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THE SUPREME COURT OF
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

RAYMOND EDWARD JORDAN,
Appellant

ANSWER TO PETITION FOR DISCRETIONARY REVIEW
BY YAKIMA COUNTY

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A. INTRODUCTION

Petitioner Jordan was convicted of five counts of Assault in the Third degree. The charges are based on the defendant's assaultive acts upon EMT's, firemen and police officers who were attempting to render him aid after he was found unconscious, face down in a puddle of his own vomit, in a handicap accessible toilet stall in a branch of the public library in Yakima County. Jordan, without explanation only challenged the convictions in counts I, II and III. These counts pertain to two EMT's and a firefighter. The two counts that were not challenged pertain to the two police officers who were assaulted. (Appellant's Opening brief at 13, 14) He now seeks review of the Court of Appeals decision under RAP 13.4(d)(1), (2), and (4)

The issue raised herein was addressed by the trial court on more than one occasion and by a panel of judges in Division I of the Court of Appeals on two occasions; the initial appeal wherein that court upheld the actions of the trial court and once again after Petitioner filed a motion for reconsideration which was denied. (This appeal was transferred to Division I of the Court of Appeals by Division III.)

The State's opening brief set out the trial court's ruling:

THE COURT: Okay. **I agree with the State on this point.** I think the right to refuse does not include the right to use physical force, at least the hitting, the biting

and kicking, and it's obviously also a limited right to refuse. I think the EMT probably testified accurately that when a person's mental state is such that they have an obligation, a legal obligation, to substitute their own judgment for a person who isn't able to protect themselves with their decisions, so I agree with the State. The instruction will not be given. (Emphasis mine.)

The State's before the trial court shows that the State believed there was insufficient evidence to support the claim of self-defense. The State's argument in part:

“To raise a claim of self defense the defendant must first offer credible evidence tending to prove self defense.... Your Honor, that doesn't mean the defendant has to get up and testify it was in self defense. What the law states is there need only be some evidence admitted in the case from whatever source which tends to prove the defendant acted in self defense. Now -- and that's -- that's the, tends to prove, and I think we -- that's where the State has an issue, which tends to prove that the defendant acted in self defense. And we'll get some more -- a defendant must produce evidence showing that he or she had a good faith belief in the necessity of force and that the belief was objectively reasonable. ... I mean, if the jury's thinking, well, you have the right to refuse and that means that you can punch somebody to refuse, that's not reasonable and that is not the law and none of the evidence that has come out so far in the State's position as elicited by defense and we were all here listening to the cross-examination, it was, well, he had the right to refuse. (RP 200-1)
(Respondent's Brief at 3-4)

The Court of Appeals began its ruling by stating “Because the record contains no evidence sufficient to entitle Jordan to a self-defense

instruction, the trial court did not err when it failed to give this instruction. We affirm.” The court concluded its opinion as follows; “Because the record shows no evidence of the subjective element of self-defense, the trial court did not err when it declined to give a self-defense instruction. We affirm.” (Slip opinion at 1, 7)

B. ISSUE PRESENTED BY PETITION

Jordan petitions this court requesting review of the decision of the Court of Appeals Division I which upheld the trial court’s denial of Jordan’s request for instruction of the jury as to the defense of self-defense.

Petitioners allege;

1. An accused person is entitled to have the jury instructed regarding the lawful use of force when there is any evidence the accused had a reasonable belief he was about to be injured and the force used was no more than necessary.
He further alleges “[t]his court should grant review to determine whether those resisting unwanted medical treatment may use limited force to do so.

ANSWER TO ISSUES PRESENTED BY PETITION

1. There is no legal basis for this court to accept review. The rule of law presented in this case does not conflict with any prior decisions of this or any court of appeal in this state. RAP 13.4(b)(1), (2) as alleged by Petitioner

C. STATEMENT OF THE CASE

The facts were set forth in the brief of appellant, the respondent’s brief and within the ruling of the Court of Appeals. The manner they are

set forth in Jordan's petition for review makes the evidence appear as if it was ascertained from the defendant and takes artistic liberty with the actual evidence.

There was clearly is not that "Jordan awoke" after the painful stimuli, in fact the EMT states the opposite reaction;

A I pinched his trapezius muscle to see if I could get any Painful stimuli to wake him up possibly.

Q How hard did you squeeze?

A Hard enough to wake someone up.

Q Okay, and then was there any response?

A No, sir.

Jordan did not awake until later when the EMT's were starting to evaluate Jordan's condition. They were rolling their patient over to "examine his airway and breathing and circulation." It was at that time that Jordan began to swing and kick at these two fully uniformed EMT's who were trying to render aid. (RP 79-80)

There is no testimony from the Petitioner so it would be impossible to state factually that "He found he was being held by the head without his consent." (Petition at 1) There is absolutely nothing in the record that would support that statement, unless yelling "fuck you and get the fuck off of me" is going to be interpreted by this court or any court as Petitioner "finding he was being held without his consent."

The State shall rely on facts set forth in the previous briefing, the

opinion of the Court of Appeals and as need will set forth specific areas of the facts in the argument section below and Appendix.

D. ARGUMENT

Jordan argues that his petition falls within RAP 13.4(b)(1) (2) and (4). The ruling by Division I of the Court of Appeals does not fall within any section of RAP 13.4(b) the Court of Appeals correctly relied upon settled case law the court cited to;

State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002), State v. George, 161 Wn. App. 86, 95, 249 P.3d 202 (2011), State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010), State v. McCreven, 170 Wn. App. 444, 462-63, 284 P.3d 793 (2012), RCW 9A.16.020(3); State v. Werner, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); State v. LB, 132 Wn. App. 948, 953, 135 P.3d 508 (2006), State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995), State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999), State v. Walker, 136 Wn.2d 767, 773, 966 P.2d 883 (1998).

These cases set out the standard of law in this state regarding the use of Jordan's proposed instruction. The ruling of the court in this case does not conflict with any of the cases cited or for that matter any other case which addresses this area of the law. Nor is this issue one of great public interest.

Jordan has not met any of the criterion set forth in RAP 13.4(b)

1. Standards of Review.

RAP 13.4(b) Considerations Governing Acceptance of Review;

RAP 13.4(b)(1) and (2) - The ruling challenged does not conflict with any ruling by this court or any other division of the Court of Appeals or for that matter any court; RAP13.4(4) nor does the ruling by Division I of the Court of Appeals present an issue of substantial public interest

In its decision the Court of Appeals cited to and relied upon the settled law in this area as set forth above and in the Court's opinion. The State has throughout this appeal argued that the law is set and known.

The area at issue was specific; was there evidence presented to the trial court such that it was required, based on the settled law, to present the jury with Jordan's theory of self-defense. That question was answered in the negative by each and every court that has addressed it. This is a factual case plainly and simply. The decision by the Court of Appeals merely applied existing law to the facts presented during Jordan's trial. As the Court of Appeals stated "[b]ecause the record contains no evidence sufficient to entitle Jordan to a self-defense instruction, the trial court did not err when it failed to give this instruction."

Jordan chose to exercise his right to not testify at his trial, he also presented no witnesses at trial. Therefore his entire theory of self-defense was based upon the sworn testimony the State's witnesses, the EMT's,

firefighters and police officers who were summoned by the staff of the public library to render aid to the unconscious person, Jordan, who was lying unresponsive on the floor of a toilet stall in a puddle of his own vomit. Testimony elicited by Jordan's trial attorney established Jordan's condition when first contacted by the EMT's. The EMT's agreed with counsel when asked if "he (Jordan) had the lowest score he could possibly have?" (See Appendix A for a portion of the testimony from the EMT's)

Jordan attempts to use State v. Koch, *infra*, as a basis for his claim that this fact pattern is one of great public interest. But once again the facts do not support this argument. The facts of this case are not such that this court can or should address the issue proffered by Jordan, that a person who is "refusing" medical treatment has the right to fight the care givers. While there may someday be a factual situation that comes before a court of this state that would allow this court or any court to address that issue this is not that case.

Jordan cites to State v. Koch, 157 Wn.App. 20, 237 P.3d 287 (2010) however Koch does not address an assault by the person to whom aid it being provided, but rather an "assault" by the provider of the aid on a party who does not wish that aid. Koch does not involve public servants who have a duty to render aid to an individual who is in distress. Koch is

distinguishable and therefore the opinion rendered in this case in not in conflict with Koch.

Jordan attempts to use a statement in the Respondent's brief to support his allegation that he presented testimony that there was an indication that he was refusing treatment. The problem with this argument is the State was pointing out that the actions and statements of Jordan were not those of a person who was capable, according to these highly trained medical personnel, of making a knowing intelligent decision regarding treatment. The State was not indicating that the statements of the EMT's supported Jordan's theory. Further even if there was a statement or statements, the totality of the facts still rail against the argument that Jordan proffers; that is obscenity laced attack on these EMT's, firemen and police is synonymous with "please sir I do not wish to receive treatment."

The operative section of the testimony referred to by the State is as follows;

Q You said all he told you was fuck off and get off me?

A That's correct, sir.

Q Okay. Is that an indication that he doesn't want treatment?

A It's not an appropriate response to me to my questions.

Q Did that communicate to you that he did not want treatment?

A No.

Q Do you believe that he wanted your treatment?

A I believed he needed treatment.

Q You substituted your judgment for his?

A That's correct.

Q Okay. You're allowed to do that if a person is not capable of making intelligent decisions for themselves?

A Correct.

Q This was a person who had a Glasgow Coma score of 3, the bottom, when you first met him.

A That's correct.

Q And was severely impaired.

A That's correct.

Q You believe you had the right to substitute your judgment for his?

A That's correct.

Q And that's why you grabbed his trapezius muscle and you gave him a shot.

A That's correct.

Q Both rather painful experiences.

(RP 99)

The facts do not support the giving of the self-defense jury instruction. This court should deny Jordan's request.

Jordan also claims that the Court of Appeals opinion at 6-7 "appears" to extend the standard applicable to a police officer to both EMT's and firemen. While the State did raise this in its briefing before the court of appeals that court clearly did not set forth a new standard for EMT's. This claim is refuted by the following portion of the ruling;

To justify the **first** alleged incident of assault, Jordan must identify some evidence showing that he had a subjective fear of harm before he acted and the objective reasonableness of this fear. Contrary to Jordan's claim, his swinging and kicking alone is not evidence of subjective fear—only unexplained aggression. By the time Jordan told the EMTs to "f*** off" and "get the f*** off of me," he had already assaulted the EMTs. Thus, the record contains no

evidence showing that Jordan acted with subjective fear of imminent harm when he first assaulted the EMTs.

Because all the **remaining assault charges** resulted from Jordan's continued struggle against justified restraint after Jordan first assaulted the EMTs, no evidence shows that he ever acted in self-defense.

(Slip at page 6) (Emphasis mine.)

The court clearly differentiated between the charges, the discussion of “the remaining charges” can only refer to the two unchallenged counts that are based on Petitioner’s assaults on the two police officers. “Jordan does not identify any evidence showing that he feared actual, imminent, serious injury or death as required to entitle him to a self-defense instruction for the **remaining** charges.” (Slip opinion at 7) (Emphasis mine.)

E. CONCLUSION

The Court of Appeals did not deviate from establish law. It did differentiate between the initial assaults on the EMT’s and the fireman and the later assaults on the two police officers. The court did not impose a new standard nor did it deviate from the law addressing the use of the self-defense instruction. This case is a question of facts and the facts did not and do not support the use of the self-defense instruction.

Jordan states that he should be allowed to use this instruction “[b]ecause a person is entitled to act on appearances” a statement that if true would allow any person to act upon their belief of the “appearance” of

another's actions. (Petition at 5) This theory would **appear** to allow an individual to assault another person because the proponent, Jordan, thought that the victims, the EMT's appeared to be assaulting him. Taken to a logical conclusion this would allow any person walking down the street to assault any person whom they believed appeared to be assaulting them or about to assault them or about to provide them care. So a person who was handing you something that you just dropped could be assaulted and the person committing the assault would be allowed the use of self-defense even if the person who was assaulted was a smiling nun in her habit, because according to Jordan's argument he is allowed to act on appearances and "the victim's reasonableness is immaterial." This is absurd. This court should not accept review of the Court of Appeals. Jordan has not established a basis for review under RAP 13.4(b) as required.

Respectfully submitted this 11th day of September, 2015.

s/ David B. Trefry
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DECLARATION OF SERVICE

I, David B. Trefry, state that on September 11, 2015, I emailed, by agreement of the parties, a copy of the State's Answer to Jennifer J. Sweigert at Sloanej@nwattorney.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 11th day of September, 2015 at Spokane, Washington,

s/ David B. Trefry
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APPENDIX A

VERBATIM REPORT OF PROCEEDINGS – EMT DANIEL JAMES TAYLOR, II.

Q How do you rec -- how do you recognize him, what happened?

A I was working on the day you asked about. We were dispatched to a call at the

Yakima Library for a male patient found down in the bathroom.

Q Okay, and what was the call -- was it an unresponsive person?

A That's correct.

Q Okay, and did you go to the library?

A Yes, sir.

Q Okay, and when you arrived at the library, what did you do?

A I was greeted by a library worker who told us there was a male patient that was down in the bathroom and led us back to the bathroom.

Q And did you have any information at that point about who was in the bathroom or what was going on? Okay. Now, were you wearing you uniform?

A Yes, sir.

Q Okay, and did you have bags and gear, what did you take into the library with you?

A A medical kit, EKG monitor, backboard, spider straps.

Q And so once you got into -- where did you say that he was located?

A In the men's bathroom at the Yakima Library.

Q Okay, and did you go to the bathroom?

A Yes, sir.

Q Okay, and what did you observe when you got into the bathroom?

A He was in the bathroom stall with the door locked laying face down in front of the toilet.

Q Okay, and what did you do then?

A I crawled over the top of the bathroom stall, made access, unlocked the door and let my partner in.

Q Now, once you were inside with your partner, what did you think, what did you do?

A Tried making contact with the patient, asked him if he could hear me, if he could talk to me. I didn't get a response.

Q And when you didn't get a response verbally, what did you do then?

A I pinched his trapezius muscle to see if I could get any painful stimuli to wake him up possibly.

Q How hard did you squeeze?

A Hard enough to wake someone up.

Q Okay, and then was there any response?

A No, sir.

Q Okay, and did you do anything else?

A Yes.

Q What did you do?

A I held a C spine in case he had a neck injury and me and my partner rolled him over so we could examine his airway and breathing and circulation.

Q Were you squeezing his neck when you rolled him over?

A No, sir.

Q Okay. And when you rolled him, what happened?

A Probably less than 15 seconds, he opened his eyes, woke up, and I tried making contact with him again.

Q What do you mean by making contact with him?

A Ask him, you know, tell him who I am. I'm Daniel with the -- I'm a paramedic with the Advanced Life Systems, how you doing today and he didn't like -- he didn't respond to me. He just got very combative.

Q Okay. Was he looking at you?

A Yes, sir.

Q Okay, and so explain to the jury combative. What do you mean?

A I was holding the C spine trying to talk to him and let him know what's going on. I ask him if he hurts and he just tried to sit up -- or he did sit up and he started swinging and kicking -- the block from being hit. I was at the head, my partner was down at his feet walking his legs and trying to push him back down to the ground to block us from being hit. I was still trying to maintain --

Q Where -- where -- where was your partner at?

A The feet end.

Q Okay, alright. Did you see him kicking?

A Yes, sir.

Q Okay, and did you restrain the legs?

A No, sir, my partner.

Q Okay, and what did you do in response to the swinging -- and was the swinging in your direction?

A Yes, sir. Just block his arms and try to push his arms against his body.

Q And he was sitting up?

A Yes, periodically. We tried to keep him supine on the ground. It makes easier to control.

Q And were those swings directed at you?

A Yes, sir.

Q Did you continue to try to communicate with --

A Yeah, multiple times asking him just to calm down and talk to us, let us know what's going on, we're just here to help you.

Q And what was his response to your questions?

A The only thing he ever said to me was fuck you and get the fuck off of me.

Q Alright. Now, was that while you -- were you holding his arms? Did you attempt to hold his arms?

A Yes.

Q And why did you attempt to hold his arms?

A I would have been hit if I wouldn't have held his arms.

Q Okay, and were you talking to him while you were holding his arms? Is that when he responded?

A Yes, sir.

Q Let go of me, get off me and -- or get the fuck off me, and is that the same time he was also saying fuck you?

A Yes.

Q And so you identified yourself?

A Yes, sir.

Q Now was he strong?

A Yes, sir.

Q Okay, and explain how did you that he was strong? I mean, explain to the jury what you experienced.

A With the two of us we weren't able to control him. He was way stronger than the two of us being able to hold his arms and legs. We were no match for him. We couldn't control him.

Q As part of your communication were you asking what, you know, questions as to we're just trying to figure out what's going on or --

A Calm down, you know, we were called here to help you. We're not trying to hurt you.

Q And did you ever ask him any questions concerning why he was laying on the ground?

A Tried to ask him what happened, you know, do you hurt anywhere.

Q And what were the responses?

A Fuck you and get the fuck off of me.

Q Were you apprehensive that if you weren't holding his arms or blocking that you would have been hit?

A Yes.

RP 79-83

EMT CHRISTOPHER O'DELL

A We were dispatched an unresponsive person at the Yakima Library.

Q And approximately what time was that at?

A Around 5:30 or a little after maybe.

Q In the morning?

A In the evening.

Q And did you go to the library?

A Yes, we did.

Q Who were you with?

A My partner, Daniel Taylor.

Q And once you got to the library what did you do?

A We made access to the library. People were directing us towards the men's room, made access to the men's room.

Q And once you got to the men's room, what did you see? What was there?

A Well, we could see the body laying underneath the stall. The stall's not totally enclosed. You could see underneath where people would normally sit, and we seen a body laying there.

Q And what did you do?

A Daniel actually went over to the next stall, jumped over and into that stall --

Q He's a younger man than you?

A Yeah, taller, too, and he was able to unlock the door and I made entry after he did.

Q Now were you wearing full uniform?

A Yes, I was.

Q Okay, and did you have gear with you, medical --

A We brought gear into the room but not into the stall.

Q But not into the stall, okay.

A No.

Q Now, once you were both in the stall, what did you do?

A We initially -- Daniel took the head. Of course, we didn't know what his condition was, to support his cervical spine and we rolled him.

Q And once you rolled him, what happened?

A He was unresponsive initially.

Q And then did he stay unresponsive?

A Until I think we did some type of stimuli to see if he was arousable.

Q Okay, and what kind of stimuli do you utilize?

A Either painful -- it's not as painful -- it's like sternum rub. You take your fist and rub on their sternum and it usually arouses them.

Q Alright. So when he was aroused what happened?

A He became aggressive, cussing, attempting to kick and swing --

Q At --

A At both of us.

Q Okay, alright. And you were down by the legs --

A I was by the legs.

Q -- did he attempt to kick you?

A Yes.

Q Okay, and how did you react to that.

A I jumped on both of his legs with my knees and (inaudible -- talking over the answer)

--

Q And did you feel you needed to do that?

A Yes, to protect myself and we wanted to protect him as well. We don't his level of consciousness at the time. He could have got up, try to fall, hit his head, anything. So, basically, number one, to protect ourselves and my crew, and second, to protect the patient.

Q So were his eyes open at the time?

A Yes.

Q Okay. And were the strikes and kicks, were they targeted --

A Yes.

Q -- at you and Officer [sic] Taylor? Okay. Now once you had the legs did he ever attempt to -- so the kicks were one thing but once you had the legs, did he ever -- did you control his legs?

A Yes.

Q Okay. How strong was he?

A I'm 250 pounds and I had both legs on and he was able to lift me off the ground.

Q Okay. And -- but the legs stayed fairly secure?

A Yes.

Q Okay. Did he ever -- after you secured his legs attempt to strike you?

A Yes.

Q And explain to the jury -- explain to the jury how it happened and your response?

A Okay, basically Taylor had let go of the (inaudible) to control his upper

torso, his arms. He calmed down some. He'd release, he would raise up and try to strike and I had a longer reach being there and I could open handedly hit his sternum with my fist and just knock him back down. I had the leverage, he didn't.

Q Did he -- was he throwing the punch?

A Yes.

Q Okay. But by pushing him, he was unable to hit you?

A Right.

Q Now if you had not reached out with the longer reach and pushed him back do you believe that you would have been hit.

A Yeah, I would have been struck.

Q Now it's you and your partner, Daniel Taylor, and did anyone else arrive?

A Yes, fire arrived shortly after we did, the fire department.

Q Okay, when you say shortly was anybody looking at their watches?

A No.

Q Okay, but an approximation about how much time?

A One, two minutes.

Q And was he still attacking and aggressive at that time?

A No, combative, yes.

RP 109-12

OFFICE RECEPTIONIST, CLERK

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Please find attached the State's Answer to the Petition for Review.

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