

COURT OF APPEALS
DIVISION II

NO. 37011-5-II

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

STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON, Respondent

v.

TODD GAYLOR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00359-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. STATEMENT OF THE FACTS1
II. RESPONSE TO ASSIGNMENT OF ERROR NO. 113
III. RESPONSE TO ASSIGNMENT OF ERROR NO. 222
IV. CONCLUSION25

TABLE OF AUTHORITIES

Cases

<u>Chapman v. California</u> , 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).....	24
<u>In Re Personal Restraint of Colyer</u> , 99 Wn. 2d 114, 122, 660 P.2d 738 (1983)	16, 19
<u>McNabb v. Department of Corrections et al</u> , 163 Wn.2d 393 180 P.3d 1257 (2008).....	17
<u>State v. Adams</u> , 31 Wn. App. 393, 641 P.2d 1207 (1992)	21
<u>State v. Callahan</u> , 87 Wn. App. 925, 929, 943 P.2d 676 (1997)	23
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	20
<u>State v. Currie</u> , 74 Wn.2d 197, 198 – 199, 443 P.2d 808 (1968)	21
<u>State v. Eaker</u> , 113 Wn. App. 111, 120, 53 P.3d 37 (2002)	24
<u>State v. Green</u> , 94 Wn.2d 216, 220 – 222, 616 P.2d 628 (1980).....	22
<u>State v. Jones</u> , 117 Wn. App. 221, 232, 70 P.3d 171 (2003).....	23
<u>State v. Lynn</u> , 67 Wn. App. 339, 345, 835 P.2d 251 (1992)	23
<u>State v. McCullum</u> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	20
<u>State v. Partin</u> , 88 Wn.2d 899, 906 – 907, 567 P.2d 1136 (1977).....	22
<u>State v. Read</u> , 147 Wn.2d 238, 243, 53 P.3d 26 (2002)	25
<u>State v. Robbins</u> , 138 Wn.2d 486, 495, 980 P.2d 725 (1999)	21
<u>State v. Roberts</u> , 88 Wn.2d 337, 562 P.2d 1259 (1977)	20, 21
<u>State v. Walden</u> , 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).....	21, 24
<u>State v. Walker</u> , 40 Wn. App. 658, 662, 7010 P.2d 1168 (1995).....	24

Statutes

RCW 9A.16.020	20
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I. STATEMENT OF THE FACTS

By Amended Information (CP 2) the defendant was charged with two counts of assault in the third degree and two counts of harassment as they related to an incident that took place at Southwest Washington Medical Center located in Vancouver, Clark County, Washington on or about November 20, 2005. The nature of the charges dealt with assaults against a nurse and an emergency room technician and also harassments dealing with those two individuals also.

Michael Jeffers testified that he worked for Southwest Washington Medical Center in the Emergency Department as an Emergency Department Technician (RP 66). He indicated that he had those duties on November 20, 2005, when he came in contact with the defendant who was a patient in the Emergency Room. He indicated that the contact in the Emergency department was at room 44 which is a critical care room. (RP 69). He recalls hearing the defendant tell his female doctor that he wanted to kill himself. He further indicated that at that point the doctor walked out of the room stating that she couldn't help him with that, that that was another person that he needed to see. He testified that as she left he reached up, grabbed his IV lines and ripped them out of the bags and the bottles. The fluids were leaking onto the IV pump which was running at

the time. Mr. Jeffers indicated that he entered the room at that point to stop the flow of the medications, get him away from the electrical equipment, and call for help. (RP 70).

When Mr. Jeffers was grabbing these items the defendant was still on the gurney in the middle of the room. He indicated that the defendant was making general statements that if “we called the Code Armstrong or brought restraints into the room, in those exact terms, that he would start gouging eyes out and he would grab the first female that he could grab.” (RP 71 L. 6 – 9). He made this general statement more than once and repeated the fact that he would grab the first female that he could grab. Mr. Jeffers indicated that this threat of violence concerned him. One of the reasons that it concerned him was that the primary nurse (a female) was standing directly to the right of him at the time with her back to him charting and recording information. (RP 71). As security came into the room with a box of restraints he was still making the threats. As soon as he saw the security officers walk in with the restraints he ripped his electrical leads, his cardiac leads off of his chest and jumped off of the gurney on the side that the nurse was on. (RP 72). Mr. Jeffers indicated to him that it was a felony to assault a health care worker but he continued to repeat the same threats again. Mr. Jeffers reached across the gurney, grabbed the defendant from behind and pulled him back to the gurney and

away from the nurse. (RP 73). He then went on to describe the altercation that he had with the defendant and how the defendant had tried to poke him in the eye with his finger and bite his hand. (RP 73 – 74).

When asked why he grabbed the defendant when he got off the gurney, Mr. Jeffers indicated “because he was lunging directly toward the primary nurse that was caring for him.” (RP 74 L. 17 – 18). Mr. Jeffers told the jury that as a result of the altercation, he had a split lip. (RP 76).

The State next called in its case in chief Katherine Scorvo. Ms. Scorvo is a registered nurse at Southwest Washington Medical Center in the Emergency Room and has been a registered nurse for forty years. (RP 89). She came in contact with the defendant on November 20, as part of her duties as a nurse. She testified that he had been there a couple of days before and that he had returned again because his blood sugar was high and he was depressed. She put in quotes that he said he was “too depressed to take care of myself.” (RP 94 L. 11 – 12).

She indicated that the first thing she did was she gave the defendant some sulfrand which is a medication for nausea. She indicated that it didn't have any other side effects. She rechecked his blood sugar and started an insulin drip in his IV to take care of the imbalance in the defendant's system. (RP 97). She indicated that everything appeared to be going fine. She had an ongoing friendly conversation with the defendant.

It appeared to change when Dr. Taylor saw him around 2:00. The defendant was saying that he was never going to eat again or take his insulin when he was talking to the doctor and the doctor told him that you're just going to have to go ahead and do it or you're going to kill yourself. It was at this point that the defendant ripped out his IV, pulled his EKG leads and caused people to issue the "Code Armstrong" which was meant to get people in there to protect the nurses and the patient from any type of harm. (RP 98 – 99). Although she wasn't in the room for some of the activity, she could see what was happening because the walls to the rooms were glass. She observed the wrestling match going on on the floor between the defendant and Mr. Jeffers. (RP 101). She indicated that for some reason the defendant was very angry, so much so that he was ripping out the IV's which usually is a painful experience (RP 102). She recalls that during the struggle the defendant was saying "I'm going to gouge out your eyes" (RP 102 L. 11 – 12).

After the defendant was put in restraints, nurse Scorvo continued to administer to him.

Q. (Deputy Prosecutor): All right. So he was then put on this bed, and then what's the next thing that happened involving you and Mr. Gaylor?

A. (Ms. Scorvo): Well, because of his agitation and all that had been going on, we gave him two milligrams of Atavan, which is a sedative.

And because he had ripped out his IV, I just gave him that in a syringe into a vein. He didn't have IV access at that time.

Q. All right.

A. A little plastic IV - -

Q. Uh- huh.

A. - - thing.

Q. Okay, What's the next thing that happened after you gave him this medication?

A. Then we needed to restart his IV because he still needed to have his insulin, which I did.

And also to - - his insulin and his IV fluids.

I rechecked his blood sugar, which was now down to 336. and at that time he was saying he was going to sue the hospital because we're supposed to protect him and also saying, "I don't care what you do, I'm not going to do my insulin or eat again, and that's your fault, and I'm going to do that again."

Q. All right. I can tell from watching you that you were reading from your notes again.

A. Yes.

Q. Is this a quote that you actually took from - -

A. Yes.

Q. - - Mr. Gaylor? Okay.

A. After he made this statement, what's the next thing that happened in terms of your involvement with Mr. Gaylor on this morning?

A. It is now 3:30 in the morning and we had stopped his insulin drip and we were going to take care of his hyperglycemia in a different manner because his blood sugar had been dropped and we don't want it to go down too fast.

His agitation continued, and he had another two milligrams of Atavan IV.

He was awake, he was alert, and at that point he grabbed my hand and said, "I'm going to hurt you." I told him to let go, and he said, "I won't let go, and you can't make me."

Q. All right. What were you doing at the time when he grabbed your hand?

A. I had given him his Atavan and, I don't know, I must have been close enough that he had ahold of my hand.

Q. All right. When you gave him his Atavan, did you give that using the IV tubing, or did you inject that again?

A. No, again, that was - - now that time it was in the IV tubing, so it was up and away from him.

Q. All right. So that's a - - is that an injection port somewhere in the - -

A. Yeah.

Q. - - IV tubing?

A. There's ports down the tubing.

Q. All right. So you were standing close to him; is that correct?

A. Yes.

Q. Which of your hands did he grab?

A. He grabbed my left hand.

Q. And did you have anything in the hand - -

A. No.

Q. - - at that point? Okay.

Do you remember what you were actually doing at the time he grabbed your hand?

A. No.

Q. Can you describe for the jury how he grabbed onto your hand?

A. He grabbed it like this with his hand and just squeezed and squeezed and squeezed (indicating).

Q. Okay. So you're demonstrating that he with his hand grabbed over the top of your hand?

A. Right.

Q. Okay. And he began to squeeze your hand?

A. Yes.

Q. How did that feel?

A. It hurt.

Q. How long did he squeeze with your hand?

A. Seconds can be minutes.

Q. How - - what did you do when he began to squeeze your hand?

A. I told him to let go.
Q. And how did he respond?
A. And, again, he had - - like I said, that he said, "No, I won't let go, and you can't make me."
Q. Were you - - did you mention to him anything about this causing you pain or that this was hurting?
A. Yes, I told him it hurt, "Let go."
Q. All right. And his response was?
A. "I don't care."
Q. How were you able to free your hand from his grasp?
A. Well, his hand was sweaty and so was mine, and eventually I just kind of pulled it free.
Q. Did your hand hurt after you finally got it away from him?
A. Yes. I had ice on it most of the rest of the night.
Q. And after you iced it during that night, did you have to go through any sort of follow-up therapy or treatment for the injury to - -
A. I went to the health - - we have an employee health department at the hospital, and they referred me to an occupational physician, who examined my hand and, you know, suggested to just do some passive motion things and hopefully it would all be fine.
Q. All right. Did the pain in your hand continue?
A. For several weeks, yes.
Q. And did you have to take any sort of medication or painkiller for that?
A. Tylenol, Motrin.

-(104, L. 1 – 108, L. 18)

During cross examination of nurse Scorvo the defense attorney asked her whether or not it appeared he was trying to leave the room.

Q (Defense Attorney) Would it be fair to say that he (the defendant) was trying to leave?

A. (Nurse Scorvo): He was very angry.

Q. Would it be fair to say that he was trying to leave?

A. I don't know if he was trying to leave or if he was just pissed.

-(RP 112, L. 5 – 10)

During cross examination she was also asked about Hospital policy when a patient wants to leave, her response was as follows:

Q. (Defense Attorney): What's the Hospital policy when a patient wants to leave?

A. (Nurse Scorvo): You can sign a waiver and, you know, be – it's a – you sign a waiver that says you're leaving against medical advice.

But when someone is depressed and says that, you know, they're not going to, you know, eat or take their insulin, then they're depressed, and then they need to be evaluated by a crisis person, a mental health professional, to say that, you know, they're – they can do that.

Until that's done, we are, you know, mandated to provide care.

-(RP 112, L. 13 – 25).

The Prosecution also called in its case in chief Adrian Weddle. Ms. Weddle was a member of the security office for Metro Watch at Southwest Washington Medical Center. (RP 117). She recalls that she was summons to the emergency room being told to get restraints because

there was a patient in one of the rooms that was out of control. She identified that person as the defendant. (RP 118). She indicated that when she first made contact with the defendant that he was being combative with the staff, resisting, yelling and being verbally assaultive. (RP 119, L. 7 – 8). She remembers that he was yelling obscenities and making threats but didn't remember the exact wording. (RP 119). She recalls witnessing the defendant being assaultive towards nurse Scorvo and Mr. Jeffers. (RP 122 – 126). In fact, she was involved in trying to free nurse Scovo's hand from the defendant when he was squeezing it. She recalls that they were fighting with him for about 30 seconds to get her hand loosened from his. (RP 126).

The State also called Dr. Cornelia Taylor, M.D. At the time of trial she was working at Oregon Health Sciences University as an assistant professor of medicine. (RP 130). She recalls that she was in the emergency room at the time that the defendant had come in and that he had been in their just several days before that. She recalls that after she took the history and did the physicals that she left and it is her understanding that at that time he became angry and started striking at the nurses. The doctor remembers being told about that and also being told that he was angry with the doctor and that the doctor should probably try to avoid going back in there because he might attack her. (RP 134).

On cross examination of the doctor, she was asked concerning the defendant's condition. She answered as follows:

Q. (Defense Attorney): Dr. Taylor, on the -- Mr. Gaylor's visit to Southwest Washington Medical Center prior to November 20th, do you recall why you left?

A. (Dr. Taylor): No, I don't recall.

Q. When he came in on November 20th, do you recall whether he was there voluntarily or involuntarily?

A. I believe he came voluntarily.

Q. Do you recall what his blood sugar was?

A. No, not offhand.

Q. Do you recall whether or not it was at a dangerous level?

A. No, not offhand.

Q. And Mr. Gaylor is a long-term diabetic; correct?

A. That's what I understand, yes.

Q. Do you call whether Mr. Gaylor is -- his health was posing an immediate risk to his life at the time that you left the emergency room?

A. In terms of the diabetes or otherwise?

Q. In general, anything.

A. I don't recall specifically, I'm assuming that, you know, again, I would need to look carefully through the medical records to make that judgment because I, you know, those are details that I have not kept up with as to his particular case.

I believe that an admission, in pa- -- acute inpatient admission was indicated by all the medical standards.

And I believe that when he struck out at the nurse, we thought that he might be a danger to others, and so, yes, we thought that we needed a little bit of time to figure out what was going on before we could determine whether or not it was safe for him to be allowed to go home or take care of his own medical problems.

Q. But – but I’m just asking about just before you left the emergency room, before you became aware of the altercation.

A. You’re asking me whether or not I thought he was in immediate danger?

Q. Yes.

A. Without treatment, yes.

Q. Of what?

A. Of the diabetes.

Q. Just before you left the emergency room, do you recall saying to Mr. Gaylor that if he kept acting the way he was that he was gonna kill himself?

A. Probably. I – it’s entirely possible that I said that because I – in all honesty, diabetes that’s not taken care of, people die of complications of diabetes.

-(RP 141, L. 4 – 143, L. 2).

The defendant testified in his own behalf and indicated that he had called the ambulance to go to the hospital (RP 148). When asked to explain why he was there he indicated what he had told to Dr. Taylor.

And so I said to her that I was so depressed I could not eat or take my medicine, and I was wanting to live and I was – and I felt that I was so depressed and in a dangerous condition that I would like to voluntarily admit myself so that I could be – have some protection so that I can make sure I’m being fed and given medicine, something that I wasn’t able to do on my own.

-(RP 150, L. 17 – 24).

He testified that he felt they were giving him the wrong medications. However, it is also to be noted that he indicated that he was not told about that until much later, after the incident. (RP 151 -152; 161).

The defendant indicated that once he had torn the IV line and the emergency people came in with the straps to restrain him, he was telling them “No, you do not need to get the straps. Let me explain.” (RP 154, L. 11 – 12). At no time does he indicate to them that he wishes to go to another hospital or to seek a second opinion. He is again asked about the activities surrounding the time that he is being restrained and he indicates that he told them “OK, let me up and I’ll cooperate. That is what I told them.” (RP 157, L. 13 – 14). He testified that he did grab nurse Scorvo and that he also was making general threats. He couldn’t remember exactly what his threats were but he was saying things to try to scare them away from him.(RP 158).

Around the time of the activity with nurse Scorvo, the defense attorney asked him if he said anything to her, his response was:

I’m sure I spoke to her, but I don’t remember what I said. I do remember her telling me at some point that it was hurting her hand. And I remember willingly letting go because I didn’t want to hurt her.

Again, it’s like seconds can become minutes, and I do not know – I know that I let go of her hand - ...
(PR 160, L. 5 – 10).

On cross examination, the defendant indicated that he had been drinking alcohol and that he was too depressed to fix meals and it was just easier to drink. (RP 166). He also indicated “I don’t believe I was capable of taking care of myself.” (RP 167, L. 13 – 14).

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim of insufficient evidence to sustain the conviction for assault in the third degree as charged in count 1 dealing with the registered nurse, Katherine Scorvo. The claim is that the State had failed to prove the absence of self defense beyond a reasonable doubt.

The Court’s Instructions to the Jury (CP 9) sets forth the elements of assault in the third degree. Instruction No. 11 reads as follow:

INSTRUCTION NO. 11

To convict the defendant of the crime of assault in the third degree, as charged in Count 01, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 20, 2005, the defendant assaulted Katherine Scorvo,
- (2) That Katherine Scorvo was a nurse;
- (3) That at the time of the assault Katherine Scorvo was performing her nursing duties;

(4) That these 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 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.

-(Court's Instructions to the Jury, CP 9,
Instruction No. 11)

Also coupled with that is the concept that self defense is not available as a defense if the jury finds that number 3 of those elements has been proven beyond a reasonable doubt and that is that she was performing her nursing duties. Instruction No. 15 sets forth the rule as follows:

INSTRUCTION NO. 15

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.

-(Court's Instructions to the Jury, CP 9,
Instruction No. 15)

The court also instructed on the concept of self defense in Instruction No. 17 which reads as follows:

Instruction # 17

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

The use of force upon or toward 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 reasonable 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.

-(Court's Instructions to the Jury, CP 9,
Instruction No. 17)

The defense is attempting to maintain that the defendant had “without any doubt, rejected medical treatment.” (Brief of Appellant, page 15). The State would strongly disagree with that statement. First of all there is absolutely no indication in this record that the defendant was attempting to reject medical treatment. As the witnesses had indicated in the Statement of Facts, they weren't sure exactly what the defendant was doing because he never told anyone what he was doing other than to make threats against the nursing staff and other personnel there at the hospital.

There is no indication that he was telling people that he wanted to go for some second opinion, there was no discussion with the doctor concerning his rights, he signed no waivers and, clearly, from the defendant's own statements, he was unable to care for himself if released. In fact, the evidence strongly suggests that the hospital had a duty to keep him so a mental health advisor could determine whether or not he was safe to be released. Safe as it relates to other people and safe as it relates to himself. Concerning the safety of other people, his actions in the hospital clearly indicate that he was a danger to others in his state of mind at the time that he was at the hospital. Further, his statements would indicate that there would be a real risk of death or serious injury to the defendant if he was just immediately discharged from the hospital.

Balanced against the individuals right to his medical treatment and seeking second opinions is the argument of a compelling State's interests. As set forth In Re Personal Restraint of Colyer, 99 Wn. 2d 114, 122, 660 P.2d 738 (1983) compelling State interests include (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) maintenance of the ethical integrity of the medical profession. These concepts have recently been explained and ruled on by the Supreme Court in a case where inmates were claiming that they had an absolute right to refuse nutrition and hydration. The Supreme

Court ruled that they did not have an absolute right and that it must be balanced against States interests. McNabb v. Department of Corrections et al, 163 Wn.2d 393 180 P.3d 1257 (2008).

This entire argument, the State submits, becomes stronger when the facts are reviewed in our case. As nurse Scorvo had testified, everything seemed to be going fine until, for whatever reason, the defendant became upset and angry at Dr. Taylor. It's after that that the defendant appears to lose control and begins to threaten people and lash out at them. Up until that point everything seemed to be going fine, the nurse was having a dialog with the defendant and he was clearly indicating to her that he could not take care of himself. Even the defendant explained this to the jury by indicating that he did not feel that he could take care of himself and that's why he checked himself into the emergency room. Nevertheless, for whatever reason, the defendant lost control and became extremely angry. At no time is he telling anyone that he wants to go to another hospital or get a second opinion. What the witnesses testified to is that he was extremely belligerent, was fighting and threatening physical harm to the nursing staff and personnel there in the hospital. This continued and the defendant did not abate this type of conduct even after being strapped down to a gurney. He continued to threaten and he assaulted nurse Scorvo by squeezing her hand to such an

extent that someone else had to come to help pry her loose from his grip and that it caused her extreme pain and discomfort and, she testified, that this pain lasted for several weeks. As both nurse Scorvo and Dr. Taylor testified, there were procedures for the defendant to be released, to sign a waiver, and to seek whatever other opinions he wanted. However, he did not seek that avenue with these witnesses. Instead, he decided to fight.

There is absolutely no question in this evidence but that the defendant was the first aggressor. There is nothing that is indicated from testimony that would indicate that the nurses or doctors were doing anything other than providing professional care to this defendant. Further, there is absolutely no question that at the time of the assault against nurse Scorvo that she was acting in her official capacity as a nurse. And there could be no question from the evidence that he had not terminated any type of treatment.

The defense in its brief attempts to continually argue that he was trying to get out the door to go somewhere else. Yet, he never expressed this to anyone nor did he demonstrate the type of behavior that would indicate that someone was trying to leave. As Mr. Jeffers testified, the defendant was jumping off the gurney on the side where one of the nurses was situated with her back towards the defendant after making claims and threats that he was going to grab the first woman he could and gouge out

eyes. Clearly this is not the behavior of somebody that is trying to peacefully exit a building. The compelling state interest here as set forth in Colyer clearly indicates that there should be protection of the interests of innocent third parties (the medical personnel and doctors), the prevention of suicide (all indications are are that the defendant was refusing to take care of himself and his claim that he could not take care of himself) and the maintenance of the ethical integrity of the medical profession (the waiver had to be signed and mental health personnel would have to be called in before this person could be discharged for his own sake and for the sake of others).

The jury was instructed on the first aggressor. Instruction number 16 indicates as follows:

INSTRUCTION NO. 16

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 defendant's acts and conduct provoked or commenced the fight, then self-defense is not available as a defense.

-(Court's Instructions to the Jury, CP 9,
Instruction No. 16)

The defendant in the appellant brief repeatedly discusses a concept that the defendant “was clearly rejecting medical care and the staff at Southwest Washington Medical Center had no legal authority to override that decision.” (Brief of Appellant, P. 15). That might be well and good, but there is no evidence that he had “clearly rejected medical care” or that he had made a decision to leave the hospital. There simply is no evidence to support this type of bold allegation.

The jury found beyond a reasonable doubt that Katherine Scorvo was performing her nursing duties. That coupled with the fact that there is no evidence in the record to support the proposition that he had terminated treatment at the hospital, would prevent, per instructions the self defense being available concerning the Assault in the Third Degree as it relates to nurse Scorvo. This clearly was a credibility question that was addressed to the jury. Credibility determinations are for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The use of necessary force against another in self defense is not unlawful. RCW 9A.16.020. To determine whether a self defense instruction should have been given, the appellate court utilizes the tests set forth in State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983); State v. Roberts, 88 Wn.2d 337, 562 P.2d 1259 (1977); and State v. Adams, 31

Wn. App. 393, 641 P.2d 1207 (1992). The defendant need not testify, but he has the burden of producing some evidence of self defense. As the Roberts case indicates or points out, the evidence can come from whatever source. Here, there is no evidence of self defense. The defense is not available to this defendant if the mental health professional or nurse is working in their official capacity and he has not attempted to terminate his treatment. There is absolutely nothing in the evidence to support a position that the patient/defendant had rejected treatment. Further, the undisputed evidence establishes that this defendant was the aggressor and precipitated the incident. Because the defendant precipitated the situation, “he would have been obligated to retreat or abandon the encounter” before he would be permitted to assert self defense. State v. Currie, 74 Wn.2d 197, 198 – 199, 443 P.2d 808 (1968). It is absolutely clear in our situation that not only did he precipitate it but he continued it without attempting to retreat from his conduct or behavior. The bottom line is that when a defendant claims self defense, he must set forth sufficient facts to establish the possibility of self defense before the burden of proof shifts to the State to establish beyond a reasonable doubt that the defendant did not act in self defense. State v. Robbins, 138 Wn.2d 486, 495, 980 P.2d 725 (1999); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

Evidence is sufficient to support a conviction if, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220 – 222, 616 P.2d 628 (1980). When a defendant challenges the sufficiency of evidence in a criminal case, the appellate court draws all reasonable inferences from the evidence in favor of the State and interprets all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906 – 907, 567 P.2d 1136 (1977).

The State submits that there is absolutely no evidence in this record to support the giving of the self defense instruction or to argue that the State has not produced enough evidence to overcome self defense beyond a reasonable doubt.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error is a claim of ineffective assistance of counsel because of jury instructions as they relate to self defense.

Specifically, the instruction complained of is Instruction number 18 which reads as follows:

INSTRUCTION # 18

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.

-(Court's Instructions to the Jury, CP 9,
Instruction No. 18)

For an error to be manifest, the defendant must plausibly show that the error had practical and identifiable consequences at trial. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). The defendant must show that but for the error the outcome likely would have been different. State v. Jones, 117 Wn. App. 221, 232, 70 P.3d 171 (2003). To prove self defense there must be evidence that: (1) the defendant subjectively feared that he was in imminent danger of death or great bodily harm; (2) this belief was objectively reasonable; (3) the defendant exercised no greater force than was reasonably necessary; and (4) the defendant was not the aggressor. State v. Callahan, 87 Wn. App. 925, 929, 943 P.2d 676 (1997). The State submits that the defendant cannot show that the outcome likely would have been different because the evidence that he submitted does not support self defense instructions. To make a prima facie case of self defense, the defendant must establish a confrontation, not provoked by himself, from which a reasonable person would have perceived a danger

of imminent bodily harm. State v. Walker, 40 Wn. App. 658, 662, 7010 P.2d 1168 (1995). The State submits that this has not been done. There has been no prima facie case established and therefore the burden has not shifted to the State to prove the absence of self defense beyond a reasonable doubt. State v. Walden, 131 Wn.2d at 473.

The error in jury instruction that has been set forth here is also subject to harmless error analysis. An error is harmless if it appears beyond a reasonable doubt that it did not contribute to the verdict. State v. Eaker, 113 Wn. App. 111, 120, 53 P.3d 37 (2002). It is the State's burden to prove the error was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). As indicated previously, the State submits that there was insufficient evidence here to reasonably argue self defense to this jury. There are clear, uncontroverted, indications that the defendant was the first aggressor and because of that self defense would not apply. It is clear, and uncontroverted, that nurse Scorvo was acting in her professional capacity as a nurse at the time of the assault against her by the defendant. It is also clear from the evidence that the defendant was not terminating his treatment because he never told anyone that that is what he was doing. These people that were responding to these acts of violence and belligerence on the part of the defendant didn't know what his motivation

was because he never told anyone. Quite the contrary, his behavior and activities would indicate that he was an extremely angry man and was lashing out at those that he felt responsible for whatever slight that he felt he had received from the doctor. There is nothing in the record to support that the defendant produced any evidence of his claim that he subjectively believed in good faith that he was in imminent danger of great bodily harm or that this belief, viewed objectively, was reasonable under the circumstances. State v. Read, 147 Wn.2d 238, 243, 53 P.3d 26 (2002).

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 15 day of Sept, 2008.

Respectfully submitted:

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