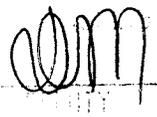


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COURT OF APPEALS

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STAFF BY  CITY

No. 34059-3-II

**IN THE COURT OF APPEALS  
DIVISION TWO  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON, Respondent,**

**v.**

**RENEE L. BRINKMEYER, Appellant.**

---

**BRIEF OF APPELLANT**

---

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*P.M. 5-19-06*

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## **I. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

- A. The instructions to the jury denied defendant her constitutional right to due process by relieving the state of the burden of proving every element of the crime of assault in the third degree.
  
- B. Defendant assigns error to Instruction No. 6:

The use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured.
  
- C. The defendant was denied effective assistance as guaranteed by the Sixth Amendment of the United States Constitution and Article 1, § 22 of the Washington State Constitution as a result of defense counsel's failure to (1) except to the trial court's Instruction No. 6 to the jury, and (2) submit appropriate instructions on self-defense.

### **Issues Pertaining to Assignments of Error**

- 1. Whether the state was relieved of its burden of proving every element of the crime of assault in the third degree, and the defendant thereby denied due process and a fair trial, where the trial court instructed the jury that the use of force upon a uniformed police officer is only lawful when used by a person who is actually about to be seriously injured, without allocating the burden of proof to the state as required by case law.

2. Whether the invited error doctrine precludes review where counsel agreed to a jury instruction that relieved the state of its burden to disprove self-defense.
3. Whether the defendant was denied effective assistance due to the failure of counsel to (a) except to the court's instruction No. 6 to the jury, and (b) submit appropriate instructions on self-defense where officers used excessive force.
4. Whether the record contains sufficient evidence to have required instruction on self-defense.
5. Whether the failure to properly instruct on the issue of self-defense constitutes harmless error.

## **II. STATEMENT OF THE CASE**

### **A. Factual background.**

On evening of April 7, 2005 Renee Brinkmeyer, the defendant, and Mark Bippes went to a café in downtown Vancouver. RP 203-204, 235. Bippes drank a few beers at the café; Brinkmeyer did not drink any alcohol. RP 204, 236. Brinkmeyer decided to drive them both home since Bippes had been drinking and they left his truck downtown. RP 204, 236. The weather was rainy and foggy that night. RP 205, 237. As Brinkmeyer drove past the Pioneer Street exit heading north on I-5 an animal ran out in front of the car. RP 205, 237. She swerved right to avoid the animal and her car spun out of control and crashed into the wire divider in the median. RP 205, 237. The car was totaled, but neither passenger suffered any injuries. RP 238.

The two exited the vehicle and gathered up their belongings. RP 206, 239. Brinkmeyer grabbed her purse and a gift bag given to her by a client and headed towards the nearest gas station. RP 239. She called her insurer to report the accident. RP 240. As they walked up to the ARCO AM/PM gas station, she knew a cab was on the way, so she pulled out a

pint of Tequila from the gift bag and started drinking it. RP 207, 239, 242. Once they got to the store, Bippes bought some coffee and they poured the rest of the Tequila into their drinks and tossed the bottle in the garbage. RP 242.

About an hour after the accident, Clark County Sheriff Deputy Taylor made contact with Brinkmeyer and Bippes at the AM/PM. RP 85, 242. Bippes identified himself as the passenger of the car wrecked in the I-5 median and indicated Brinkmeyer was the driver. RP 85. She explained that she was the driver and that an animal ran out in front of her causing her to lose control of the vehicle. RP 86. Deputy Taylor smelled a strong odor of intoxicants on her breath and her eyes appeared bloodshot. RP 86-87. She denied drinking and driving. RP 87, 243. Taylor did not ask her any other questions. RP 243.

Washington State Patrol Trooper Ortner arrived on scene and took over the investigation. RP 88, 135, 209, 243. Brinkmeyer voluntarily submitted to field sobriety tests. RP 138, 245. Three physical tests were administered which include the horizontal gaze nystagmus, walk and turn, and one-leg stand. RP 139-156. Then Trooper Ortner asked her if she would provide a voluntary breath sample on the portable breath test, to

which she agreed. RP 156. He showed her the results (.17) and she threw up her arms in disbelief because the trooper's demeanor was very accusing and he made her feel like she was guilty already. RP 245. The next thing she knew the trooper grabbed her arm so hard her head snapped back. RP 212, 246. Her instant reaction was to pull away because she was shocked that she was being attacked. RP 246. Deputy Taylor immediately responded to assist the trooper and they pulled her arms behind her back and lifted her feet off the ground. RP 213, 246. The officers slammed her face down onto the pavement. RP 213, 248. Bippes said it was the hardest thing he has ever had to watch and described the officers manhandling her. RP 213, 216. Brinkmeyer only weighs 120 pounds. RP 189. She sustained bruises on her elbow and arm, a burn on her face, and a ripped shirt. RP 248.

Trooper Ortner testified that after showing Brinkmeyer the PBT results, he asked her if she knew what the legal limit was and she said it was .08. RP 158. Then he said she turned and walked away. RP 158-159. The trooper advised her that she was under arrest for DUI. RP 159. She continued to walk away so he grabbed both of her wrists and pulled them behind her back. RP 159. She began to tense up and flail her arms when

Deputy Taylor came to his assistance. RP 159, 161. At that point, she pivoted her lower body and kned Deputy Taylor in the groin. RP 95, 161. Deputy Taylor was upset and wanted to take her to the ground. RP 162. They kicked her legs out from under her and took her to the ground. RP 162. Once on the ground, she kept kicking with her legs. RP 162. She was handcuffed and placed in leg restraints. RP 217, 249. While Brinkmeyer was face down on the ground, Trooper Ortner threatened to pepper spray her in the eyes. RP 217, 249. She was then stuffed in the back seat of the patrol car and transported to the Clark County Jail. RP 250.

After she was booked into the jail Brinkmeyer sought medical attention, and her arm was placed in a sling. RP 268.

**B. Procedural history.**

An information charging one count of assault in the third degree and one count driving while under the influence was filed on April 13, 2005. CP 4. A jury trial convened before the Honorable John P. Wulle on November 7, 2005.

On November 8, 2005, Brinkmeyer was acquitted on the charge of driving under the influence and convicted of third degree assault. RP 345.

She was sentenced on November 14, 2005 to a term of 60 days (30 days work crew, 30 days work release) with fines, costs and standard probationary conditions. CP \_\_\_\_\_. She timely appealed and remains free on conditions pending disposition by this Court.

### **III. ARGUMENT**

- A. **Where the trial court instructed the jury that “[t]he use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured” without expressly allocating the burden of proof, the state was relieved of its burden of proving every necessary fact of the crime of assault in the third degree beyond a reasonable doubt, and the defendant was denied her right to due process of law and a fair trial.**

In a criminal prosecution, due process requires the state to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. Redwine, 72 Wn. App. 625, 629, 865 P.2d 552 (1994).

“Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” State v.

Rodriguez, 121 Wn.App. 180, 184-185, 87 P.3d 1201 (2004). The Washington Supreme Court subjects self-defense instructions to more rigorous scrutiny. Id. Jury instructions on self-defense must more than adequately convey the law. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997) (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. Id. “A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” Id. Under RAP 2.5(a), manifest error affecting a constitutional right may be raised for the first time on appeal.

It is a defense to the charge of assault in the third degree that the force used was lawful. It is a long-standing rule in Washington that a criminal assault requires *unlawful force*. Acosta, 101 Wn.2d at 619. The state must disprove self-defense in order to prove that the defendant acted unlawfully. Id. at 616.

The trial court failed to instruct the jury on the state’s burden of disproving self-defense. All parties agreed on the following instruction:

The use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a

person who is actually about to be seriously injured. CP \_\_\_  
(Instruction No. 6); RP 278-291. Appendix D.<sup>1</sup>

The language was extracted from WPIC 17.02.01 Lawful Force–Resisting Detention. Washington Supreme Court Committee on Jury Instructions, Washington Pattern Jury Instructions: Criminal vol.11, 154 (2d ed. West Publishing Co. Supp. 2005) (WPIC); Appendix F. However, the burden of proof was conspicuously missing from the instruction given by the court. The state wanted to define “unlawful force” without having the burden of proving it. RP 283.

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<sup>1</sup> The state initially proposed the following instruction to which defense counsel objected:

The use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured. Further, a reasonable but mistaken belief that the person was about to be seriously injured or that the person was entitled to protect himself from such danger is insufficient, the person must actually be about to be seriously injured before force may be used upon or toward a uniformed police officer performing his official duties. State v. Ross, 71 Wn. App. 837, 840 (1993); State v. Holeman, 103 Wn.2d 426 (1985); State v. Valentine, 75 Wn. App. 611 (1994), aff’d, 132 Wn.2d 1, 935 P.2d 1294 (1997). CP \_\_\_; RP 226. Appendix E.

In State v. Acosta, the Washington Supreme Court noted the importance of expressly allocating the burden on the state to prove unlawful force:

[T]he jury was not told in the “to convict” instruction that the force used must be unlawful, wrongful, or without justification or excuse. In addition, from the placement of the self-defense instruction immediately *after* the instruction listing the elements that must be proved by the State, the jury could have believed by negative inference that the State had no burden with respect to self-defense. 101 Wn.2d at 623.

In the case at bench, the “to convict” instruction which states the elements that the state must prove beyond a reasonable doubt did not mention unlawful force as one of those elements. CP \_\_\_ (Instruction No. 4); Appendix B. The instruction immediately following the “to convict” instruction did define assault as requiring unlawful force, but did not indicate which party had the burden of proving unlawful force. CP \_\_\_ (Instruction No. 5); Appendix C. As previously discussed, instruction No. 6 attempted to define unlawful force but did not expressly place the burden on the state.

In State v. Redwine, the court held an incomplete self-defense instruction, which failed to place the burden of disproving self-defense on

the state, was reversible error. 72 Wn. App. at 625. Similar to the case at bench, the jury instructions defined unlawful force in a separate instruction following from the one setting out the elements that the state must prove beyond a reasonable doubt. Id. at 630.

**B. Agreement to a jury instruction that relieved the state of its burden to prove the defendant acted with unlawful force was the result of ineffective assistance of counsel, therefore does not preclude review.**

Defense counsel did not request a self-defense instruction in this case; he simply acquiesced to the state's modified instruction incorporating part of the uniform instruction on self-defense.<sup>2</sup> Nevertheless, if the court is inclined to consider instruction No. 6 as one requested by the defendant, the invited error doctrine does not preclude review in this case. In State v. Rodriguez, the court explained when error is invited:

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<sup>2</sup> The record does not show that defense counsel proposed any jury instructions at trial RP 224.

Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm. *Here, however, defendant maintains that any error that occurred was the result of ineffectiveness of counsel and therefore the invited error doctrine does not apply.* Review is not precluded where invited error is the result of ineffectiveness of counsel. 121 Wn. App. at 184.

In the case at bench, defense counsel agreed to a jury instruction that relieved the state of their burden which was the result of ineffective assistance of counsel.

**C. The defendant was denied effective assistance due to the failure of counsel to (1) except to the court's instruction No. 6 to the jury, and (2) offer a self-defense instruction.**

To demonstrate ineffective assistance of counsel, a defendant must show: (1) defense counsel's representation was deficient, and (2) defense counsel's deficient representation prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Representation is deficient if it fell below an objective standard of reasonableness based on consideration of all the circumstances. Rodriguez, 121 Wn. App. at 184. The defendant was prejudiced if there is a reasonable probability that, except for counsel's unprofessional errors, the

BRIEF OF APPELLANT - 12

result of the proceeding would have been different. McFarland, 127 Wn.2d at 334.

Courts engage in a strong presumption counsel's representation was effective, but the presumption can be overcome by showing deficient representation. Id. at 336. The defendant can prove deficiency by showing an absence of legitimate strategic or tactical reasons supporting the challenged conduct. Id.

In Rodriguez, the court gave the self-defense instructions requested by the defendant. 121 Wn. App. at 184. The self-defense instruction used the language, "in actual danger of *great bodily harm*," a term which was defined for the jury in terms of assault in the first degree. Id. at 186. Therefore, by defining great bodily injury to exclude ordinary batteries, a reasonable juror could read the instruction to prohibit consideration of the defendant's subjective impressions of all the facts and circumstances, like whether the defendant reasonably believed the battery at issue would result in great personal injury. Id. The court held the flawed instruction reduced the burden on the state to disprove self-defense. Id. at 182. The court found defense counsel's performance deficient because they could not conceive of any strategy or tactic that would advance the defendant's

position at trial where the net effect was to decrease the state's burden to disprove self-defense. Id. at 187.

In the case at bench, defense counsel agreed to submit instruction No. 6 to the jury. The court's instruction erroneously reduced the burden on the state to prove all elements of assault in the third degree. Specifically, the court did not place the burden on the state to prove unlawful force, which is a necessary element of the crime charged. As in Rodriguez, counsel's performance was deficient because there is no conceivable tactic or strategy justifying an instruction reducing the state's burden of proof.

**D. The defendant produced sufficient evidence to require instruction on self-defense.**

To be entitled to instruction on self-defense the defendant must produce *some* evidence, whereupon the burden shifts to the prosecution to prove the absence of self-defense beyond a reasonable doubt. Walden, 131 Wn.2d at 474; State v. Marquez, 131 Wn. App. 566, 127 P.3d 786 (2006) (the defendant need only prove "any evidence" of self-defense). A trial court determines whether there is sufficient evidence to instruct the jury on self-defense by reviewing the entire record in the light most favorable to the

defendant, with particular attention to those events immediately preceding and including the alleged criminal conduct. State v. Callahan, 87 Wn. App. 925, 933, 943 P.2d 676 (1997). Self-defense may be based upon facts inconsistent with the defendant's own testimony because she is entitled to the benefit of all the evidence. Id.

Turning to the facts in the case at bench, Brinkmeyer only weighs 120 pounds, and she testified that she was brutally attacked by the officers. RP 189, 246, 248. Both officers testified that she intentionally struck Deputy Taylor only after they forcefully grabbed her and attempted to restrain her. RP 95, 161. Bippes observed her head snap back when the trooper first grabbed her and pulled her arms behind her back. RP 212. He said they were manhandling her. RP 213. Brinkmeyer's feet were suspended in the air and she was forced onto the pavement face-first. RP 214-215; 246-248. Her arm was injured during the arrest, and she also sustained a burn on her face and a ripped shirt. RP 248, 268. The prosecutor clearly thought some evidence existed to support a claim of self-defense since he proposed the instruction defining unlawful force. RP 226-227. The trial judge agreed, and instructed counsel to propose appropriate instructions. RP 281-282. Thus, the record clearly contains evidence sufficient to have required instruction on the issue of self-defense.

**E. Failure to allocate the burden of proof to the state to disprove self-defense constituted a misstatement of the law which cannot be characterized as harmless.**

A misstatement of the law is presumed prejudicial to the defendant. Walden, 131 Wn.2d at 478. “An instructional error is harmless only if it ‘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.*’” Walden, 131 Wn.2d at 478.

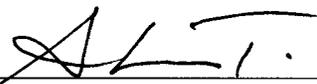
The trial court’s instructions are as important to the jury as a road map is to a traveler in a foreign land. A failure to include critical information can only create confusion and may cause either to lose their way.

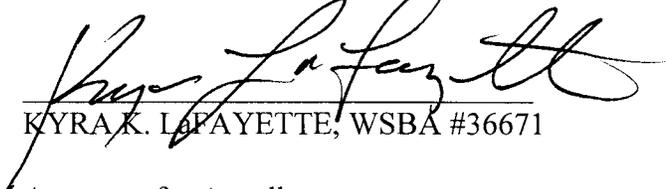
Instruction No. 6 misstated the law of self-defense by failing to allocate the burden of proof on the issue of self-defense. A reasonable juror easily could have mistakenly imputed to the defendant the burden of proving that the force she used was lawful. See Redwine, 72 Wn. App. at 631. Consequently, the error in this case increased the likelihood of conviction, and cannot be considered harmless.

#### IV. CONCLUSION

Based upon the foregoing arguments and authorities, Brinkmeyer's conviction and sentence on the charge of assault in the third degree should be reversed, and this case remanded for a new trial.

DATED this 19<sup>th</sup> day of May, 2006.

  
\_\_\_\_\_  
STEVEN W. THAYER, WSBA #7449

  
\_\_\_\_\_  
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Attorneys for Appellant

INSTRUCTION NO. 3

A person commits the crime of assault in the third degree when he or she assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.

APPENDIX A

INSTRUCTION NO. 4

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about April 7, 2005, the defendant assaulted Ryan Taylor;

(2) That at the time of the assault Ryan Taylor was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and

(3) That the defendant knew at the time of the assault that Ryan Taylor was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 5

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 6

The use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured.

APPENDIX D

INSTRUCTION NO. \_\_\_\_\_

The use of force upon or toward a uniformed police officer performing his official duties is only lawful when used by a person who is actually about to be seriously injured. Further, a reasonable but mistaken belief that the person was about to be seriously injured or that the person was entitled to protect himself from such danger is insufficient, the person must actually be about to be seriously injured before force may be used upon or toward a uniformed police officer performing his official duties.

State v. Ross, 71 Wn. App. 837, 840 (1993)

State v. Holeman, 103 Wn.2d 426 (1985)

State v. Valentine, 75 Wn. App. 611, (1994), aff'd, 132 Wn.2d 1, 935 P.2d 1294 (1997).

## WPIC 17.02.01

LAWFUL FORCE—RESISTING DETENTION  
[RETTLED, REPLACEMENT]

It is a defense to a charge of \_\_\_\_\_ (fill in crime) \_\_\_\_\_ that force [used] [attempted] [offered to be used] was lawful as defined in this instruction.

A person may [use] [attempt to use] [offer to use] force [to resist] [to aid another in resisting] an arrest [by someone known by the person to be a [police] [correctional] officer] only if the person being arrested is in actual and imminent danger of serious injury. The person [using] [or] [offering to use] the force may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the force [used] [attempted] [offered to be used] by the defendant was not lawful. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

## COMMENT [Replacement]

This instruction is based on State v. Holeman, 103 Wn.2d 426, 693 P.2d 89 (1985) and State v. Westlund, 13 Wn.App. 460, 536 P.2d 20 (1975). In *Holeman*, the state Supreme Court, adopting the holding of the Court of Appeals in *Westlund*, held that an arrestee may not resist an arrest, and a bystander may not intervene on the arrestee's behalf, unless the arrestee is actually about to be seriously injured or killed. See also State v. Ross, 71 Wn.App. 837, 863 P.2d 102 (1993); State v. Bellman, 70 Wn.App. 778, 783, 856 P.2d 403, 406 (1993); State v. Cyrus, 66 Wn.App. 502, 508, 832 P.2d 142, 145, n. 11 (1992). In State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294, 1304 (1997), the court reiterated its support of *Westlund* and *Holeman*. "[A]lthough a person who is being unlawfully arrested has a right . . . to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not use force against the arresting officer if he or she is faced only with a loss of freedom."

## LAWFUL FORCE

## WPIC 17.02.01

In *Holeman* the court stated that the rule applied regardless of whether the arrest was lawful or unlawful. The court has more recently stated, however, that an arrestee charged with assault upon a law enforcement officer "must show that there was an imminent threat of serious physical harm in connection with an unlawful arrest in order to establish legitimate use of force in self-defense." State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286, 294 (1995), citing, *inter alia*, citing RCW 9A.16.020(3) and State v. Hornaday, 105 Wn.2d 120, 713 P.2d 71 (1986). The cited statute provides that the use of force "by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person . . . in case the force is not more than is necessary" is lawful. *Hornaday* makes clear that the basis for the defense is that an illegal arrest is an assault, which may be resisted as such. 105 Wn.2d at 130, 713 P.2d at 78.

While it may be argued from the language used that the court intended to limit the availability of any self defense instruction in a detention situation to cases of unlawful arrest, the court also cites City of Seattle v. Cadigan, 55 Wn.App. 30, 776 P.2d 727, review denied, 113 Wn.2d 1025, 782 P.2d 1069 (1989). In *Cadigan* the court held, citing *Westlund*, supra, "In a lawful arrest, the arrestee may not use physical force against the arresting officer unless the use of excessive force by the officer places the arrestee in actual danger of serious injury." 55 Wn.App. at 37, 776 P.2d at 731. See also State v. Ross, supra, 71 Wn.App. 837, 863 P.2d 102 (upholding application of WPIC 17.04 to arrestee resistance of excessive force during lawful arrest).

Issues relating to the lawfulness of the arrest and the degree of force used by the arresting officer are not raised in this pattern instruction. However, in certain circumstances, instructions may need to be drafted addressing these issues in light of specific factual questions submitted to the jury. Attention must be paid to the elements of the charged offense. "The lawfulness of an arrest only becomes a jury question if the issue is injected into the trial by reason of the charging language of the information, as, for example, when a defendant is charged with resisting 'lawful' apprehension." State v. Hoffman, 116 Wn.2d 51, 97-98, 804 P.2d 577, 602 (1991). See the Comment to WPIC 120.06, Resisting Arrest.

The phrase "and imminent" has been added to further qualify "actual danger," on the basis of the characterization of the rule in *Mierz*. The Committee does not believe that in the context of the instruction there is a distinction between "danger" and the term "threat" as used by the court.

An unlawful or excessive force arrest may be resisted only by force which is "reasonable and proportioned to the injury attempted on the party sought to be arrested." *Hornaday*, 105 Wn.2d at 130, 713 P.2d at 78. See also State v. McCrorey, 70 Wn.App. 103, 851 P.2d 1234, review denied 122 Wn.2d 1013, 863 P.2d 73 (1993). As noted above, the use of

**WPIC 17.02.01**

**DEFENSES**

any force to prevent an arrest which threatens only a loss of freedom is not reasonable. *Hornaday*, supra, citing *State v. Goree*, 36 Wn.App. 205, 673 P.2d 194 (1983), review denied 101 Wn.2d 1003 (1984). See also *State v. Valentine*, supra, *State v. Crider*, 72 Wn.App. 815, 866 P.2d 75 (1994).

The phrase "known by the person to be a [police] [correctional] officer" has been bracketed in the instruction on the basis of the holding in *State v. Belleman*, supra, that there was no requirement the defendant know the arresting person is a police officer for the limitation on the self defense rule to be operative. The *Belleman* case involved a prosecution under RCW 9A.36.031(1)(a) requiring the "intent to resist ... lawful apprehension or detention." In this context, the court was able to make the legal determination that it was a lawful arrest and, therefore, only the issue of the defendant's intent to resist it remained for the jury. The court reasoned that this was simply a variation of the rule that there is no requirement that the defendant know the arrest was lawful, citing *State v. Goree*, supra. Indeed, the principles have been held to be applicable to any detentions on the basis of RCW 9A.36.031(1)(a), including those by store employees. *State v. Jones*, 63 Wn.App. 703, 821 P.2d 543, review denied 118 Wn.2d 1028, 828 P.2d 563 (1992). In view of this, the title has also been changed to substitute "Detention" for "Police Officer or Correctional Officer."

The limitation on the right to self defense generally applicable in the typical resisting arrest setting may still, however, not apply in a prosecution under RCW 9A.36.031(1)(g) (assault on an officer performing official duties) which has no specific intent requirement. In a prosecution under subsection (g) when there is a question about whether the defendant knew the would-be detainer was an officer, the usual subjective standard for self defense may still be applicable. This analysis would appear consistent with the logic of the holding of *State v. Allen*, 67 Wn.App. 824, 840 P.2d 905 (1992), questioned in *State v. Tunney*, 129 Wn.2d 336, 339, n. 2, 917 P.2d 95, 96, n. 2 (1996), that conviction under this statute requires proof of the defendant's knowledge that the person assaulted was a law enforcement officer engaged in performing official duties. See WPIC 35.23.02, Assault—Third Degree—Law Enforcement Officer—Elements.

The paragraph referring to the burden of proof is based upon *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984). In *Acosta*, the court held that the State has the burden of proving the absence of self defense in prosecutions for assault. See also *State v. Valentine*, supra.

[*Current as of 1998 Pocket Part.*]

**LAWFUL FORCE**

**WPIC 17.04**

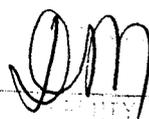
**WPIC 17.04  
LAWFUL FORCE—ACTUAL DANGER  
NOT NECESSARY**

**COMMENT [Addition]**

It is not appropriate to give this instruction when self defense is asserted in the context of resisting an unlawful or excessive force arrest. See the Comment to WPIC 17.02.01, Lawful Force—Resisting Detention. [*Current as of 1998 Pocket Part.*]

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STA.  BY \_\_\_\_\_

**IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,	)	
	)	No. 34059-3-II
Plaintiff,	)	
	)	
vs.	)	DECLARATION OF SERVICE
	)	
RENEE L. BRINKMEYER,	)	
	)	
Defendant/Appellant	)	
_____	)	

I declare that on May 19, 2006, a true copy of the Brief of Appellant and Report of Proceedings was deposited in the U.S. Mail, postage prepaid and addressed as follows:

James David  
Deputy Prosecuting Attorney  
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Vancouver, WA 98660

I further declare that on May 19, 2006, a true copy of the Brief of Appellant was deposited in the U.S. Mail, postage prepaid and addressed as follows:

Renee Brinkmeyer  
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Vancouver, WA 98660

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington this 19<sup>th</sup> day of May, 2006.



—  
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