

**NO. 45302-9-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**CHARLENE EVA PRATT,**

**Appellant.**

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**RESPONDENT'S BRIEF**

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**I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR**

The jury was properly instructed on the law, Pratt's offender score was properly calculated, and the court did not abuse its discretion in ordering Pratt to pay the cost of her court-appointed counsel as part of her legal financial obligations.

**II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR**

- A. Has Pratt shown that there was a manifest error affecting a constitutional right when the jury was properly instructed on the law?**
- 1. Was the jury properly instructed on the crime of assault in the third degree when the jury instructions included "intentional" in the definition of assault?**
  - 2. Was it error for the court not to give a self-defense instruction when Pratt did not request this instruction, self-defense would have contradicted her argument that she did not possess intent, and there was no evidence that Pratt was being assaulted?**
- B. Was Pratt properly sentenced when her attorney acknowledged that her criminal history was correct at sentencing?**
- C. Did the trial court abuse its discretion by requiring Pratt to repay the cost of her court-appointed counsel as part of her legal financial obligations?**

### **III. STATEMENT OF THE CASE**

After midnight on May 29, 2013, Paul Aldrete, an Emergency Medical Technician (“EMT”), drove his work van back to the American Medical Response (“AMR”) office in Kelso, after having responded to a wheelchair call. RP at 20-21. When Aldrete arrived he observed Charlene Pratt pounding on the back door of the building and “playing with the keypad” attempting to enter. RP at 21. Aldrete approached Pratt to see if she needed help. RP at 21. Pratt responded by saying, “Let me the F-- in the building. I need to get out of the rain.” RP at 21. Because Pratt was belligerent and was trying to enter the building, Aldrete instructed her to step in front of his van and then called dispatch to contact the Kelso Police Department. RP at 21-22.

Pratt was “very irate” and kept trying to come at Aldrete. RP at 22. She told Aldrete to “F-off” and tried to kick him a couple of times. RP at 22. As she would come at Aldrete, he had to push her back toward a car that was behind him. RP at 22. Aldrete could smell an odor of alcohol on Pratt, and observed that her breasts were exposed and she was missing a shoe. RP at 22. Aldrete refused to allow Pratt to enter the building because the AMR office is a secured facility that only employees are permitted to enter. RP at 22-23. As Pratt continued to try to walk past

Aldrete, she kicked and cussed at him. RP at 23. She also yelled, “F-- you, I need to get out of the rain, get me in the fricking building so I’m out of the rain.” RP at 23. As she spoke, Pratt slurred her speech. RP at 23. Aldrete believed Pratt to be intoxicated. RP at 27.

Officer Mark Berglund of the Kelso Police Department responded to the AMR office. RP at 28, 31. When Officer Berglund arrived, he observed Aldrete struggling with Pratt. RP at 32. Officer Berglund observed Pratt cursing and screaming at Aldrete. RP at 33. Officer Berglund observed that Pratt was soaking wet, her clothes were a mess, and she was only wearing one shoe. RP at 33-34. Pratt was rambling, incoherent, and appeared to be intoxicated. RP at 34. Because Officer Berglund was concerned that Pratt presented the potential for harm, he took her to the emergency room at St. John Medical Center for an evaluation. RP at 34-35, 54. On the ride to the hospital Pratt screamed, swore, and said things that did not make any sense. RP at 35. She continued to be upset and irate. RP at 35. With the assistance of security, Pratt was taken to the emergency department in handcuffs. RP 35-36, 37. Pratt continued to yell and curse at the hospital staff. RP at 36. As the staff began to remove Pratt’s wet clothing, she yelled, “[S]omeone’s going to get hit.” RP at 37. Officer Berglund removed Pratt’s handcuffs, so that the hospital staff could dress her in a gown. RP at 38.

Megan Kautz was employed as an Emergency Department Social Worker at St. John Medical Center. RP at 54. St. John Medical Center is a licensed under RCW 70.41, and Kautz position was that of a health care provider regulated under Title 19 of the Revised Code of Washington. RP at 55, 57. Kautz' duties as a health care provider included evaluating patients brought to the emergency department and providing consultations and treatment recommendations to emergency department physicians. RP at 58. Primarily, her evaluations were for patients with mental health or substance abuse issues. RP at 58. Because agitated patients create an increased risk for violence, Kautz' duties also included attempting to "de-escalate" such patients. RP at 59.

When Pratt was brought to the emergency department a little before 1:00 a.m., Kautz was performing her health care duties. RP at 61. Kautz observed that Pratt was disheveled, wearing wet clothing, having difficulty following directives, and was yelling and cursing. RP at 63. Hospital policy required that a patient needing treatment in the emergency department wear a gown. RP at 64. This was for safety and to allow a physician to examine the patient physically. RP at 64-65. Therefore, part of Kautz' duties as a health care provider included getting Pratt into a gown prior to her examination by the physician. RP at 65.

Because Pratt was unwilling to undress herself, Kautz and a nurse began to help her undress. RP at 65. After Pratt's wet shoe, socks, and top were removed, a gown was placed over her. RP at 66. Kautz attempted to unbutton Pratt's jeans but was unsuccessful. RP at 66. At this point Kautz asked Pratt, "Can you please unbutton your pants so we can get them off?" RP at 66. Pratt reached toward her button as if she was going to unbutton her pants. RP at 66. However, rather than unbuttoning her pants, Pratt cocked her right hand into a closed fist and punched Kautz in the mouth. RP at 67. The punch to Kautz' mouth caused her pain, as the inside of her lip was cut, swollen, and throbbing. RP 67-68. This cut later developed into two painful canker sores. RP at 68.

Pratt was charged with assault in the third degree for assaulting a health care provider. CP at 1. At trial, her attorney proposed a jury instruction for voluntary intoxication. CP at 4, 21. Pratt's attorney argued that due to her intoxication, Pratt did not possess intent when she punched Megan Kautz. RP at 186-87. Pratt's attorney did not propose a self-defense jury instruction and made no argument that she had punched Kautz in self-defense. RP at 141-42, 172-188. The jury found Pratt guilty as charged. RP at 200.

At sentencing the court asked if the parties were in agreement as to Pratt's offender score. RP at 206. The prosecutor explained that the parties agreed that Pratt's criminal history included a burglary in the second degree conviction, four convictions for assault in the third degree, a malicious mischief in the first degree conviction, and a point for being on community custody. RP at 207-08. The prosecutor also explained that the parties' only dispute was whether two of the convictions for assault in the third degree—committed against the same officer on the same date—were the same criminal conduct. RP at 207. The prosecutor reiterated that other than this disagreement on same criminal conduct the rest of the prior convictions were agreed, and it was agreed that Pratt had been under the supervision of the department of corrections. RP at 207. Pratt's attorney responded by saying, "Yes, it's just that one issue your honor." RP at 207. The court heard evidence and argument on the issue and found that the two prior convictions for assault in the third degree at issue were same criminal conduct. RP at 211. The court then sentenced Pratt within her standard range.

#### IV. ARGUMENT

Pratt's conviction and sentence should be affirmed. First, because the jury instructions properly defined an assault as an intentional touching or striking that is harmful or offensive, the jury was properly instructed that assault required intent. Second, because Pratt did not request a self-defense jury instruction, and there was no evidence that she was being assaulted, the trial court did not err when it did not *sua sponte* instruct the jury on self-defense. Third, because Pratt's attorney affirmatively acknowledged an agreement as to her criminal history at sentencing, the court did not err in calculating her offender score. Fourth, the trial court did not abuse its discretion by requiring Pratt to repay the cost of her court-appointed counsel, when an ability to pay inquiry is not constitutionally required until the point of collection, if sanctions are sought for nonpayment.

**A. Pratt cannot challenge the jury instructions for the first time on appeal unless she can show a manifest error affecting a constitutional right.**

Because Pratt did not object to the jury instructions at trial, she cannot challenge the instructions for the first time on appeal unless she can show there was a manifest error affecting a constitutional right; however when read as a whole, the instructions properly informed the jury of the

applicable law. “Generally, an appellant cannot raise an issue relating to alleged jury instruction errors for the first time on appeal unless it is a ‘manifest error affecting a constitutional right.’” *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012) (citing RAP 2.5(a)). Under RAP 2.5(a), an appellate court “may refuse to review any claim of error which was not raised in the trial court.”

Although an argument must be raised at trial to be preserved for review, in certain, limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration has been satisfied. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right.

In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a “manifest error affecting a constitutional right” are not unlimited stating:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be “manifest,” otherwise the word “manifest” could be removed from the rule. *Id.* The court explained: “[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344 (emphasis in original).

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is “manifest,” an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable

consequences in the trial. *Id.* The term “manifest” means “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Pratt maintains that she suffered a manifest error affecting a constitutional right, by claiming that the “to convict” instruction omitted an essential element of the crime and the trial court erred by not instructing the jury on self-defense. These arguments fail. First, because the assault was properly defined by a definitional jury instruction it was unnecessary to define it again in the “to convict” instruction. Second, because Pratt did not pursue self-defense as a defense at trial and there was insufficient evidence to raise a claim of self-defense, the trial court did not err when it did not *sua sponte* instruct the jury on self-defense.

**1. The jury was properly instructed on the crime of assault in the third degree because the jury instructions included “intentional” in the definition of assault.**

Because when read as a whole the jury instructions properly informed the jury of the law by accurately defining assault to include intentional conduct, there was no error in the “to convict” instruction. “Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002) (citing *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 909, 976 P.2d 624 (1999)). Pratt argues that because the “to convict” instruction did not state “intentionally” prior to “assault” it omitted an essential element of the offense. In doing so, Pratt fails to consider that the jury instructions included a definition of assault that properly defined assault as an “intentional touching or striking that is harmful or offensive[.]” CP at 18. Because the jury instructions properly defined assault, the use of the term assault in the “to convict” instruction necessarily entailed the requirement of intent. Thus, the instructions when read as a whole did not omit an essential element of the crime.

When considering a jury instruction challenge, the appellate court reviews the instructions as a whole. *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012) (citing *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). “Generally, an appellant cannot raise an issue relating to alleged jury instructions for the first time on appeal unless it is a ‘manifest error affecting a constitutional right.’” *Id.* (citing RAP 2.5(a)). Jury instruction errors are not automatically constitutional in magnitude. *Id.* (citing *State v. Scott*, 110 Wn.2d 682, 691, 757 P.2d 492 (1988)). Further, a jury is presumed to follow the trial court’s instructions. *State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982). When a term used in the “to convict” instruction is defined elsewhere in the jury instructions, this provides an adequate definition of the essential elements of the crime. *See State v. Hall*, 104 Wn.App. 56, 62-63, 14 P.3d 884 (2000).

In *Hall*, the trial court had refused to include the word “intent” in its “to convict” instruction for the crime of assault in the third degree. *Id.* at 62. On appeal, the Court of Appeals explained that because “assault” was properly defined by a separate instruction to include intent, and “intent” was properly defined by another instruction, “[v]iewed in their entirety, the instructions properly informed the jury that intent was an essential element of third degree assault.” *Id.* at 62-63 (citing *Esters*, 84

Wn.App. 180, 185, 927 P.2d 1140 (1997). It is also noteworthy that these instructions were taken from those provided in the 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (3d ed. 2008) (“WPIC”). *See id.* at 62; *see also*, WPIC 35.50 (defining assault); WPIC 10.01 (defining intent).

Here, as in *Hall*, the jury instructions taken as a whole properly instructed the jury on the essential elements of assault in the third degree. Instruction No. 8 defined assault as follows: “An assault is an intentional touching or striking of another person that is harmful or offensive[.]”<sup>1</sup> CP at 18. Instruction No. 9 provided the definition of intent as: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP at 19. Instruction No. 7 was the “to convict” instruction, the first element of this instruction required the jury to find beyond a reasonable doubt “[t]hat on or about May 29, 2013, the defendant assaulted Megan Kautz[.]” CP at 17. Each of these three instructions was taken from the corresponding instruction suggested by the WPIC.<sup>2</sup> When the jury was instructed that to convict it

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<sup>1</sup> The complete instruction read: “An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.” CP at 18.

<sup>2</sup> WPIC 35.50 provides the definition of assault, WPIC 10.01 provides the definition of intent, and WPIC 35.23.04 provides the definition for assault in the third degree involving a health care provider. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (3d ed. 2008).

must find beyond a reasonable doubt that Pratt had assaulted Megan Kautz, it was with the understanding that an assault was defined as an intentional touching or striking. Consequently, when the jury found Pratt guilty of the assault, it necessarily found beyond a reasonable doubt that Pratt committed the assault by intentionally touching or striking Megan Kautz in a manner that was harmful or offensive. Because the instructions did not permit the jury to find Pratt guilty without finding that she had committed an intentional touching or striking there was no error in the instructions.

Pratt fails to show an error, much less one of constitutional magnitude. However, even if it were assumed that the “to convict” instruction should have included the phrase “intentional assault,” any error would be harmless as the definition of assault necessarily included a requirement of intentional conduct, jury instructions are considered as a whole, and the jury is presumed to follow the court’s instructions. The State concedes no error here, because of the results such a position would entail.

The flaw in Pratt’s position is that it takes the “to convict” instruction in isolation and fails to consider the jury instructions as a whole. Pratt argues that the “to convict” instruction should have stated “intentionally assaulted.” However, with the definition of assault already

including “intent” this would amount to instructing the jury that Pratt had committed an “intentional, intentional touching or striking of another person that was harmful or offensive.” Such doublespeak would have been much more confusing to the jury than the instructions that were provided.

Because the jury instructions defined assault to require intentional conduct, there was no error.

**2. The trial court did not err when it did not *sua sponte* instruct the jury on self-defense after Pratt did not request a self-defense instruction, and there was no evidence Pratt was being assaulted when she punched Megan Kautz.**

Because Pratt had a constitutional right to choose her defense and chose not to pursue self-defense, and because there was insufficient evidence to support self-defense, the trial court did not err when it did not *sua sponte* instruct the jury on self-defense. “Instructions satisfy the requirement of a fair trial when, taken as a whole they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue his theory of the case.” *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999) (citing *State v. Theroff*, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980)). Pratt argues the trial court erred by failing to instruct the jury on self-defense, even though her attorney did not propose a self-defense instruction. Yet Pratt makes no claim of ineffective assistance of counsel, rather she raises this issue for the first time on appeal claiming she

suffered a “manifest error affecting a constitutional right.” It would have been inappropriate for the trial court to instruct the jury on self-defense for two reasons. First, because Pratt did not pursue self-defense, instructing the jury on self-defense would have violated her constitutional right to choose her own defense and would not have been helpful to Pratt’s argument that she did not possess intent. Second, there was no evidence that Megan Kautz was assaulting Pratt when she was performing her health care duties.

Courts err when they force an affirmative defense upon a defendant who has chosen a different defense to pursue. “[S]elf-defense is an affirmative defense.” *State v. Fry*, 168 Wn.2d 1, 8, 228 P.3d 1 (2010). “Imposing a defense on an unwilling defendant impinges on the independent autonomy the accused must have to defend against charges.” *State v. Coristine*, 177 Wn.2d 370, 377, 300 P.3d 400 (2013). “The defendant’s right to control his defense is necessary ‘to further the truth-seeking aim of a criminal trial and to respect individual dignity and autonomy.’” *State v. Lynch*, 178 Wn.2d 487, 492, 309 P.3d 482 (2013) (quoting *State v. Coristine*, 177 Wn.2d at 376). Further, “[i]nstructing the jury on an affirmative defense over the defendant’s objection violates the Sixth Amendment by interfering with the defendant’s autonomy to present a defense.” *Id.* (citing *Coristine*, 177 Wn.2d at 375). Not only is it a

violation of the Sixth Amendment to deny a defendant the right to mount the defense of his or her choosing, but “[a] deprivation of this right respecting individual autonomy is error even if the trial court’s instructions in the law are a model of accuracy.” *Coristine*, 177 Wn.2d at 381.

In two recent cases, the Supreme Court reversed convictions when the trial court instructed the jury on an affirmative defense over defense objections. *See Lynch*, 178 Wn.2d at 495-96; *Coristine*, 177 Wn.2d at 383). In *Coristine*, by instructing the jury on an affirmative defense the trial court impacted jury deliberations by interfering with *Coristine*’s “straightforward presentation of his sole defense.” *Id.* In *Lynch* the court stated: “The State argues that the consent instruction was justified because *Lynch* introduced evidence that T.S. consented. But in *Coristine* we rejected a similar argument made by the State that evidence presented by *Coristine* bolstering his case somehow justified instructing the jury on an affirmative defense.” *Lynch*, 178 Wn.2d at 493-94. Thus, even if evidence was presented sufficient to support an affirmative defense, it is error for the court to instruct the jury on this affirmative defense if the defendant has not chosen to pursue this affirmative defense.

Also, in a custodial setting, a defendant is required to show actual danger to justify the use of self-defense. *State v. Bradley*, 96 Wn.App.

678, 684-85, 980 P.2d 235 (1999). “Washington cases have held that a reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer engaged in the performance of official duties.” *Id.* at 683 (citing *State v. Valentine*, 132, Wn2d 1, 20-21, 935 P.2d 1294 (1997); *State v. Holeman*, 103 Wn.2d 46, 430, 693 P.2d 89 (1985); *State v. Ross*, 71 Wn.App 837, 843, 863 P.2d 102 (1993)). “An arrestee’s resistance of excessive force by a known police officer, effecting a lawful arrest, is justified only if he was actually about to be seriously injured.” *Id.* (quoting *Ross*, 71 Wn.App at 842). The requirement of actual danger for self-defense is stricter than what is applied in non-arrest settings, where the defendant is merely required to show that he or she had a reasonable belief of imminent danger. *Id.* at 683 (citing *State v. Janes*, 121 Wn.2d. 220, 240, P.2d 495 (1993)). This heightened standard of actual danger not only applies at the time of arrest, but also in a custodial setting because of “the danger to law enforcement officers and the needs for security are heightened in both the arrest setting and the custodial setting.” *Id.* at 684.

Here, Pratt did not seek a self-defense instruction; rather due to her extreme intoxication her attorney argued that she did not possess intent. Pratt had a Sixth Amendment right to choose her defense. As in *Coristine*, this gave Pratt the right to a straightforward presentation of her sole

defense. If the court had forced a self-defense instruction upon her, it would have risked impacting jury deliberations to her detriment. Further, a self-defense argument would have contradicted Pratt's defense that due to her intoxication she did not possess intent when she punched Megan Kautz. While punching someone in self-defense is justified under the law, it still remains an intentional act. It was not possible for Pratt to lack intent when she punched Kautz, and at the same time, intentionally punch Kautz in self-defense. For these reasons, the trial court did not err when it did not *sua sponte* introduce a self-defense instruction when Pratt did not propose such an instruction and was not pursuing a self-defense claim.

Additionally, there was no error in the trial court's decision not to instruct the jury on self-defense because there was insufficient evidence presented to establish this defense. When a person is involuntarily detained at a hospital for purposes of evaluation or treatment this is akin to a custodial setting. Under such circumstances, a health care provider is required by his or her professional duties to interact physically with a combative patient. Further, the health care provider is often required to administer medical procedures to the combative patient against the patient's will.<sup>3</sup> This presents a great risk to the safety of the health care

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<sup>3</sup> Such procedures might be considered assaultive if they were not administered in a health care context. For example, drawing blood could be considered an assault if the blood was not drawn for medical purposes.

provider that is performing his or her duties. For these reasons, the actual danger requirement for self-defense in a custodial setting should also apply to the circumstances of this case, where Pratt was combative, was brought to the hospital against her will in handcuffs by the police, and prior to the assault had announced, “someone’s going to get hit.” RP at 37.

Megan Kautz duties as a health care provider required her to interact with Pratt and prepare her to be examined by the physician. At no time did Kautz or any other person assault Pratt. Rather, Kautz was attempting to calm Pratt down and was in the process of helping her change into a gown. Just prior to the assault, Kautz asked Pratt to unbutton her wet jeans, after the gown had been placed over her. There was absolutely no evidence that Pratt was in actual danger, and, even if the non-custodial standard for self-defense applies, there was no evidence that Pratt had a reasonable fear of imminent danger. Accordingly, had Pratt’s attorney sought a self-defense instruction, it is likely the court would have declined to give this instruction.

Because there was no error, Pratt cannot show that there was a manifest error affecting a constitutional right.<sup>4</sup> Further, even if it had been error not to give this instruction, Pratt could not show that such an error was “manifest,” because there would not have been any practical and identifiable consequence on the trial. Pratt’s argument was that she had no intent. Because self-defense is contradictory to this argument, a self-defense instruction would not have been helpful to Pratt. Also, considering that Pratt punched a health care provider in the face for asking her to unbutton her pants as she was helping Pratt into a gown, self-defense was not a viable defense strategy under the facts of the case. Thus, even if it is assumed that failing to instruct the jury on self-defense was a manifest error, such an error would have been harmless because a self-defense instruction would not have impacted the outcome of the trial.

**B. The trial court correctly calculated Pratt’s offender score.**

Because Pratt affirmatively acknowledged her criminal history was accurate at sentencing, the trial court did not err when it sentenced her accordingly. The State’s burden to prove prior convictions at sentencing

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<sup>4</sup> If there is no *sua sponte* requirement for a court to instruct the jury on an affirmative defense the defendant has not sought, then arguably because Pratt’s claim of error is that a jury instruction was not given when her attorney did not propose this instruction, she has forfeited a claim of manifest error affecting a constitutional right by not raising it through a claim of ineffective assistance of counsel.

is relieved “if the defendant *affirmatively* acknowledges the alleged criminal history.” *State v. Hunley*, 175 Wn.2d 901, 917, 287 P.3d 584 (2012) (emphasis in original) (citing *State v. Ford*, 137 Wn.2d 472, 479-80, 973 P.2d 452 (1999)). A “defendant’s mere failure to object to State assertions of criminal history does not result in acknowledgement.” *Id.* at 912 (citing *Ford*, 137 Wn.2d at 482-83). However, “if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State’s depiction of the defendant’s criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.” *State v. Bergstrom*, 162 Wn.2d 87, 94, 169 P.3d 816 (2007) (citing *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). Further at sentencing, “[t]he State is entitled to rely on representations advanced by defense counsel[.]” *Id.* at 96.

Here, as in *Bergstrom*, by agreeing to the State’s depiction of her criminal history, Pratt waived the right to challenge that history on appeal. At sentencing, the court asked if the parties were in agreement as to Pratt’s offender score.<sup>5</sup> The State provided the specific convictions listed in Pratt’s criminal history, explained that the parties were in agreement as to

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<sup>5</sup> It is also noteworthy that prior to sentencing the State had explained that the parties were in agreement as to Pratt’s prior felony convictions and community custody status, and Pratt’s attorney acquiesced to this representation. RP at 204.

**C. The trial court did not abuse its discretion by requiring Pratt to repay the cost of her court-appointed counsel as part of her legal financial obligations.**

The trial court did not abuse its discretion by ordering Pratt to pay the cost of court-appointed counsel as part of her legal financial obligations. “RCW 10.01.160 allows courts to require an indigent defendant convicted of a felony to pay court costs, including recoupment of fees for court appointed counsel.” *State v. Smits*, 152 Wn.App. 514, 519, 216 P.3d 1097 (2009). Further, “the Constitution does not require an inquiry into ability to pay at the time of sentencing. Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment.” *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Because RCW 10.01.160 authorizes a court to require an indigent defendant to pay for the recoupment of fees for court-appointed counsel, and the Constitution does not require an inquiry into the ability to pay at the time of sentencing, the trial court did not abuse its discretion when it ordered Pratt to pay the cost

of court-appointed counsel. If at the point of collection sanctions are sought for non-payment, then this is when an inquiry into Pratt's ability to pay would be necessary.<sup>6</sup>

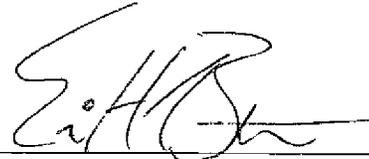
V. **CONCLUSION**

For the above stated reasons, Pratt's conviction and sentence should be affirmed.

Respectfully submitted this 9<sup>th</sup> day of June, 2014.

SUSAN I. BAUR  
Prosecuting Attorney

By:



ERIC H. BENTSON  
WSBA # 38471  
Deputy Prosecuting Attorney  
Representing Respondent

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<sup>6</sup> Considering a person's ability to pay could change in the future, it makes little sense to conduct an ability to pay inquiry at the time of sentencing rather than collection. Otherwise a person who has the ability to pay at the time of sentencing, but subsequently loses that ability would not be protected against being forced to pay money he or she did not have. For this reason, the optimum time to inquire as to the ability to pay is at the time collection is sought.

**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 9<sup>th</sup>, 2014.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

**June 09, 2014 - 2:12 PM**

## Transmittal Letter

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Court of Appeals Case Number: 45302-9

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