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STATE OF WASHINGTON  
BY \_\_\_\_\_  
ATTORNEY

NO. 37011-5-II  
Clark County No. 06-1-00359-4

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**TODD GAYLOR**

**Appellant.**

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**BRIEF OF APPELLANT**

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PM 7-2-08

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**A. ASSIGNMENTS OF ERROR**

**I. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MR. GAYLOR'S CONVICTION FOR ASSAULT IN THE THIRD DEGREE.**

**II. MR. GAYLOR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

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**II. MR. GAYLOR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED AN INSTRUCTION THAT MISSTATES THE LAW OF SELF DEFENSE AND THEREBY LOWERED THE STATE'S BURDEN OF PROOF.**

**C. STATEMENT OF THE CASE**

On November 20<sup>th</sup>, 2005 Mr. Todd Gaylor sought medical treatment for diabetes at Southwest Washington Medical Center. RP VIII, 67, 93. Mr. Gaylor was in Room 44 when Michael Jeffers, an ER technician, walked by his room and heard an exchange between Mr. Gaylor and a doctor whom he did not know. RP VIII, 69. Although accounts of this exchange varied among the witnesses, the Mr. Jeffers claimed he heard Mr. Gaylor state his intention to kill himself, and the doctor replied she couldn't help him with that and walked out of the room.

RP VIII, 69. Another witness, Katherine Scorvo, recalled that the doctor told Mr. Gaylor that if he didn't take his insulin and eat, that he was going to kill himself. RP VIII, p. 100. At that point Mr. Jeffers saw Mr. Gaylor reach up and grab his IV lines and rip them out of the bags and bottles. RP VIII, 70. The fluids began to leak onto the IV pump. RP VIII, 70.

Mr. Jeffers entered the room and grabbed the IV lines, which were still attached to Mr. Gaylor, and called for help. RP VIII, 70. According to Mr. Jeffers, Mr. Gaylor made the conditional threat that if they called a "Code Armstrong" or brought in restraints, "he would start gouging eyes out and he would grab the first female that he could grab." RP VIII, 71. At that point a Code Armstrong was paged on the PA system. RP VIII, p. 72. Security then entered the room with restraints. RP VIII, p. 72. When he saw the restraints Mr. Gaylor leapt off the gurney, removing his cardiac leads that were attached to his chest. RP VIII, p. 72. When Mr. Gaylor jumped off the gurney he was, Jeffers claimed, three feet from a female nurse. RP VIII, p. 73. Two witnesses other than Mr. Jeffers testified that when Mr. Gaylor jumped off the gurney he was running toward the door and attempting to leave the treatment room. RP VIII, p. 112, 120. Jeffers then reached across the gurney and grabbed Mr. Gaylor from behind and pulled him back to the gurney. RP VIII, p. 73. At that point a struggle ensued in which, Jeffers claimed, Mr. Gaylor poked him in the eye and bit

him. RP VIII, p. 73-74. (The jury, however, found Mr. Gaylor not guilty of assaulting Mr. Jeffers. CP 36.) After the struggle with Jeffers, security lifted Mr. Gaylor onto the gurney and placed him in four point restraints. RP VIII, p. 77. Mr. Jeffers admitted that he didn't know if Mr. Gaylor came to the hospital voluntarily or not. RP VIII, p. 83.

After Mr. Gaylor was placed in four point restraints, a different nurse by the name of Katherine "Kem" Scorvo, who had been caring for Mr. Gaylor earlier in the evening, resumed care for Mr. Gaylor. RP VIII, p. 79, 89. Ms. Scorvo testified that she is a registered nurse at Southwest Washington Medical Center. RP VIII, p. 89. She testified that Mr. Gaylor had been in the Emergency Room several days before and that he returned because his sugar was high and he was suffering from depression. RP VIII, p. 94. On the November 20<sup>th</sup> visit, Mr. Gaylor's condition was not critical. RP VIII, p. 96. Ms. Scorvo cared for Mr. Gaylor after he was placed on the gurney with his arms and legs restrained. RP VIII, p. 104. According to Ms. Scorvo's account of what happened next, she used a syringe to insert Atavan into a vein in his arm. RP VIII, p. 104. Next, she claims she restarted his IV and subsequently re-checked his blood sugar. RP VIII, p. 104. Ms. Scorvo, who testified primarily from her notes and not from memory, believed that at some point later (about 3:30 a.m.) they stopped Mr. Gaylor's insulin drip so they could treat his hyperglycemia

another way. RP VIII, p. 105. She testified his agitation continued and he was given another two milligrams of Atavan in his IV tubing. RP VIII, p. 105-06. Ms. Scorvo claimed Mr. Gaylor then grabbed her hand and said "I'm going to hurt you," and that she then told him to let go and he replied "I won't let go, and you can't make me." RP VIII, p. 105. When pressed, Ms. Scorvo could not remember what she was doing at the time Mr. Gaylor grabbed her hand, and speculated she must have been close enough to Mr. Gaylor for him to grab her hand. RP VIII, p. 106.

Ms. Scorvo testified that it was her belief that Mr. Gaylor was not competent to refuse care and needed to be evaluated by a mental health professional. RP VIII, p. 112. It was her belief that until that could be accomplished "we are...mandated to provide care." RP VIII, p. 112. The clear implication from this testimony was that Ms. Scorvo believed Mr. Gaylor was not free to leave the Emergency Room. RP VIII, p. 111-12. Ms. Scorvo also testified that she had been told that the comment made by Mr. Gaylor's doctor that precipitated this entire incident was that Mr. Gaylor should "go ahead and kill himself." RP VIII, p. 113.

Ms. Adrian Weddle was working as a security guard for Metro Watch at Southwest Washington Medical Center on November 20<sup>th</sup>, 2005. RP VIII, p. 117. She was one of the participants in the Code Armstrong who placed Mr. Gaylor in restraints. VIII, p. 118. She recalled the

incident between Mr. Gaylor and Ms. Scorvo differently than Ms. Scorvo. RP VIII, p. 124. According to Ms. Weddle, who was in the room at the time, Mr. Gaylor grabbed Ms. Scorvo's hand when Ms. Scorvo was trying to re-secure his IV by taping it to his arm. RP VIII, p. 124. Mr. Gaylor, on the other hand, was trying to pull the IV out. RP VIII, p. 124. Mr. Gaylor bent his restrained hand upward and grabbed the palm of Ms. Scorvo's hand, digging his fingers into the palm of her hand. RP VIII, p. 124. Ms. Weddle estimated this lasted about thirty seconds. RP VIII, p. 126. Ms. Weddle also testified that she had been told by someone on the nursing staff that Mr. Gaylor was at the hospital involuntarily. RP VIII, p. 128.

Dr. Taylor, who treated Mr. Gaylor, had no recollection of the events of November 20<sup>th</sup>, 2005, and relied entirely upon her notes for her testimony. RP VIII, p. 134. She conceded, without remembering specifically, that she likely did not come across as particularly caring or compassionate. RP VIII, p. 134. Dr. Taylor testified that she believed Mr. Gaylor was at the hospital voluntarily. RP VIII, p. 141.

Mr. Gaylor testified that he recalled his interaction with Dr. Taylor. RP VIII, p. 150-51. He told her about how he was feeling and he remembers her being angry at seeing him back in the hospital after only a few days. RP VIII, p. 151. Mr. Gaylor remembers Dr. Taylor saying that

she wished he had killed himself so she wouldn't have to deal with him again, or words to that effect. RP VIII, p. 151. At that point, Mr. Gaylor decided he wanted a second opinion and decided to go to Legacy Emanuel Hospital. RP VIII, p. 151. Mr. Gaylor tore the IV line in half in front of Dr. Taylor and expected that she would explain to him how he could leave against medical advice. RP VIII, p. 151. Instead, Dr. Taylor simply turned and walked out the door. RP VIII, p. 151. Mr. Gaylor was concerned not only with Dr. Taylor's horrific attitude, but also with the fact that there may have been a mix-up with his lab work, leading the hospital to believe he had taken an overdose of aspirin when he, in fact, had not consumed any aspirin. RP VIII, p. 152. (Ms. Scorvo, indeed, confirmed that at some point Portland Poison Control was called because Mr. Gaylor had a high aspirin level, although Dr. Taylor found no information in her record indicating Mr. Gaylor had taken aspirin). RP VIII, p. 109-110, 143. Based on these things, Mr. Gaylor decided he "no longer wanted to get medical care from Southwest Washington Medical Center, and I wanted to be discharged and—and go to Legacy." RP VIII, p. 152.

When Mr. Gaylor tore the IV line, he testified that Mr. Jeffers saw that he did that and came into the room, yelling "Quick, get the straps, he tore his IV line in half." RP VIII, p. 154. At that point Mr. Gaylor sat up

and attempted to explain his intentions but it was clear Mr. Jeffers was not listening. RP VIII, p. 154. Because he was fearful that he was going to be given the wrong medicine he became fearful for his life and tried to leave. RP VIII, p. 154. When Mr. Gaylor heard the Code Armstrong called out he tried to run toward the door. RP VIII, p. 154. Mr. Gaylor was then assaulted by several staff members, including Jeffers, which ultimately concluded with Mr. Gaylor being strapped to a gurney in four point restraints. RP VIII, p. 157. Mr. Gaylor admitted to making general threats in an attempt to re-gain his freedom. RP VIII, p. 158.

After being strapped to the gurney, Ms. Scorvo came toward him to reinsert his IV. RP VIII, p. 158. Because Mr. Gaylor no longer wanted to receive treatment and because he believe he was about to be administered the wrong medicine, he grabbed and held onto Ms. Scorvo's hand in an effort to prevent her from reinserting the IV. RP VIII, p. 158. He recalled saying something to her, but can't recall what it was. RP VIII, p. 160. He couldn't recall how long he held Ms. Scorvo's hand, but as soon as she indicated he was hurting her he let go. RP VIII, p. 160. He testified: "I let go of her hand the instant it registered in my head that she said it was hurting her. Because I genuinely did not want to hurt anyone...but I do not know if it was seconds or minutes. It's hard for me to believe it was longer than ten seconds." RP VIII, p. 160.

The Clark County Prosecuting Attorney charged Todd Gaylor by Amended Information with Count I: Assault in the Third Degree against Katherine Scorvo, a nurse; Count II: Assault in the Third Degree against Michael Jeffers, a health care provider; Count III: Harassment (misdemeanor) against Katherine Scorvo; and Count IV: Harassment (misdemeanor) against Michael Jeffers. CP 2-3.

At trial, the Mr. Gaylor proposed the following instructions on self-defense which the court gave to the jury:

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

The use of force upon or towards the person of another is lawful when used by a person who reasonably believes that he is about to be injured and when the force is not more than necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

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

WPIC 17.02. CP 5.

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the

danger. Actual danger is not necessary for the use of force to be lawful.

WPIC 17.04. CP 6.

It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he is being attacked to stand his ground and defend against such attack by the use of lawful force. The law does not impose a duty to retreat.

WPIC 17.05. CP 7.

Necessary means that, under the circumstances as they reasonably appeared to the actor at the time, (1) no reasonably effective alternative to the use of force appeared to exist and (2) the amount of force used was reasonable to effect the lawful purpose intended.

WPIC 16.05. CP 8.

The court gave the following instructions which Mr. Gaylor did not propose, but did not object to (RP IX, p. 179):

Self-Defense is not available as a defense if the nurse or health care provider is performing his or her nursing or health care duties at the time of the alleged assault. If these duties have been terminated by the patient by rejection of treatment, the defense is available.

Instruction No. 15. CP 25.

No person may, by any intentional act reasonably likely to provoke a belligerent response, create a necessity for acting in self-defense or defense of another and thereupon use, offer, or attempt to use force upon or toward another person. Therefore, if you find beyond a reasonable doubt that the defendant was the aggressor, and that the defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

Instruction No. 16. CP 26.

Great bodily harm means bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ.

Instruction No. 24. CP 24.

The discussion of jury instructions, as usual, did not take place on the record beyond the taking of objections and exceptions (of which there were none by either party). RP XI, p. 179.

Mr. Gaylor was found guilty on Counts I, III, and IV, and found not guilty of Count II (assaulting Mr. Jeffers). CP 35-38. Mr. Gaylor was given a standard range sentences on each count. CP 39-60. This timely appeal followed. CP 62.

#### **D. ARGUMENT**

##### **I. THE STATE FAILED TO PROVE THE ABSENCE OF SELF DEFENSE BEYOND A REASONABLE DOUBT AND, AS SUCH, THE EVIDENCE IS INSUFFICIENT TO SUSTAIN THE CONVICTION FOR ASSAULT IN THE THIRD DEGREE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court

explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996). “Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

Where a defendant claims he acted in self-defense and presents some evidence in support, the *absence* of self-defense becomes an element of the crime that the State must prove beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *State v. Acosta*, 101 Wn.2d 612, 615-18, 683 P.2d 1069 (1984); *State v. McCullum*, 98 Wn.2d 484, 489-90, 656 P.2d 1064 (1983).

A person has both a common law right and a constitutional right to refuse medical intervention. *In re Colyer*, 99 Wn.2d 114, 119-21, 660 P.2d 738 (1983); *In re Ingram*, 102 Wn.2d 827, 838-39, 689 P.2d 1363 (1984); *In re Schuoler*, 106 Wn.2d 500, 723 P.2d 1103 (1986); *Smith v. Shannon*, 100 Wn.2d 26, 666 P.2d 351 (1983). This constitutional right to refuse medical intervention is rooted in the right of privacy guaranteed to all individuals by Article 1, Section 7 of the Washington State Constitution. *Colyer* at 119-21. .

In Mr. Gaylor’s case, the State failed to prove that Mr. Gaylor did not properly act in self defense. First, he had clearly and unequivocally rejected medical treatment at the time he grabbed Ms. Scorvo’s hand. Second, he did not act as the primary aggressor prior to grabbing Ms. Scorvo’s hand. Third, the force he employed was reasonable, minor, and

not more than necessary to defend himself. Each of these principles is discussed in turn below.

Prior to grabbing Ms. Scorvo's hand (the assault for which Mr. Gaylor was convicted), Mr. Gaylor had, without any doubt, rejected medical treatment. All of the witnesses except Mr. Jeffers agreed that prior to being tackled by Mr. Jeffers, Mr. Gaylor was attempting to leave by running for the door. Mr. Gaylor was not under arrest, and was not being held involuntarily pursuant to any legal authority. He presumably was competent (because if he wasn't, the State failed to prove he acted intentionally), and he had the absolute right to refuse medical care. He was free to leave the hospital no matter how foolish that might seem to an ordinary person. Mr. Jeffers had no right to decide for Mr. Gaylor that he could not leave, and no right to assault him (which is what he did). Mr. Gaylor was clearly rejecting medical care and the staff at Southwest Washington Medical Center had no legal authority to override that decision. When he ran for the door, as all of the credible witnesses agreed he did, Mr. Jeffers should have let him run. Instead, he tackled him and called for Mr. Gaylor to be tied down to a bed in four point restraints.

Because Mr. Gaylor had rejected treatment, any further invasion upon his body or his privacy, by restraint or administration of medication against his will, was unwanted and assaultive. He had a right to repel an

impending assault and to defend himself from assault. When Ms. Scorvo came at him to reinsert or re-anchor his IV, Mr. Gaylor was tied to a bed against his will. He was not asked his permission before Ms. Scorvo administered Atavan or before she came at him to reinstate his IV. His only defense was to grab her hand in an effort to repel her assault, and that is what he did.

Mr. Gaylor did not act as the primary aggressor either. To be the primary aggressor, Mr. Gaylor would have had to commit an act likely to produce a belligerent response and thereby create the need to act in self defense. The act likely to produce a belligerent response was committed by the hospital staff in overriding Mr. Gaylor's lawful revocation of medical treatment and then strapping him to a gurney in four point restraints. He did not create the need to act in self defense; it was created by the hospital staff who tackled him when he tried to leave the hospital and then tied his arms and legs to a gurney. Mr. Gaylor not only had the right to leave that hospital but he had the continuing right to refuse medication and treatment. At the time Mr. Gaylor grabbed Ms. Scorvo's hand, she was either reinserting or re-anchoring his IV and Mr. Gaylor believed she was about to administer him more medication against his will (in addition to the Atavan she had already given him without his consent). Mr. Gaylor believed that the hospital was under the mistaken impression

he had taken an overdose of aspirin and he didn't want any medication administered to him. He was fearful that his health or life was in danger from the negligent care he believed he was receiving and he wanted to go to another hospital, as is his right. His act of grabbing Ms. Scorvo's hand was not an act likely to produce a belligerent response but in fact an act done in self defense. He had no other recourse, given that his hands and legs were tied to a gurney, than to grab Ms. Scorvo's hand when she came at his IV.

Last, Mr. Gaylor's action in grabbing Ms. Scorvo's hand constituted reasonable force. Mr. Gaylor was entitled to employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person at the time. RCW 9A.16.020 (3). Here, the force employed was reasonable if not outright minimal. He merely grabbed Ms. Scorvo's hand, the only thing he could do to defend himself from the assault he reasonably believed he was about to suffer.

The evidence here was insufficient to find that the State disproved self-defense beyond a reasonable doubt and Mr. Gaylor's conviction for Assault in the Third Degree should be reversed and dismissed.

**II. MR. GAYLOR WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PROPOSED AN INSTRUCTION THAT MISSTATES THE**

**LAW OF SELF DEFENSE AND THEREBY LOWERED  
THE STATE'S BURDEN OF PROOF.**

Defense counsel proposed the so-called “act on appearances”

instruction which reads as follows:

A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

This instruction is found in WPIC 17.04. The “act on appearances” instruction is a misstatement of the law of self defense. *State v. Woods*, 138 Wn.App. 191, 156 P.3d 309, 313 (2007); *State v. Walden*, 131 Wn.2d 469, 932 P.2d 1237 (1997). The Supreme Court held in *Walden* that the use of this “act on appearances” instruction was error because the instruction required the actor to fear “great bodily injury” in order to act on appearances, however such fear is not required. *Walden* at 475-77. Rather, one can fear a simple battery when acting on appearances, even when that belief turns out to be mistaken. *Id* at 477. As such, use of this instruction was reversible error because it failed to make the relevant legal standard for self-defense manifestly apparent to the average juror. *Id.* at 473. As the *Walden* court held, self-defense instructions must be given higher scrutiny than other jury instructions. Specifically, the *Walden* Court held that “Jury instructions on self-defense must more than

adequately convey the law...Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. *Walden* at 473, citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996); *State v. Irons*, 101 Wn.App. 544, 4 P.3d 174 (2000). This instruction should not be used, even in homicide cases, because it erroneously requires the actor to believe he is in danger of great bodily harm. *Woods* at 313.

At least one case has held that use of this instruction would not necessarily be error so long as the level of harm is defined for the jury. *State v. Rodriguez*, 121 Wn.App. 180, 87 P.3d 1201 (2004). In *Rodriguez*, the Court held that this definition is found at WPIC 2.04.01 which defines “Great Personal Injury” as injury that would produce severe pain and suffering. *Rodriguez* at 478. It appears that the holding in *Rodriguez*, which instructs us to use a separate instruction defining “Great Personal Injury” when the “act on appearances” instruction is used, contradicts the holding in *Walden* which holds that such a high level of fear is not required (fear of simple battery is enough). Here, the court instructed the jury on great bodily harm, not great personal injury, and in any event the act on appearances instruction is purely erroneous no matter what level of harm is defined. Under the law of self defense in the State of Washington fear of simple battery is enough. *Walden* at 475-77. Use of this

instruction was therefore error because the jury was left with the impression that Mr. Gaylor was required to have a higher level of fear than the law requires before acting in self-defense against Ms. Scorvo. Thus, the State's burden of proof was lowered and the instructions failed to make the relevant legal standard on self-defense manifestly apparent to the jury.

In *Woods*, supra, Division III reversed the defendant's conviction for assault in the third degree, holding that the defendant receive ineffective assistance of counsel where his attorney proposed the "act on appearance instruction." *Woods* at 313. In *Woods*, the Court noted that an actor need only fear he is about to be injured and, as such, instructing the jury on either great bodily harm or great personal injury significantly raises the level of harm the jury needed to find in order to conclude the defendant acted in self defense. *Woods* at 314. Further, WPIC 17.04 (act on appearance) is inconsistent with the basic self defense instruction found at WPIC 17.02 (given in Mr. Gaylor's case as instruction No. 17). CP 5.

Further, the *Woods* Court held that defense counsel's proposal of this erroneous instruction should not bar relief for the defendant because defense counsel was ineffective in proposing this instruction. The invited error doctrine "generally forecloses review of an instructional error but does not bar review of a claim of ineffective assistance of counsel based

on such instruction.” *Woods* at 312, citing *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). “Proposing a detrimental instruction, even when it is a WPIC, may constitute ineffective assistance of counsel.” *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999).

Here, defense counsel was clearly ineffective for proposing an instruction that is not only totally unnecessary (self defense is adequately and accurately defined in WPIC 17.02, there is no need for further instruction), but made it *more difficult* for the jury to find that Mr. Gaylor acted in self defense. Further, Mr. Gaylor was prejudiced by defense counsel’s deficient performance. Self defense was the only defense in this case. The assault in question was de minimis, in that Mr. Gaylor’s hand was strapped to a gurney and his only recourse to prevent Ms. Scorvo from further assaulting him was to grab her hand, albeit briefly. Although the jury could easily have concluded Mr. Gaylor was in fear that Ms. Scorvo was about to commit a simple battery upon him by re-anchoring or re-inserting his IV, or injecting more medicine into him, it is unlikely they concluded that he feared great bodily injury, which was defined for them as bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ. This is an extremely high standard that is unlikely to be met in cases other

than homicides or serious assaults, and certainly was not met here.

Because Mr. Gaylor need only have feared simple battery to avail himself of his right of self defense, it cannot be said that the outcome of this trial would have been the same had the jury been correctly instructed on self defense and Mr. Gaylor's conviction for assault in the third degree should be reversed and his case remanded for a new trial.

**E. CONCLUSION**

Mr. Gaylor's conviction for Assault in the Third Degree should be reversed and dismissed due to insufficient evidence. Alternatively, his conviction for Assault in the Third Degree should be reversed due to ineffective assistance of counsel and his case remanded for a new trial.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of July, 2008.



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ANNE M. CRUSER, WSBA# 27944  
Attorney for Mr. Gaylor

COURT OF APPEALS  
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DEPUTY

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

STATE OF WASHINGTON, )  
 ) Court of Appeals No. 37011-5-II  
 ) Clark County No. 06-1-00359-4  
 Respondent, )  
 )  
 vs. )  
 ) AFFIDAVIT OF MAILING  
 TODD GAYLOR, )  
 )  
 Appellant. )  
 \_\_\_\_\_ )

ANNE M. CRUSER, being sworn on oath, states that on the 2<sup>nd</sup> day of June 2008,  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

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AND

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Tacoma, WA 98402-4454

AND

Mr. Todd Gaylor  
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