

FILED
COURT OF APPEALS
10 OCT -2 PM 12:53
STATE OF WASHINGTON
BY 

No. 34059-3-II

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

STATE OF WASHINGTON, Respondent,

v.

RENEE L. BRINKMEYER, Appellant.

REPLY BRIEF OF APPELLANT

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P.M. 9-29-06

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I. REPLY TO BRIEF OF RESPONDENT

A. Self-defense was an issue in this case and, as a result, defense counsel had an obligation to ensure the jury was properly instructed.

The State argues that failure to properly instruct the jury on self-defense was unnecessary because defense counsel did not argue that theory at trial. However, the issue was *factually* before the jury because the defendant testified 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 and the trooper pulled her arms behind her back, lifted her feet off the ground, and slammed her face into the pavement, RP 213, 246, 248; she only weighs 120 pounds, RP 189; and she sustained bruises on her elbow and arm, a burn on her face, and a ripped shirt, RP 248.

Mark Bippes testified it was the hardest thing he ever had to watch and described the officers manhandling her. RP 213, 216.

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

The issue was also before the jury *legally* as a result of the Court's

Instruction No. 6, which was abstracted from WPIC 17.02.01, defining lawful force in the context of resisting detention. While the Court was reluctant to characterize it as a self-defense instruction, the record clearly shows that the Court was concerned that the defendant's testimony described excessive force and recognized a need to instruct the jury accordingly. For example, at RP 281-82:

THE COURT: Isn't that your client's testifying (sic), or did I not hear her testify the officers slammed her to the ground? using - -

MR. PHILBROOK: Correct, that's - -

THE COURT: Which I interpret to be excessive force.

MR. PHILBROOK: Right. Right.

THE COURT: When two large males - - I don't know the weight of the two officers, but they're - -they're - -big guys - -

MR. PHILBROOK: Uh-huh.

THE COURT: - - take a woman who the testimony indicates is 120 pounds, five foot two, I believe it is - - (To witness:) You don't need to answer, ma'am.

But the - - and - - and place her on the ground to where she's saying she got injured and torn shirt. That sounds like there's an implication of excessive force.

MR. PHILBROOK: Uh-huh.

THE COURT: And their response to that was is that she was flailing at her (sic). So that begs the question that the jury needs to be able to interpret and have some guidance under the law how to interpret the testimony of one side of the case versus the other on whether or not her resistance was appropriate under the use of excessive force, or whether their -- their testimony indicates they placed her on the ground was in response to her resistance.

So I think we need to give the jury some kind of guidance on that.

Having participated in submission of Instruction No. 6 to the jury, defense counsel had an obligation to ensure that the burden of proof on the issue was properly allocated to the State as required by our self-defense jurisprudence. See State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984); State v. Redwine, 72 Wn.App. 625, 865 P.2d 552 (1994). Counsel's performance was fundamentally deficient initially in failing to ensure that Instruction No. 6 allocated the burden of proving self-defense to the State, and secondarily in omitting to except to an instruction that relieved the State of the burden of proving self-defense. Regardless of trial strategy, since the issue was before the jury, counsel had an obligation to ensure that the jury was properly instructed since the jury is empowered to resolve the case on any theory supported by the record. Counsel failed to do so in this case.

B. The record contains sufficient evidence of self-defense.

The Defendant was entitled to an instruction on self-defense, despite the state's argument to the contrary. At trial the state recognized that the lawfulness of the assault was an issue, which is why the *State* submitted a self-defense instruction. In addition, the court agreed an instruction defining "lawfulness" would be helpful to the jury. RP 281-82. Any time two men throw a 120 pound woman on the ground she faces imminent risk of serious injury by any definition. RP 281-82. Whether her belief of imminent harm was reasonable is a question for the jury to decide. The trial court only needed to make a threshold determination that the record contained *some* evidence of self-defense. See State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 237 (1997). Certainly that standard was met here, as acknowledged by the Trial Court. RP 281-82.

C. **It is irrelevant whether the trial court characterized Instruction No. 6 as something other than a self-defense instruction.**

Jury instructions misstating the law of self-defense are presumptively prejudicial. See Walden, 131 Wn.2d at 473. The Court's Instruction No. 6 is extracted from WPIC 17.02.01 (Lawful Force - Resisting Detention), and undeniably put the issue of self-defense before the jury without properly allocating the burden of proof to the State as required by law. State v. Acosta, 101 Wn.2d at 615; State v. Redwine, 72 Wn.App. at 629.

D. **An acquittal on the charge of DUI does not negate the fact that counsel's performance was deficient and prejudicial regarding the assault charge.**

The State contends that counsel's performance could not have been deficient because defendant was acquitted on the DUI charge, ignoring the fact that the issue is whether counsel's performance was deficient at any point during the trial in a manner that prejudiced the defendant, see State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995), and that the failure of Instruction No. 6 to properly allocate the burden of proof to the State is presumptively prejudicial as a matter of law. State v. Walden, 131 Wn.2d at 473.

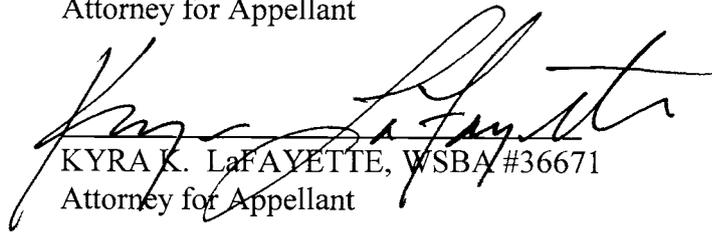
II. CONCLUSION

Based upon the foregoing argument and authorities, the defendant re-submits that her conviction and sentence on the charge of assault in the third degree should be reversed, and this case remanded for a new trial.

Respectfully submitted,



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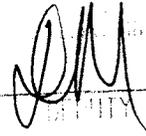


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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY:  CLERK

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 RENEE L. BRINKMEYER,)
)
 Appellant)
 _____)

No. 34059-3-II

DECLARATION OF SERVICE

I declare that on September 29, 2006, a true copy of the Reply Brief of Appellant was sent to the following by depositing same in the U.S. Mail, postage prepaid, in an envelope addressed as follows:

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Mr. David Ponzoha
Clerk of the Court
Washington Court of Appeals, Division II
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Tacoma, WA 98402-4454

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 29th day of September, 2006.



Betty Olesen, Legal Assistant