

COA No. 65411-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Respondent,

v.

CYNTHIA CUELLAR,  
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Hollis Hill

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. In Cynthia Cuellar's trial on a charge of third degree assault of a Kent police officer, to which she interposed a claim of self-defense, the trial court erred in giving the jury the "first aggressor" instruction of WPIC 16.04.

2. The trial court erred in not giving a "words alone" instruction as requested.

3. The trial court's instructional error relieved the State of its burden under the Fourteenth Amendment to prove the absence of self-defense beyond a reasonable doubt.

4. The deputy prosecuting attorney committed prejudicial misconduct in closing argument.

5. The trial court erred in not giving the resisting arrest instruction as a lesser included offense.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. While breaking up a fracas outside an apartment complex in Kent, police officers encountered a crowd of additional persons who began protesting the police treatment of an alleged assailant and later of one or more of the angry onlookers themselves. The defendant, Cynthia Cuellar, advanced toward

the group of police and arrestees, but complied when told to stay back. However, when she became upset at the police actions toward her family members, she approached the area where officers had handcuffed her cousin and another female relative, yelling at them to “get off my family.” One or more officers stated they told Ms. Cuellar to stay back, but she allegedly did not.

Officer Clark, who had been inside the apartment building investigating, came upon and entered the scene of the commotion, and at some point he approached Ms. Cuellar from behind, and applied a “full LVNR”<sup>1</sup> choke hold on her. The officer used such a degree of arm pressure on her neck, above the “Level 1” hold designed to merely restrain a citizen, that another officer saw Ms. Cuellar’s eyes “starting to roll in the back of her head,” as she lost consciousness.

As Ms. Cuellar’s body went limp, which Officer Clark assumed was a volitional act obeying his orders to comply, he did not hear his fellow officer yelling to him, “she’s out!” He re-applied the LVNR neck hold on Ms. Cuellar when she resumed flailing after he let up on the pressure briefly, and the defendant

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<sup>1</sup>“Lateral Vascular Neck Restraint.” See 1RP 58-59.

then bit the officer on the forearm, in order to defend herself against a second application of what she alleged was excessive force.

The trial court properly instructed the jury on the legal standard applicable to defense of self against detention by a law enforcement officer using excessive force. However, at the State's request and over multiple defense objections, the court also instructed the jury pursuant to WPIC 16.04, the disfavored "first aggressor" instruction.

Did the trial court err in giving WPIC 16.04, instructing the jury that Ms. Cuellar could not secure acquittal based on self-defense if she was the "first aggressor,"

(a) where the "first aggressor" doctrine is logically inapplicable when self-defense is interposed to a charge of assault of a police officer, who is necessarily detaining the defendant for some act legally sufficient to warrant the police detention;

(b) where in any event the evidence, even when viewed in the light most favorable to the prosecution, failed to show that Ms. Cuellar engaged in any provoking act beyond her words alone of

“get off my family,”<sup>2</sup> which she uttered in reaction to the officers’ use, however proper, of taser firings, choke holds, facial strikes, straight arm bar take-downs, and front-stop kicks upon the original assailant and another member of the upset, protesting crowd; or

(c) where the provoking act, if any, was ‘directed,’ if any such act was directed at anyone, at the third party officers who had taken her cousin Luis Cuellar and another relative down to the ground, rather than at the officer/victim of the alleged assault, who testified inadequately that his concern was merely that Ms. Cuellar would excite the crowd, and admitted that he decided to take down the most disruptive individual, who happened to be Ms. Cuellar?

2. Where the disfavored “first aggressor” instruction effectively precludes the accused’s ability to prevail on a legitimate claim of self-defense, and where the court also erred in not giving the requested “words alone” instruction, did the trial court’s instructional error relieve the State of its burden to prove

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<sup>2</sup>See 1RP 101-02 (testimony of Kent police officer Joel Makings)

the absence of self-defense beyond a reasonable doubt as required by the Fourteenth Amendment?

3. Is reversal of the defendant's conviction required where the deputy prosecutor, over multiple defense objections (two of them sustained), repeatedly exhorted the jury in closing argument that it needed to safeguard the police officers who protect the safety of our community, and who might be hit or stabbed while doing their duty if a proper line was not drawn?

4. Did the trial court err in not giving the resisting arrest instruction as a lesser included offense, where the lesser met the legal and factual tests for inclusion?

### **C. STATEMENT OF THE CASE**

**1. Procedural history.** The defendant, Cynthia Cuellar, was charged with third degree assault of a law enforcement officer, pursuant to RCW 9A.36.031(1)(g),<sup>3</sup> by information filed in King County Superior Court on April 29, 2009. CP 1.

According to the affidavit of probable cause, officers of the Kent Police Department were called to the scene of a fight in the

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<sup>3</sup>RCW 9A.36.031(1)(g) makes a simple assault (which is normally assault in the fourth degree) into a third degree assault where the defendant assaults a law enforcement officer who was performing his or her official duties.

parking lot of the Pembroke Apartments on 29th Ave. South. CP

2. Upon arrival, the police observed multiple persons in the parking lot and the sounds of a loud argument, and were advised by witnesses that an alleged assailant, Luis Cuellar, was being held down by two males. Officers ordered the males to release Cuellar, who rose to his feet and began walking away, ignoring police directives to stop, requiring him to be physically restrained.

CP 2.

During the officers' efforts to restrain Mr. Cuellar, a crowd of people approached the officers and began complaining. Mr. Cuellar's cousin Cynthia Cuellar allegedly "pushed and pulled her way past officers" and toward Luis and the officers restraining him, allegedly ignoring officers who attempted to calm her down verbally. CP 2. Kent police officer Clark therefore approached Ms. Cuellar from behind, and applied a "Level 1 LVNR (Lateral Vascular Neck Restraint)"<sup>4</sup> upon her neck with his arm and body.

CP 2.

During his application of the choke-hold, Officer Clark did not find Ms. Cuellar's protestations that she was unable to

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<sup>4</sup>Officer Williams stated that this method of restraint is commonly and incorrectly thought of by the public as a "choke hold." 2RP 59.

breathe to be credible. CP 2. When Ms. Cuellar's arms went to her side,<sup>5</sup> Officer Clark released the choke hold, and Ms. Cuellar then began trying to pull away from him. CP 2-3. Officer Clark therefore attempted to re-apply the choke hold, whereupon Ms. Cuellar bit him on his right forearm. She did not release her bite and Officer Clark struck her in the face to cause her to do so. CP 2-3.

Ms. Cuellar was later interviewed by a Kent police detective and, quite straightforwardly, she "admitted to deliberately biting the officer's forearm to prevent him from applying a neck hold [again]." CP 3.

Ms. Cuellar did not plead guilty and instead proceeded to jury trial on the charge of third degree assault of a police officer, pursuant to RCW 9A.36.031(1)(g). She interposed a claim of self-defense, which required the State to prove that the force used by the defendant was not lawful, under the standard that force may be used to resist arrest if the arrestee is in imminent

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<sup>5</sup>It became a matter of dispute at trial whether Ms. Cuellar's arms went to her side because the officer was directing her to place them there, or because the LVNR choke-hold had been applied by Officer Clark above a "Level 1" degree of force, causing excessive restriction of blood flow to Ms. Cuellar's brain and her actual loss of consciousness. See 2RP 159 (closing argument).

danger of serious injury. CP 35; see WPIC 17.02.01 (“Lawful Force – Resisting Detention”); State v. Holeman, 103 Wn.2d 426, 693 P.2d 89 (1985) (force may be used in self-defense if the arrestee is actually and imminently about to be seriously injured by the arresting officer).

Over multiple defense objections, the trial court gave the jury a “first aggressor” instruction, which precludes a defendant from securing acquittal even where her use of force was justified. CP 36; 2RP 123, 138. The jury ultimately issued a verdict of guilty. CP 13.

At sentencing, the court determined that Ms. Cuellar was eligible for a first-time offender waiver and imposed time served as the period of incarceration under RCW 9.94A.650. CP 48; 2RP 195-96. The court and counsel noted that the conviction for assault of a police officer would now prevent Ms. Cuellar from becoming a dental worker, which she had hoped would allow her to support her family, but that she would hopefully be able to work in her mother’s restaurant. 2RP 194-96. The court stated that these effects of the incident were “sufficient punishment,” and also declined to impose community service hours. 2RP 195-96.

Ms. Cuellar appeals, arguing that the jury was wrongfully precluded from fairly assessing her claim of self-defense as a result of the improper “first aggressor” instruction, and by the prosecutor’s improper argument to the jury during closing argument. CP 44.

**2. Relevant trial testimony.** Kent Police Officer Mark Williams responded to the dispatch call to the Pembroke Apartments along with three other officers. The apparent male assailant Luis Cuellar was tased and “front-stop” kicked when he tried to walk away and would not respond to orders after his captors were directed off of him. 1RP 54. Officers had to continue to struggle with Mr. Cuellar even after he was handcuffed, and another officer was struggling with and tasing or choke-holding a female (not the defendant), trying to handcuff her. 1RP 54-59. People were yelling things like, “Let him go, what are you doing, you are hurting him.” 1RP 67. The officer was asked if he heard someone yell “get off my family,” to which he responded, “Not that I recall documented.” 1RP 67. However, the crowd was yelling to the police officers to let people go who hadn’t been doing anything. 1RP 58.

In the midst of the commotion, Officer Williams saw that Officer Clark, one of the responding officers, had restrained a person, the defendant Cynthia Cuellar, using a Lateral Vascular Neck Restraint (“LVNR”), commonly referred to as a “choke hold,” which “disrupts the blood flow to the brain [but] does not impair your airway.” 1RP 58-59. Cynthia Cuellar’s face was already injured with her lip bleeding.<sup>6</sup> 1RP 62-63.

Officer Williams explained that a “Level 1” LVNR will stop the subject citizen’s body from struggling, while a “Level 3” hold will “render somebody unconscious for a period of five to ten seconds,” thus “putting the person out.” 1RP 60. Williams stated that the particular Level of LVNR – 1, 2 or 3 – depends on how much pressure the law enforcement officer is applying to the neck of the citizen with his or her arm. 1RP 60-61.

Officer Williams testified that Officer Clark was applying the “full LVNR” to Ms. Cuellar, who was struggling with him. 1RP 63.

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<sup>6</sup>Officer Joel Makings later testified that prior to the choke-hold incident, officers were trying to hold Cynthia Cuellar down on the ground and handcuff her, he tried to help them by grabbing her hair and holding her head “down onto the ground, onto the concrete.” 1RP 103. This was before Ms. Cuellar was tased and then the LVNR hold applied to her. 1RP 104-06. Officer Vance described Ms. Cuellar’s face as smeared with blood, although a major dispute arose as to her knowledge of whether this injury was in existence when the officers first arrived on the scene. 1RP 159, 165.

I could see the defendant's eyes starting to roll in the back of her head which is normal or common, and she started to slump down and it's kind of hard to show unless somebody wants to volunteer, but with the LVNR you lose consciousness and we use our leg to support the body, we seat you down and we roll you over on your stomach so that you can be placed in the handcuffs while you [sic] still unconscious.

1RP 63. Officer Williams testified that the LVNR technique of obtaining citizen compliance is "not lethal," which he stated he had been instructed during a "Power Point [presentation] at a Friday training." 1RP 87-88. The trial deputy spent much of her direct examination of the various police witnesses eliciting testimony to this effect. See, e.g., 2RP 9-10.<sup>7</sup>

When a person is subjected to the LVNR hold, which Officer Williams had experienced himself during officer training, it causes a person to lose consciousness. 1RP 70. "[I]t starts to get black on the outside and just closes in," said Officer Williams. 1RP 70-71. The officer continued to explain that upon revivification and return to sentience, a person is initially unable to

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<sup>7</sup>But note Part D., infra, indicating that under Washington law, a person need not be faced with danger of full death, in order for a use of force to defend herself against an officer's excessive force to be legally justifiable. See, e.g., State v. Ross, 71 Wn. App. 837, 840-42, 863 P.2d 102 (1993).

“recognize your surroundings and recognize that the people around you are your friends and not anything else.” 1RP 71.

Officer Williams noted that police officers are trained to warn another LVNR-applying officer when the citizen has lost consciousness, since the choking officer is using an arm-hold in which he necessarily cannot see the victim’s face. 1RP 64. This in fact occurred in the incident with Officer Clark and Ms. Cuellar. Officer Williams testified that he “was yelling, Tom, she’s out, Tom, she’s out, but he couldn’t hear me.” 1RP 64.

Because of the distractions caused by the protesting crowd, Officer Williams could provide little detail regarding the interaction between Officer Clark and the subject. 1RP 63-64. However, he had not seen Ms. Cuellar hit, strike, head butt, or brandish any weapons toward any officer or officers. 1RP 79-80.

Officer Joel Makings testified that he handcuffed a woman (later identified as Hilda Cuellar) who had approached the scene and tried to talk to alleged assailant Luis Cuellar, requiring him to take Hilda Cuellar to the parking lot surface using a straight arm bar take down. 1RP 99-100. As he was holding Hilda Cuellar down, Cynthia Cuellar “started running over yelling get off my family.” 1RP 101-02. She looked angry. 1RP 102. Then, other

officers “started struggling with her [Cynthia Cuellar].” 1RP 102. They were trying to hold her down on the ground and handcuff her, and Officer Makings tried to help the officers by reaching over with one hand and grabbing her hair and holding her head “down onto the ground, onto the concrete.” 1RP 103. He saw that an officer used a taser on Ms. Cuellar while she was down on the ground on her stomach, but he did not see the later incident where Ms. Cuellar had the LVNR hold applied to her by Officer Clark. 1RP 104-06.

Officer Heather Vance testified that during the restraint of various other individuals during the commotion, Cynthia Cuellar “was advancing towards the officers, so we want to keep everybody else back so that they don’t, somebody doesn’t jump on their back or hurt them because they don’t want that person on the ground to be detained.” 1RP 116-17.

Officer Vance did state that Ms. Cuellar stated she wanted to get to the police, and testified “it was more attacking than just wanting to talk or help,” however, there was no evidence that Ms. Cuellar was trying to attack any police officer or officers, including at that time or any other. See 1RP 117.

In fact, Officer Vance testified that she initially told Ms. Cuellar to “get back” in a firm voice, and she did not have to restrain the defendant, because “she [Cynthia Cuellar] did comply and then she walked over to other family members that were other people observing.” (Emphasis added.) 1RP 117-18. Officer Vance then began speaking with the person who called 911 (Hilda Cuellar, who the police also moved to the ground during the incident), and she was “doing something else when I heard a taser application” on Mr. Luis Cuellar. 1RP 118.

At that point, Cynthia Cuellar “advanced back, was very upset, yelling, in attack mode, [I] tried to tell her again to step back and then I saw Officer Clark grab her from behind.” 1RP 119. Ms. Cuellar was yelling. 1RP 119. When Officer Clark applied the LVNR hold to Ms. Cuellar, she “continued to fight and kick.” 1RP 122. Officer Vance’s attention was diverted at that time, but she then saw that Ms. Cuellar had revived from passing out and she was biting the officer’s arm. 1RP 123. The officer struck Ms. Cuellar in the face and she was arrested. 1RP 124-25.

During Officer Vance’s testimony, she testified she believed that Ms. Cuellar’s bloody face was the result of an injury she had sustained prior to any police officers initially arriving on

the scene. 1RP 159, 165. Officer Makings' testimony appeared to directly contradict this assertion, 1RP 102-06. Ms. Cuellar's claim of self defense was thus rendered that more viable by virtue of the fact that her bleeding facial injury constituted not just "risk" of imminent injury, but injury already in fact inflicted.<sup>8, 9</sup>

Officer Clark testified that the LVNR hold is "not lethal." 2RP 9. He placed Ms. Cuellar in the neck hold because she was advancing toward the officers restraining the original assailant and was yelling, and was likely to excite the crowd. 2RP 21-22.

When Officer Clark arrived at the scene of the 911 call, he went inside the apartment building to investigate the possible location of the incident that had prompted the dispatch. 2RP 20. When Officer Clark returned to the parking lot, he saw Officer Barber "trying to control a female that was initially advancing on him." 2RP 20-21. The person, identified as the defendant, pulled away and then "was still screaming at him [Officer Barber] and then started walking advancing [sic] towards him." 2RP 21.

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<sup>8</sup>The jury was not provided any instructions regarding the meaning of either "excessive force," or "serious injury." CP 23-39.

<sup>9</sup>Officer Vance's police reports and CAD printout showing the chronology of the original 911 assault call were among the documentation the jury twice unsuccessfully requested to see during deliberations. CP 40, CP 42; 1RP 144; Supp. CP \_\_\_\_, Sub # 50B (Exhibit list, Defense exhibit 18).

From Officer Clark's testimony, his actions toward the defendant arose from a general concern about the size of the crowd protesting the police actions, as opposed to actual belief that Ms. Cuellar was about to physically attack an officer. To the extent that he believed the latter, Ms. Cuellar did not engage in any conduct beyond words, or in any provoking act toward his person. Officer Clark testified that Ms Cuellar was "advancing" on the "officers that were trying to hold the crowd at bay." 2RP 21. The defendant was yelling something that he could not hear or remember. 1RP 21. He stated, "That's clearly a safety risk." 2RP 21-22. The officer explained that Ms. Cuellar's behavior was "the most violent at that moment, the most aggressive, and which needed to be controlled the quickest.

Q: So what did you do?

A: I approached her from behind and placed the lateral vascular neck hold on her.

2RP 22. The officer stated that Ms. Cuellar continued to flail her arms, but then stated that she put her hands down by her side. When he released the hold, she "went back to fighting." 2RP 26. When Officer Clark tried to re-apply the neck hold with pressure, Ms. Cuellar bit him on the forearm. 2RP 27.

Officer Clark claimed that he only applied a Level 1 LVNR hold when he initially employed the restraint method on the defendant, and stated that a Level 1 hold would not normally cause the citizen to lose consciousness. 2RP 23-25. He asserted that Ms. Cuellar did not lose consciousness. 2RP 40. This was of course belied by the testimony of the officers who saw Ms. Cuellar appear to lose consciousness. See 1RP 64, 123, 175.<sup>10</sup>

Officer Clark also claimed that Ms. Cuellar's arms went to her side during the initial choke hold because she was intentionally complying with his order to do so, not because she had lost consciousness. 2RP 39.

Ms. Cuellar testified that she lost consciousness. She had gone outside to the apartment's parking lot to determine what was going on when the police arrived, and she approached her cousin Luis Cuellar to tell him to relax. 2RP 62-63. Everything happened fast. 2RP 63. She never saw or heard any officer put their hand up or tell her to stop – she was simply thrown to the

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<sup>10</sup>Sergeant Eric Hemmen was also able to observe Officer Clark holding the defendant in an LVNR choke restraint. 1RP 174. As did other police officers, Sergeant Hemmen saw Ms. Cuellar's body as it "started relaxing" as a result of the choke hold. 1RP 175.

ground. 2RP 63. As one officer pushed her face to the ground by holding her hair, she unsuccessfully tried to avoid her face being scraped on the cement. 2RP 63-64. An officer picked her up and put his arm around her neck, at the same time lifting her so hard that her toes were almost off the ground. 2RP 66-67. She was saying or trying to say that she could not breathe. 2RP 67.

Just when Ms. Cuellar thought “it was over,” that was when she did bite the officer. 2RP 67. Ms. Cuellar continued:

Then when he said let go and I went to let go and he hit me in the side of my face, he hit me on my left cheek, my jaw, and I went to the ground, that’s when I got tased. I am on the ground and I am being tased and I got tased a couple times.

2RP 67. Nothing in the State’s cross-examination of Ms. Cuellar indicated that she said or did anything at any time that could be considered provocation. 2RP 83-100.

#### **D. ARGUMENT**

- 1. THE TRIAL COURT ERRED IN GIVING THE JURY THE “FIRST AGGRESSOR” INSTRUCTION REQUESTED BY THE PROSECUTION.**

Based on the State’s argument that Ms. Cuellar was rushing toward police officers to attack them before Officer Clark placed a

choke hold on her, the trial court gave the jury the “first aggressor” instruction per WPIC 16.04, which may preclude a defendant from securing acquittal even where her use of force was justified<sup>11</sup> under WPIC 17.02.01. 2RP 138-39. Ms. Cuellar objected to the State’s proposed inclusion of WPIC 16.04 and formally took exception to the court’s decision to include the instruction. 2RP 129, 138-40. Ms. Cuellar may appeal; she objected that the instruction was improper because the defendant’s provoking conduct, if any, consisted of words alone; and further argued that first aggression cannot be premised on the defendant’s actions toward a third party. CP 36; 2RP 123, 138. RAP 2.5(a).

**(a) Jury instructions on self-defense are reviewed as a whole and held to a rigorous standard on appeal.** In general, the Court of Appeals reviews challenged jury instructions simply to determine whether they are warranted in the case, correctly state

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<sup>11</sup>The State did not dispute Ms. Cuellar’s plain entitlement below to have her jury instructed on her claim of self-defense. When a defendant raises a claim of self-defense, she must set forth sufficient facts to establish the possibility of self-defense before she becomes entitled to have the jury so instructed, whereupon the doctrine applies and the burden is upon 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); State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). In determining whether a defendant is entitled to present a claim of self-defense, the trial court views the factual proffer in the light most favorable to the defendant. State v. Westlund, 13 Wn. App. 460, 465, 536 P.2d 20 (1975).

the applicable law, and to ensure they do not mislead the jury.

State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990).

However, where a defendant charged with assault asserts that her use of force was lawful and thus did not constitute a criminal act, the jury instructions pertaining to that defense – “self defense” – are reviewed with a “rigorous scrutiny.” See State v. Rodriguez, 121 Wn. App. 180, 87 P.3d 1201 (2004). The instructions are reviewed as a whole, and importantly, they must do “more than adequately convey the law” of self-defense. State v. Walden, 131 Wn.2d at 473. Instead, the multiple pertinent jury instructions relating to self defense, read as a whole, must make the relevant legal standard, of when force can legally be used, “manifestly” apparent to the average juror. (Emphasis added.) State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

Importantly, instruction of the jury “that misstates the law of self-defense is constitutional error.” State v. Harris, 122 Wn. App. 547, 553, 90 P.3d 1133 (2004) (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)); U.S. Const. amend. 14; see infra. This category of constitutional error includes the erroneous use of a first aggressor instruction in the series of instructions relating to self-defense, because such use results in

instructions that, as a whole, misstate the law of self-defense applicable to the case. Harris, 122 Wn. App. at 554 (quoting State v. Irons, 101 Wn. App. 544, 550, 4 P.3d 174 (2000)).

**(b) The “first aggressor” instruction of WPIC 16.04 is rarely appropriate and is per se inapplicable to a case involving assault of a police officer who is arresting the defendant for conduct toward a third party that is claimed by the State to be the alleged act of provocation.** The trial court gave the jury the WPIC 16.04 “first aggressor” instruction, which read as follows:

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 or defense of another is not available as a defense.

CP 46 (Instruction No. 18); see 11 Washington Pattern Jury Instructions: Criminal § 16.04; see generally State v. Riley, 137 Wn.2d 904, 911, 976 P.2d 624 (1999).

Under the more rigorous standard of review applied to self-defense jury instructions as a whole, the Washington Courts

have begun with the assessment that a “first aggressor” instruction is rarely appropriate:

Few situations come to mind where the necessity for an aggressor instruction is warranted. The theories of the case can be sufficiently argued and understood by the jury without such instruction.

State v. Arthur, 42 Wn. App. 120, 125 n.1, 708 P.2d 1230 (1985). It is recognized that “first aggressor” instructions may operate to preclude the jury from even reaching the substantive question of whether the defendant’s use of force was in fact lawful – “effectively vitiat[ing] any claim of self-defense to be considered by the jury.” Arthur, 42 Wn. App. at 124-25.

Thus the limitations on the use of first aggressor instructions only begin with the requirement that they are only appropriate if “there is credible evidence from which a jury can reasonably determine that the defendant provoked [her] need to act in self-defense.” See Riley, 137 Wn.2d at 909-10.

For example, under State v. Wasson, 54 Wn. App. 156, 772 P.2d 1039 (1989), the provoking act must be an intentional act which a “jury could reasonably assume would provoke a belligerent response by the victim,” and the “provoking act must also be related to the eventual assault as to which self-defense is

claimed.” (Emphasis added.) State v. Wasson, 54 Wn. App. at 159 (quoting Arthur, 42 Wn. App. at 124).

Thus, in addition to the fact that there are few situations where a “first aggressor” instruction is warranted at all, there are even fewer, if any, where the instruction is justified in circumstances where the defendant’s belligerence was directed at a third party. In Wasson, the court concluded that WPIC 16.04 was not appropriate to be given where a stranger, Reed, intervened in a fight between Wasson and his cousin. Reed struck Wasson's cousin several times then walked toward Wasson who shot Reed. The Court of Appeals held that Wasson could not be the aggressor because the fight between Wasson and his cousin was not related to Reed's assault. Wasson, 54 Wn. App. at 160.

Consistent with the plain language of WPIC 16.04 and the dictates of decisions like Wasson, the cases in which an aggressor instruction is properly given involve situations where there was a belligerent act by the defendant toward the ultimate assault complainant. See, e.g., State v. Davis, 119 Wn.2d 657, 666, 835 P.2d 1039 (1992); State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998), review denied, 138 Wn.2d 1008 (1999).

The present case is different. The police witnesses who

were able to testify to observations of Ms. Cuellar before and leading up to the application of the choke hold were very clear that the defendant was walking toward, and yelling at, officers other than Officer Clark.

Officer Vance testified that during the restraint of various other individuals during the commotion, Cynthia Cuellar was moving towards the officers who had the several persons, such as the original assailant and Hilda Cuellar on the ground. She seemed to be doing this because she was angry that they were being detained. 1RP 116-17. Officer Vance consistently stated that Ms. Cuellar was moving toward the group of officers who were on top of "Luis [Cuellar]," and made clear that this did not include Officer Clark, who Vance then saw "grab her [the defendant] from behind." (Emphasis added.) 1RP 119.

No police witness contradicted the undisputed fact that Officer Clark was not among the officers who were the subject of Ms. Cuellar's or the crowd's focus. Even according to Officer Clark, Ms. Cuellar was screaming at Officer Barber and then started walking or advancing towards him. 2RP 21. And of course, Officer Clark had come upon the scene of the fracas where citizens were being arrested or detained, from inside the

apartment building where he had been investigating. 2RP 20. Officer Clark was in no way involved in the original difficult police efforts to detain Luis Cuellar and the additional person who was approaching them and protesting the police actions. 2RP 18-20.

The undisputed evidence below indicates that the present case is simply not one in which ‘the defendant provoked the victim into using the very force against which she claims to have defended herself.’ For that reason alone, the WPIC 16.04 “first aggressor” instruction should not have been given to Ms. Cuellar’s jury.

In addition, Ms. Cuellar urges this Court to hold that even if the defendant engaged in a provoking, belligerent act (but see Part D.1.c, infra, arguing that words alone are inadequate), and even if a provocative act toward a third party under these facts may warrant an aggressor instruction, the rule must be that a “first aggressor” instruction is per se improper where the allegedly provoking act is the conduct for which the officer is arresting or detaining the defendant.

Under the charge in this case, a heightened standard for gaining acquittal under a claim of self-defense applies in the circumstance where the charge is assault of a law enforcement

officer. See State v. Brown, 140 Wn.2d 456, 998 P.2d 321 (2000).

As to her claim of self defense against the charge of third degree assault pursuant to RCW 9A.36.031(1)(g), Ms. Cuellar's jury was instructed with regard to the lawful use of force in circumstances where a law enforcement officer's conduct in detaining or arresting a person creates a risk of imminent serious injury to the defendant.

The jury instruction defining lawful use of force read as follows:

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

A person may 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 from an officer's use of excessive force. The person may employ such force and means as a reasonably prudent person would use under the same or similar circumstances.

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.

CP 35 (Jury instruction no. 9); see WPIC 17.02.01. It was in this context that the trial court gave the first aggressor instruction. CP 46 (Instruction No. 18).

However, in the context of self defense interposed against a charge of RCW 9A.36.031(1)(g) assault on a police officer, where

the alleged act of provocation by the defendant is directed at a third party, and the arresting police officer is detaining the defendant on grounds of that conduct, the “first aggressor” doctrine is legally inapplicable.

Here, Officer Clark plainly detained Ms. Cuellar for the conduct which the prosecution at trial argued was an act of first aggression warranting a “first aggressor” instruction.

To the extent that the officer acted as he did because of some act by her directed at someone, Officer Clark alleged that he placed the defendant in a choke hold because Ms. Cuellar was screaming at Officer Barber and then started walking toward him. 2RP 21. He also testified that Ms. Cuellar was advancing toward the officers trying to hold the crowd at bay. 2RP 21. For these reasons, Officer Clark explained that he placed the neck hold on Ms. Cuellar because. 2RP 21-22. In addition, Officer Vance also testified that Officer Clark grabbed Cynthia Cuellar from behind when she re-commenced yelling and refused to step back upon Vance’s orders. 1RP 119.

The trial deputy, in turn, specifically argued to the court in seeking the first aggressor instruction that it was this testimony by Officers Vance and Clark that supported a first aggressor

instruction premised on Ms. Cuellar's actions of yelling at the officers detaining the original fracasant and the first intervenor. 2RP 138.

The combination of the particular charge of assault on a police officer performing his official duties of arrest for certain conduct, and a prosecution claim that the arrestee was the first aggressor by virtue of that very conduct, precludes use of the first aggressor doctrine if the aggressive conduct was directed toward a third party. In the context of self defense interposed against a charge of RCW 9A.36.031(1)(g) assault on an officer, where the alleged act of provocation by the defendant is directed at a third party, and the arresting police officer is detaining the defendant on grounds of that conduct, an aggressor instruction vitiates the right of defense of self categorically. Despite the doctrine that force is lawful if used in self-defense, an accused will always be disqualified by the aggressor doctrine from prevailing based on a factually valid self defense claim. In such circumstances, an aggressor instruction is violative of due process and inappropriate. U.S. Const. amend. 14.

**(c) The provoking act, if any, was merely "words alone."**

Ms. Cuellar argues, in addition, that any aggressive conduct by her

consisted solely of words alone, which is inadequate to invoke the first aggressor doctrine. A trial court's decision regarding any jury instruction must be based upon the facts of the case, or it will be deemed to be an abuse of discretion. State v. Lucky, 128 Wn. 2d 727, 731, 912 P.2d 483 (1996), reversed on other grounds by State v. Berlin, 133 Wn. 2d 541, 543, 548-49, 947 P.2d 700 (1997).

But Ms. Cuellar argues that the facts show only that the defendant's provoking "act" was belligerent language, and "[w]ords alone do not constitute sufficient provocation" for a first aggressor instruction. State v. Riley, 137 Wn.2d at 911.

Here, although various officers stated that Ms. Cuellar was walking towards the police, it is clear that she presented no risk of physical, much less violent actions, leaving only her yelling and screaming as any act of aggression. Indeed, Officer Clark himself testified that Ms. Cuellar merely presented a theoretical safety risk. The defendant was yelling something that the officer could not hear or remember. 1RP 21. He stated,

That's clearly a safety risk, she looked like she was moving forward to, in an aggressive manner and at any time you have to assume that's an assaultive behavior. I believe that the officers that were there were at risk because of the size of the crowd,

because of the behavior of the crowd. In those types of situations you need to quickly get people into custody, especially those who are, whose behavior is the worse, being the worst, those causing the biggest disturbance need to be controlled quickly otherwise it excites the rest of the crowd and that is what my intent was.

(Emphasis added.) 2RP 21-22. This is inadequate. There was no act of physical aggression such as instigating a physical confrontation that rendered Ms. Cuellar a first aggressor. For example, in State v. Arthur, the defendant had a verbal altercation with the victim earlier in the day. Arthur, 42 Wn. App at 121. Later the same day, his car collided with the victim's car. The victim approached Arthur in a threatening manner and Arthur stabbed him. Arthur, 42 Wn. App at 121-22.

The Court of Appeals determined that this trial evidence was insufficient to characterize any of the defendant Arthur's conduct as an act of aggression warranting a first aggressor instruction. Arthur, 42 Wn. App. at 124-25.

For further example, in Rorie v. United States, 882 A.2d 763, 772-73 (D.C. App. 2005), there was an ongoing feud and trading of threats between the defendant, Rorie, and the complainant over several days. Rorie, 882 A.2d at 770-73.

Ultimately, however, the Court determined that the defendant Rorie's mere conduct of stating that "if I leave she [Ms. Price] goes with me," was not an aggressive act beyond mere words that precipitated the attack and the need to use self-defense.

Rorie, 882 A.2d at 772-73.

**(d) The erroneous instruction relieved the State of its burden of disproving the absence of self-defense beyond a reasonable doubt, and requires reversal.** Self-defense instructions misstating the law are constitutional error in that they implicate a defendant's rights of due process, which include the right to hold the State to proof that he used unlawful force. See State v. McCullum, 98 Wn.2d at 484; see also State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002) ("An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal."); U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). An improper aggressor instruction deprives the defendant of his self-defense claim and violates this due process right. State v. Cowen, 87 Wn. App. 45, 52, 939 P.2d 1249 (1997);

McCullum, 98 Wn.2d at 48 (defendant has a due process right to a proper self-defense instructions).

Under this analysis, the erroneously given aggressor instruction in Ms. Cuellar's case impacted her claim of self-defense, which the State had the burden of disproving beyond a reasonable doubt. This is why the courts should use care in giving an aggressor instruction. State v. Riley, 137 Wn.2d at 910. And therefore it is reversible error to give an aggressor instruction when not supported by the evidence, under the limitations described above. State v. Birnel, 89 Wn. App. at 473-74. Here, the first aggressor instruction was not supported by the evidence or the law. Because it cannot be said beyond a reasonable doubt that the jury would have rejected Ms. Cuellar's self-defense claim in the absence of the erroneous instruction, this Court should reverse her assault conviction.

**2. THE COURT WRONGLY REFUSED A  
"WORDS ALONE" INSTRUCTION.**

Generally, an instruction can be given to the jury if there is evidence to support the theory upon which the instruction is based. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Ms. Cuellar specifically asked for a simple instruction that words alone

are not an act of first aggression. 2RP 128. Absent that instruction, she was plainly not able to argue this theory of the case with legal instructional support. See State v. Bowerman, 115 Wn.2d 794, 809, 802 P.2d 116 (1990) (jury instructions are sufficient if they permit each party to argue their theory of the case and properly inform the jury of the applicable law).

Self-defense instructions misstating the law are constitutional error. See State v. McCullum, 98 Wn.2d at 484. Here, for all the reasons set forth in Part D.1, infra, the jury could have concluded there was no belligerent act beyond Ms. Cuellar's use of words toward the officers. For that reason, the failure to instruct the jury as requested requires reversal.

**3. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT BY URGING THE JURY TO 'DRAW THE LINE' AND ACT AS THE COMMUNITY TO PROTECT THE POLICE FROM HARM, AND BY IMPLYING THAT ACQUITTAL REQUIRED THE JURY TO CONCLUDE THAT OFFICER CLARK WAS LYING.**

**(a) The trial deputy engaged in closing argument misconduct.** During closing argument the trial deputy, over several objections, two of which were sustained by the court, the prosecutor also repeatedly asked the jury, "Where do we draw the

line?” and wondered if the line should be drawn now, or when a police officer is eventually stabbed. 2RP 183-84. The prosecutor told the jury that it had been brought in to do just that, to say as a community what is acceptable, and wondered who would “protect” police officers who “take an oath of protecting” and serving, stating to the jury, “You are brought in from the community to do just that.” 2RP at 183.

The State’s argument described above was prosecutorial misconduct, requiring reversal. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)). Surely that is all the more true in a case like Ms. Cuellar’s in which the jury must separate dramatic facts and passion from their duty to carefully analyze relatively complex self-defense law.

Thus, in this type of case more so than most, a prosecutor’s closing argument should be confined to the evidence and reasonable inferences therefrom. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The prosecutor must act impartially and “with the object in mind that all admissible evidence

and all proper argument be made, but that inadmissible evidence and improper argument be avoided." State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976). As the Torres court noted: "Each trial must be conducted within the rules and each prosecutor must labor within the restraints of the law to the end that defendants receive fair trials and justice is done." State v. Torres, 16 Wn. App. at 263. Under these rules, the State's conduct of exhorting the jurors to act as the community and protect the police from harm requires reversal. Prosecutorial argument that the jury should act as the conscience of the community is improper and inflammatory if it in effect requests the jury to resolve the case on grounds other than the facts of the case and the applicable law. State v. McNallie, 64 Wn. App. 101, 111, 823 P.2d 1122 (1992), affirmed, 120 Wn.2d 925, 846 P.2d 1358 (1993).

The type of argument advanced by the deputy prosecutor in Ms. Cuellar's case was incurable because the prosecutor effectively urged the jury to side with the police generally (and thus against Ms. Cuellar), and act as the community protector. See, e.g., State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989) (improper to argue that the jury send a message to society and "enforce the law" against sex abuse), review denied,

114 Wn.2d 1011, 790 P.2d 169 (1990); United States v. Leon, 534 F.2d 667, 679-81 (6th Cir. 1976) (finding misconduct in closing argument wherein government invoked extrinsic evidence to contend appellants' gambling activities were part of a nationwide scheme that was "effecting the decay of our cities") (citing Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 1314, 55 S. Ct. 629 (1935)). Once charged with that dramatic statement of the jury's 'responsibility to the community' – which is in fact an overblown misstatement of the jury's duty to simply decide the case before it – no jury could have ignored an admonition to disregard it.

In addition, the State argued that Ms. Cuellar's case implied that Officer Clark must be lying about his use of force. 2RP 159. But it is prosecutorial misconduct for the prosecutor in a criminal case to argue to the jury, as the State did here, that acquittal requires concluding that testifying police officers were lying. State v. Riley, 69 Wn. App. 349, 354, 848 P.2d 1288 (1993) (misconduct in closing to argue that if the jury were to believe the defendant it would have to believe the arresting officers and other witnesses were lying); State v. Barrow, 60 Wn. App. 869, 875-76, 809 P.2d 209 (1991) (similar argument). Where, as here, no defense objection was made, prosecutorial misconduct may be appealed

and is reversible if it is material to the trial's outcome and could not have been remedied. State v. Suarez-Bravo, 72 Wn. App. 359, 366-68, 864 P.2d 426 (1994).

This Court should find the prosecutor's twin improper arguments to be misconduct, requiring reversal under any standard – in a case where the evidence as to whether Ms. Cuellar acted lawfully in self-defense was sharply in dispute – although, if anything, was strong in favor of the defendant.

**(b) The State's misconduct in closing argument requires reversal of Ms. Cuellar's assault conviction.** As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); State v. Belgarde, 110 Wn.2d at 508.

To prevail on the claim, a defendant must show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

Here, notably, after the evidence phase, the jury deliberated on Thursday, April 15, from before lunch to the end of the court

day, and again through much of the morning of Friday, April 16.

Supp. CP \_\_\_\_, Sub # 57 (trial court minutes).

That relatively lengthy amount of deliberation, and in addition the jury's repeated requests to see the police reports of several of the testifying police officers (this was denied), indicates a jury that was deeply conflicted. CP 40, 41, 42, 43. This is just the sort of jury that is susceptible to inflammatory argument of the sort the trial deputy engaged in in this case. The jurors likely were dissuaded from issuing an acquittal of Ms. Cuellar, despite the strong facts in her favor, based on the concern that doing so would be an abdication of their responsibility as community members to 'draw a line' and protect the police from harm. The jurors were told, incurably, that an acquittal would be a conclusion by them that the police officer lied to them. Reversal is required.

**4. THE COURT WRONGLY DENIED A  
LESSER INCLUDED OFFENSE  
INSTRUCTION OF RESISTING  
ARREST.**

The court wrongly denied the lesser included offense instruction requested, which defense counsel emailed to the court in the midst of discussion of jury instructions and which was thoroughly argued by the parties. 2RP 130, 133-35. Criminal

defendants generally may be convicted only of crimes with which they have been charged. State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988). However, one statutory exception to this rule is that a defendant may be convicted of a lesser included offense. RCW 10.61.006; see State v. Berlin, 133 Wn.2d 541, 545, 947 P.2d 700 (1997). A two-part test determines whether an offense is lesser included: First, each of the elements of the lesser offense must be a necessary element of the offense charged; second, the evidence in the case must support an inference that the lesser crime was committed. Berlin, 133 Wn.2d at 548. Despite the trial court's "elements" analysis, the lesser included analysis is applied to the greater offense as specifically charged and prosecuted, rather than to every statutory alternative means of the greater offense as they appear in the statute. Berlin, 133 Wn.2nd at 548.

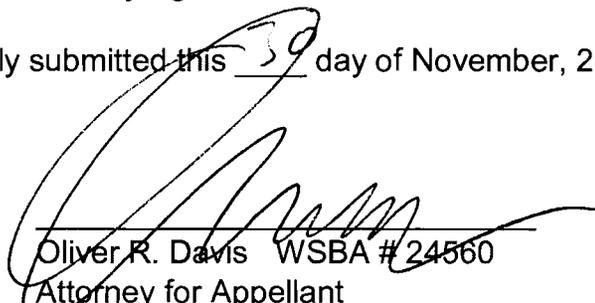
A person is guilty of third degree assault of a police officer if she "assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). As a consequence, because use of force was Ms. Cuellar's attempt to resist detention, the element of assault is included in resisting arrest as charged.

A person is guilty of resisting arrest if she intentionally prevents or attempts to prevent a peace officer from lawfully arresting her. RCW 9A.76.040(1). Thus, in addition, the evidence clearly shows that Ms. Cuellar was resisting custodial detention by the officer, and the jury could have so found, rendering the error harmful. Although a person can commit an assault on an officer without intentionally preventing or attempting to prevent the officer from arresting him, the facts of this case as charged and prosecuted demonstrate that Ms. Cuellar could legally and did factually commit the lesser crime. See State v. Marshall, 37 Wn. App. 127, 129, 678 P.2d 1308, review denied, 101 Wn.2d 1017 (1984). Reversal is required.

#### **E. CONCLUSION**

Based on the foregoing, Ms. Cuellar respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 30 day of November, 2010.



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Attorney for Appellant  
Washington Appellate Project - 91052

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 65411-0-I
	)	
CYNTHIA CUELLAR,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF NOVEMBER, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CYNTHIA CUELLAR 23205 26 <sup>TH</sup> AVE S DES MOINES, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF NOVEMBER, 2010.

X \_\_\_\_\_ 

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