

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN BLODGETT,

Appellant.

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT
OF CLALLAM COUNTY

The Honorable S. Brooke Taylor

APPELLANT'S OPENING BRIEF

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STATE OF WASHINGTON
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DIVISION II

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A. ASSIGNMENT OF ERROR

In Mr. Blodgett's trial on charges of third degree assault of a police officer and resisting arrest, the trial court erred in denying Mr. Blodgett's request for jury instructions on self-defense.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the trial court erred in denying Mr. Blodgett's request for instructions on self-defense, where entitlement to the instruction under Washington Pattern Jury Instruction 17.02.01 required evidence of actual danger of serious injury risked to Mr. Blodgett by the conduct of the arresting police officers, and where the evidence at trial would have allowed the jurors to conclude that such danger was actually present, allowing acquittal had this jury been properly instructed.

2. Whether, under established Washington cases and statutory law, the loss of human consciousness caused by choking constitutes "serious injury" within the meaning of WPIC 17.02.01.

C. STATEMENT OF THE CASE

Ryan Blodgett was charged with two counts of third degree assault (assault of a law enforcement officer performing official duties), pursuant to RCW 9A.36.031(1)(g), one count of possession of marijuana pursuant to RCW 69.50.401(3) (later dismissed), and

one count resisting arrest pursuant to RCW 9A.76.040. CP 39 (information, filed June 20, 2007).

According to the affidavit of probable cause, two police officers from the town of Sequim, Washington were arresting an individual, Murray, outside a bar, and while they were placing the person into custody, Mr. Blodgett yelled profanities at them. CP 41. At trial the evidence was never disputed that the arresting officers "tasered" Murray, using the electrical device on him two times. 1/15/08RP at 138.

During their arrest of Murray, the officers recognized Blodgett when he was part of a crowd that had gathered, loudly protesting the police treatment of the arrestee. CP 41; 1/15/08RP at 46, 71. After checking and determining that Blodgett had an outstanding arrest warrant, the officers entered the bar to take him into custody. CP 41; 1/15/08RP at 38. The officers claimed that Mr. Blodgett, while aware they were law enforcement officers, struggled against their efforts to detain him, pushed his shoulder into one of the officers, and hit another in the ribs, thereby constituting assaults of them in the course of their duties. CP 41; 1/15/08RP at 34, 40-41 (testimony of Officer Michael Hill), 63-68 (testimony of Officer Chris Wright).

Following the trial court's denial of Mr. Blodgett's motion to instruct the jury on justifiable force used in defense against law enforcement officers, per WPIC 17.02.01, the case was submitted to the jury. 1/16/08RP at 34. The jury issued a verdict of guilty on count 3, resisting arrest, and a verdict of guilty as to third degree assault of a law enforcement officer on count 1 only, acquitting Mr. Blodgett on count 2. CP 19-21. At sentencing, Mr. Blodgett was given a standard range term of incarceration based on an offender score of zero. CP 27-33.

Mr. Blodgett appeals. CP 34.

D. ARGUMENT

THE TRIAL COURT ERRED IN DENYING MR. BLODGETT'S REQUEST FOR SELF-DEFENSE INSTRUCTIONS PURSUANT TO WPIC 17.02.01.

a. Mr. Blodgett may appeal the denial of WPIC 17.02.01.

At the commencement of trial and again later during final resolution of the jury instructions, Mr. Blodgett's defense counsel requested two particular instructions - WPIC 17.02 and WPIC 17.02.01. 1/15/08RP at 9-15; 1/16/08RP at 28-36. WPIC 17.02, the standard instruction defining self-defense involving complainants who are not law enforcement officers, was requested on the basis of the abundant evidence showing that Mr. Blodgett did not realize his

assailants were police. 1/16/08RP at 29. The court denied the request for use of WPIC 17.02, agreeing with the prosecutor that conviction under RCW 9A.36.031(1)(g) did not require that the defendant have knowledge that the persons in question were law enforcement officers. 1/16/08RP at 20, 35.¹

However, the court also denied Mr. Blodgett's motion to instruct the jury on justifiable force used in defense against law enforcement officers, per WPIC 17.02.01. 1/16/08RP at 34. Although Mr. Blodgett's counsel initially argued that only the standard self-defense instruction was appropriate since Mr. Blodgett was unaware that his assailants were police officers, and rejected the idea that WPIC 17.02.01 should be given, counsel ultimately sought the submission of WPIC 17.02.01. Counsel agreed that the instruction provided that a defendant's use of force is lawful where used against a police officer effecting an arrest if the defendant was in "actual and imminent danger of serious injury" and argued the evidence supported this theory of self-defense 1/15/08RP at 9-15; 1/16/08RP at 28-36. Mr. Blodgett therefore may appeal the denial of

¹The Supreme Court has held that in cases under this alternative of third degree assault, the State does not have to prove that the defendant knew that the complainant was a law enforcement officer performing official duties. See State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000).

the requested instruction regarding lawful force, which used the following language:

A person may use or attempt to use force to resist an arrest by someone known by the person to be a police officer only if the person being arrested is in actual and imminent danger of serious injury.

1/15/08RP at 9; WPIC 17.02.01; RAP 2.5. This language coincided precisely with the State's argument as to the appropriate self-defense standard, which stated that actual danger of "serious injury" is required; however, the State argued that the facts of the case did not merit this jury instruction. 1/15/08RP at 12. Following argument, the trial court denied Blodgett's request for jury instructions regarding self-defense against police officers, stating that the evidence was inadequate to warrant the giving of WPIC 17.02.01. 1/16/08RP at 170-74.

b. A criminal defendant is entitled to jury instructions on self-defense if there is some evidence to support giving the

instruction. When a defendant makes a claim of self-defense, he or she 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. See State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997). In general, where a defendant requests that the

jury be instructed on self-defense, there need only have been some evidence admitted at trial that tends to prove an act was done in self-defense to entitle the defendant to such instruction. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Adams, 31 Wn. App. 393, 395, 641 P.2d 1207 (1982). In determining whether a defendant was entitled to present a claim of self-defense, an appellate court must view the underlying facts in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. 460, 465, 536 P.2d 20 (1975).

There are limited circumstances under which a person may claim that the use of force against a law enforcement officer was justified as self-defense. Specifically, one case has stated that an arrestee charged under RCW 9A.36.031(1)(g) must show that there was an imminent threat of "serious physical harm" or "serious physical injury" in connection with the arrest in order to establish the legitimate use of force in self-defense. State v. Mierz, 127 Wn.2d 460, 476-77, 901 P.2d 286 (1995). Because in such cases the threat faced by an individual is judged under an objective standard, such force can only be used if the arrestee was actually facing danger of such injury. State v. Bradley, 141 Wn.2d 731, 737, 10 P.3d 358 (2000). A reasonable but mistaken belief of imminent

danger is an insufficient justification for use of force against a law enforcement officer. State v. Valentine, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997); Bradley, 96 Wn. App. at 683.

c. The evidence at Mr. Blodgett's trial required that the jury be instructed on self-defense because there was evidence of actual danger or threat of serious injury. Parties are entitled to instructions on each theory of the case that is supported by the evidence. State v. Theroff, 95 Wn.2d 385, 622 P.2d 1240 (1980). Here, the trial court erred, because the evidence at trial allowed a finding of actual danger of serious injury to Mr. Blodgett, and thus justified the self-defense instruction ultimately sought by his counsel.

At trial the defendant, along with other witnesses from both the prosecution and defense sides of the case testified that officers had entered the tavern headed for the defendant, and that one officer approached Mr. Blodgett from behind. See, e.g., 1/15/08RP at 89-90, 140. One of the officers placed Mr. Blodgett in an immediate headlock, over the shocked protestations of at least one bar patron, and a State's witness who plainly favored the prosecution case admitted that she never heard the officers identify themselves as police as they moved on Mr. Blodgett, and that it resulted in a dangerous situation. 1/15/08RP at 89-90, 93-94

(prosecution witness Stephanie Segle); 1/15/08RP at 107, 111
(testimony of prosecution witness Sandra Patterson).²

In the loud and dark tavern, the witnesses did not hear either officer identify himself as police as the officers claimed and it seemed Mr. Blodgett did not know who was attacking him.

1/15/08RP at 108, 111 (prosecution witness Sandra Patterson);
1/15/08RP at 116, 128-29 (prosecution witness Anthony Brownfield).

Mr. Blodgett maintained in his testimony, as he had done consistently since the incident, that he had not realized that the men who accosted him were police officers, and that he was afraid the choking headlock he was put in was causing him to lose consciousness. 1/15/08RP at 141-45; 1/16/08RP at 15. Both officers were forced to admit the truth of Mr. Blodgett's testimony that he had apologized for resisting, explaining that he stopped trying to fend off the men when realized that Hill and Wright were police officers. 1/15/08RP at 43, 55, 82-83.

²The evidence in total, beyond the multiplicity of charges forwarded by the City of Sequim Police Department suggested that the officers had acted in retaliation against the defendant's protestations over what he felt was the officer's use of excessive force against the arrestee Murray. 1/15/08RP at 46, 71, 138. Interestingly, the trial court ordered the drug charge dismissed prior to trial, following receipt of a laboratory report indicating there was so little of the suspected substance that it could not scientifically be shown to constitute marijuana. 1/15/08RP at 8-9.

More critically, Ryan Blodgett testified that he had been lifted two feet into the air and was then placed in a “sleeper hold” by one of his surprise assailants. 1/15/08RP at 142-44; 1/16/08RP at 13-15. One of the police officers admitted at trial that Mr. Blodgett had indeed been placed in a headlock. 1/15/08RP at 40-41 (testimony of Officer Hill). Although Officer Wright stated he did not see Mr. Blodgett lose consciousness,” 1/16/08RP at 16-17, neither he nor Officer Hill ever disputed that Blodgett had been placed in a headlock. This evidence shows the error of the trial court’s reasoning.

d. The trial court erred in concluding that the absence of use of weapons by the officers per se justified denial of the defense request for WPIC 17.02.01. In its ruling denying the request for jury instructions regarding self-defense against police officers, the trial court stated that the evidence was inadequate to show “actual and eminent [sic] danger of serious injury.” 1/16/08RP at 170-74. The court reasoned that the only person who was injured was one officer, who receive a minor injury. 1/16/08RP at 28-29. In addition, the court emphasized that “there were no weapons used or threatened” by the arresting officers. 1/16/08RP at 29.

However, the evidence below was more than adequate to allow a jury to find that Mr. Blodgett faced an actual risk of serious injury. Importantly, it is not necessary that a person be armed in order to create as to another an actual danger of serious injury. In a long line of cases, the Washington Courts have set a far lower threshold, stating that

“It is well within the realm of common experience that “an ordinary striking with the hands or fists” might inflict [great personal injury], depending upon the size, strength, age, and numerous other factors of the individuals involved.”

(Parentheticals in original.) State v. Walden, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997) (quoting with approval State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980)). Cases applying Walden have been in the context of self-defense instructions in non-law enforcement cases, where certain language in jury instructions was deemed an erroneous statement of the law because it prevented jurors from finding self-defense where a defendant reasonably believed that an unarmed assault could cause “great bodily harm.” See. e.g., State v. Walker, 136 Wn.2d 767, 774-75, 966 P.2d 883 (1998). But Walden recognizes the common sense conclusion that an unarmed person can indeed cause “great personal injury,” under appropriate facts. Other cases have shown that the presence of a

danger of "serious injury" occurring as a result of a punch is so plain as to be unworthy of much note. See, e.g., State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) ("Zumwalt punched the victim hard in the face with his fist, knocking her to the ground. He caused serious injuries, including fracturing her eye socket").

Additionally, in another case reviewing a prosecution for rape under RCW 9A.44.040(1)(c), which required proof of sexual intercourse by forcible compulsion and the concomitant infliction of "serious physical injury," the Court of Appeals rejected a challenge to a jury instruction defining "serious physical injury" as follows: "[a]ny bodily harm or hurt that is painful or hard to bear. It need not be a permanent hurt or injury." State v. Welker, 37 Wn. App. 628, 637-38, 683 P.2d 1110, review denied, 102 Wn. 2d 1006 (1984). The Welker Court, rejecting the defense argument that this instruction allowed the jury to convict him of first degree rape with less showing of harm to the victim than required by statute, found that the defendant's objection to the instruction was vague, and further stated,

The Legislature has not defined the term "serious physical injury," nor is there case law definition. In our view it is neither necessary nor desirable to attempt to do so in a jury instruction. The term speaks for itself, is adaptable to the type of injury in issue and permits argument both pro and con. The jury is usually told it

may rely upon common sense and the "common experience of mankind." Judges and lawyers are no better able to explain such ordinary terms than the jurors themselves.

State v. Welker, 37 Wn. App. at 638 n.2. In the present case, Mr. Blodgett's jury could have found that he faced actual danger of serious injury. The defendant's specific testimony was that he was placed in a "sleeper hold" by one of his attackers, and briefly lost consciousness. 1/15/08RP at 142-44; 1/16/08RP at 13-15. Blodgett stated that during the incident, he had been in danger of being beat up, and further, that he was then also choked to the point of losing consciousness. 1/15/08RP at 143, 145. During this time, Stephanie Segle, a patron inside the bar, was yelling "what are you doing to him, what are you doing to him?" 1/15/08RP at 94. Blodgett described how he "was out," and that all he could recall was "waking up on my belly with handcuffs on." 1/15/08RP at 144-45. Neither Officer Wright nor Officer Hill ever disputed that Blodgett had been placed in a headlock, and indeed Officer Hill admitted at trial that Mr. Blodgett had been placed in a headlock, confirming the defendant's testimony. 1/15/08RP at 40-41.

There can be no question that a "sleeper hold," a police technique of subduing arrestees by cutting of bloodflow, falls well within the realm of conduct that can risk actual danger of serious

injury.³ For example, the overwhelming majority of federal courts addressing the “sleeper hold” in Eighth Amendment criminal cases and civil rights cases have recognized the danger of serious injury or death inherent in this method of arrest. For example, in a federal civil rights action brought under 42 U.S.C. § 1983, the federal district court for the Northern District of Illinois denied the city's motion for summary judgment, holding that trial should proceed under the theory of recovery that the decedent's death was a result of an actionable failure to retrain police officers following the consensus determination that the "sleeper hold" causes "risk of injury or death" by asphyxiation. Lewis v. City of Chicago, 2005 U.S. Dist. LEXIS 7482 (N.D. Illinois 2005) (Slip. Op. at 15). See also Papp v. Snyder, 81 F. Supp. 2d 852 (N.D. Ohio 2000) (Slip. Op. at 12-14) (denying defendant's motion for summary judgment in civil rights case under

³The former Seattle police chief Norm Stamper has described the “sleeper hold,” which he believed constituted excessive force, as a method used by police officers

to “choke out” violent suspects [as it] cuts off the carotid arteries, rendering the subject unconscious. When drugs are involved, the hold has caused death.

Seattle Times, April 24, 1998 (“STAMPER RECALLS BEING SUCKED INTO TOUGH-GUY COP CULTURE”) (<http://seattlepi.nwsourc.com/archives/1998/9804240063.asp>).

42 U.S.C.S. §§ 1983 and 1985 alleging use of excessive force by City of Akron police officer causing death of decedent).

Given the evidence at trial, Mr. Blodgett was entitled to the benefit of the well-established rule that, in determining whether a defendant was entitled to instructions on self-defense, an appellate court must view the underlying facts in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. at 465. As defense counsel argued, the question for the trial court was whether Mr. Blodgett was in danger or threat of actual serious injury, not whether actual serious injury resulted. See Committee Notes to WPIC 17.02.01 (stating that the language of the Mierz Court regarding a requirement of a “threat” of actual harm was replaced in the Pattern Jury Instructions by the use of the term “danger,” which has the same meaning) (citing State v. Mierz, supra, 127 Wn. App. at 476). The trial court’s refusal to give the jury instruction requested by Mr. Blodgett was error.

e. Depriving Mr. Blodgett of the ability to raise self-defense was constitutional error. Anytime a defendant presents even some evidence of self-defense in an assault case, jury instructions must contain the law of self-defense and the burden of proof. State v. Walden, 131 W.2d at 473. The issue is one on a

constitutional scale, because conduct committed in lawful defense of self is not adequate proof of an illegal assault, which the State must prove beyond a reasonable doubt. U.S. Const. amend 14.

Importantly, the ability of defense counsel to argue a theme of self-defense in closing argument, where not accompanied by proper instructions of law, does not negate the instructional error. State v. LeFaber, 128 Wn.2d 896, 903, 913 P.2d 369 (1996).

f. Reversal is required. Finally, the error in refusing to give self-defense instruction of WPIC 17.02.01 was not harmless. An error affecting a defendant's ability to raise a self-defense claim is constitutional in nature and requires reversal unless it is harmless beyond a reasonable doubt. State v. McCullum, 98 Wn.2d at 497.

Here, an inquiry from the jury during deliberations indicates that the jury would likely have acquitted Mr. Blodgett based on a self-defense theory. During deliberations, the jury sent an inquiry to the court, asking, "If a person is defending himself, does this constitute assault?" CP 22. The court responded by instructing the jury to refer to its instructions. CP 22. Plainly, proper instructions of law would have informed the jury that if Mr. Blodgett acted in self-defense under the WPIC 17.02.01 standard, his use of force was lawful, and therefore not "assault," just as the jury asked. The

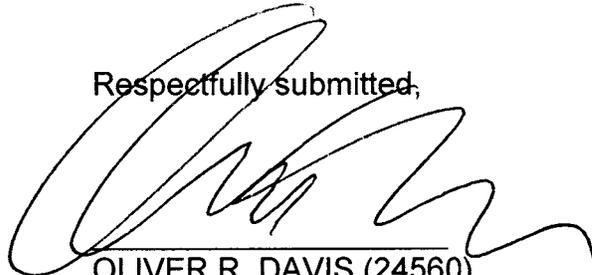
defendant would not in such instance have been convicted of assault as to either officer, or have been found guilty on the charge of resisting arrest. Instructional error such as occurred here, which deprived Mr. Blodgett of his ability to seek acquittal under a viable self-defense claim, was not harmless error. State v. Hutchinson, 85 Wn. App. 726, 733, 934 P.2d 1201 (1997). Reversal of Mr. Blodgett's convictions is therefore required.

E. CONCLUSION.

Based on the foregoing, Mr. Blodgett submits his convictions and sentences for assault and resisting arrest must be reversed as argued herein.

DATED this 26 day of August, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'O. R. Davis', written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 37304-1-II
)	
RYAN BLODGETT,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 26TH DAY OF AUGUST, 2008, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2008.

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