trespass. These facts were known to the officers. We conclude that the brief interaction[4] between the officers and Mr. Johanson before the scuffle was permissible.

Mr. Johanson was lawfully arrested

Mr. Johanson next argues, even if this court was to find he was not unlawfully seized or detained, he was unlawfully arrested when the officers moved in to handcuff him after he stepped off the curb toward them. He argues the police lacked probable cause to arrest him. We disagree with this description of the events.

"'An arrest takes place when a duly authorized officer of the law manifests an intent to take a person into custody and actually seizes or detains such person.'" *State v. Patton*, 167 Wn.2d 379, 387, 219 P.3d 651 (2009) (quoting ROYCE A. FERGUSON, JR., WASHINGTON PRACTICE: CRIMINAL PRACTICE AND PROCEDURE § 3104, at 741 (3d ed. 2004)). Here, Mr. Johanson was not arrested for stepping off the curb. When he stepped

[4] We do not refer to this interaction as a detention. The colloquy between the officers shows they were trying to de-escalate a tense situation and get Mr. Johanson to leave the transit station. They were not there to investigate or pursue charges.

off the curb, Officer Humphrey moved toward him, raised one open hand, and said, "Stay away." RP at 188. This action was not an arrest.

Mr. Johanson was arrested after swatting Officer Humphrey's outstretched arm. It was at that point the officers seized him and took him to the ground.

A person may not be arrested unless the police have probable cause that the person committed a crime. *See State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Here, the officers saw Mr. Johanson swat Officer Humphrey's arm, which is a third degree assault. We conclude that Mr. Johanson was lawfully arrested.

Mr. Johanson was not in danger of serious injury

Mr. Johanson next argues he used lawful force in defending himself from serious injury. We again disagree with his description of the events.

The conviction on appeal relates to the first incident—Mr. Johanson swatting Officer Humphrey's outstretched arm. It does not relate to the second incident—Mr. Johanson swiping Officer Haulk's hat and lip during the scuffle. The jury found Mr. Johanson not guilty of that alleged assault.

Mr. Johanson understood the ground rules but ignored them and stepped toward the officers. Officer Humphrey stepped toward Mr. Johanson, raised an open hand, and ordered him to stay back. Mr. Johanson took a step back but then swatted Officer

Humphrey's arm. Mr. Johanson was not in any danger before he swatted Officer Humphrey's arm, and he was not entitled to use force against the officer.

Our preview of Mr. Johanson's unlawful seizure, detention, arrest, and lawful defense arguments show that they were unlikely to succeed at trial. Therefore, although the challenges implicate constitutional rights, any related error did not have practical and identifiable consequences at trial and is not manifest under RAP 2.5(a)(3). We decline to review them.

INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Johanson contends he received ineffective assistance of counsel because his defense counsel failed to challenge the lawfulness of his arrest and failed to request a self-defense instruction. We disagree.

The right to effective assistance of counsel is guaranteed by both the state and federal constitutions. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To succeed on an ineffective assistance claim, a defendant must show both that (1) defense counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the outcome at trial. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *Strickland v. Washington*, 466 U.S. 668, 684-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We presume counsel is

effective, and the defendant bears the burden of proving there was no conceivable trial strategy or tactic explaining counsel's performance. *State v. Kyllo*, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009).

As discussed above, any argument that Mr. Johanson was unlawfully arrested was unlikely to succeed at trial. As also discussed above, Mr. Johanson was not legally justified in swatting Officer Humphrey's outstretched arm before the scuffle. Therefore, counsel's failure to advance those arguments was not deficient performance. We need not address prejudice when deficiency has not been established. *State v. Crow*, 8 Wn. App. 2d 480, 507, 438 P.3d 541 (2019).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Siddoway, C.J.

Staab, J.

Supreme Court No. (to be set)
Court of Appeals No. 38317-2-III

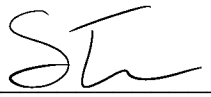
CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On November 17, 2022, I filed a true and correct copy of the Petition for Review by the Appellant, including the appendix, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division III. I also served said document as indicated below:

Daniel F Lebeau, Denis Paul Tracy, Whitman Co Prosecutor	(X) via email to: danL@whitmancounty.net, denist@whitmancounty.net, amandap@co.whitman.wa.us

SIGNED in Tacoma, WA, on November 17, 2022.



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