NO. 38317-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON ALLAN JOHANSON,

Appellant.

BRIEF OF APPELLANT

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHITMAN COUNTY
THE HONORABLE GARY J. LIBEY, JUDGE

STEPHANIE TAPLIN
Attorney for Appellant, Jason Allan Johanson
Newbry Law Office
623 Dwight St.
Port Orchard, WA 98366
(360) 876-5567

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

///

///

Constitutions

Statutes, Court Rules, and Other Authority

I. INTRODUCTION

In April 2021, Jason Allan Johanson attempted to ride a bus in Pullman, WA, without a mask or face covering. This violated the mask mandate, but it was not illegal. Three Pullman Police officers responded to the scene. As the situation escalated, Mr. Johanson swatted at an officer's outstretched hand, striking his arm. Officers responded by tackling Mr. Johanson, breaking his glasses, wrapping an arm around his neck, and placing him in a chokehold. The State charged him with third degree assault.

This Court should reverse, for two reasons. First, police unlawfully detained Mr. Johanson and unlawfully arrested him. In the course of this arrest, police used a chokehold; a dangerous and potentially lethal technique that is now outlawed. Mr. Johanson did not commit assault because he responded to this unlawful and potentially deadly detention with reasonable and proportionate force. Second, Mr. Johanson's attorney provided ineffective assistance by failing to challenge this unlawful detention and failing to request a jury instruction on self-defense.

II. ASSIGNMENTS OF ERROR

1. The State failed to prove that Mr. Johanson committed assault in the third degree.

2. Mr. Johanson received ineffective assistance of counsel.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did Mr. Johanson reasonably defend himself against potentially deadly force used by police in an unlawful detention?

2. Did defense counsel provide ineffective assistance, prejudicing Mr. Johanson, when he was failed to challenge the lawfulness of this detention and failed to request a self-defense jury instruction?

IV. STATEMENT OF THE CASE

On April 14, 2021, Jason Johanson attempted to ride a bus in Pullman, WA. RP at 141, 197. The bus driver informed him that he could not ride the bus because he was not wearing a mask or face covering. RP at 141. Mr. Johanson became verbally agitated. RP at 141.

Three Pullman Police Department officers responded to the scene: Jared Haulk, Holden Humphrey, and Josh Bray. RP at 164, 183, 197. Officers Haulk and Humphrey approached Mr. Johanson and started to talk to him. RP at 170, 184. Throughout this encounter, Mr. Johanson swore, yelled, and appeared agitated. RP at 166, 171; Ex. 100. One of the officers testified that he was "threatening verbally, not physically" and was "upset about the mask mandate." RP at 165. Mr. Johanson did not have a weapon. CP 2 ("WEAPONS INVOLVED: No").

Officer Humphrey said that he wanted to "set some ground rules." RP at 170. He told Mr. Johanson: "Don't come towards me or my partners." *Id*. Mr. Johanson replied that he would defend himself if officers approached him. *Id*. A few minutes later, Officer Humphrey told Mr. Johanson, "If you don't wear a mask, you can't ride the bus." RP at 172. Mr. Johanson yelled, "What fucking country do I live in?" and stepped off the curb in Officer Haulk's direction. *Id*.

At this point, Officer Humphrey moved toward Mr. Johanson with his arm stretched out. RP at 184-85. Mr. Johanson took a few steps backing up, and then swatted at Officer Humphrey's arm, striking him. RP at 185; Ex. 100. Officer Humphrey testified that it "hurt" but he was not "seriously injured". RP at 185.

At this point, all three officers tackled Mr. Johanson to the ground, breaking his glasses. RP at 185, 206; Ex. 100. Mr. Johanson flailed and struck Officer Haulk in the lip. RP at 174. He testified that it stung for five to ten minutes. *Id*.

Officer Bray moved behind Mr. Johanson and placed him in a chokehold, or a "vascular neck restraint hold". RP at 212. Mr. Johanson was subdued in a matter of seconds. Ex. 100. At trial, Officer Bray testified that backing up or retreating was a choice but was not always the right choice. RP at 214-15.

The State charged Mr. Johanson with two counts of assault in the third degree. CP at 11-12. One count was based on swatting Officer Humphrey's arm, and the other was based on

striking Officer Haulk's lip during the arrest. *Id*. Mr. Johanson's attorney did not challenge the lawfulness of this detention or arrest. RP at *passim*. He did not request a self-defense jury instruction. RP at 219-21.

A jury convicted Mr. Johanson of assaulting Officer Humphrey but acquitted him of assaulting Officer Haulk. CP 84. He was sentenced to 58 days incarceration, time served. CP 86. Mr. Johanson appeals. CP 90-96.

V. ARGUMENT

Police unlawfully detained and arrested Mr. Johanson. During this arrest, police used potentially deadly force without justification. Mr. Johanson had the right to use reasonable and proportionate force to resist this unlawful detention. In addition, his trial attorney was ineffective by failed to challenge this detention or request a self-defense jury instruction.

A. Mr. Johanson Had the Right to Resist an Unlawful Arrest.

A person has the right to use force to resist an unlawful arrest if he is faced with "serious injury or death". *State v.*

Valentine, 132 Wn.2d 1, 20, 935 P.2d 1294 (1997). However, he does not have the right to resist if he is faced "only with a loss of freedom." *Id*. at 21.

Here, Mr. Johanson was vocally upset about the mask mandate on the bus. RP at 141. He spoke loudly and used provocative language. *Id*. However, he did not break the law, and his "language alone did not present a risk of harm to himself or others or cause any breach of the peace." *State v. Montgomery*, 31 Wn. App. 745, 753, 644 P.2d 747 (1982). Police unlawfully detained and arrested him.

Mr. Johanson also faced a risk of "serious injury or death" as a result of this unlawful arrest. *Valentine*, 132 Wn.2d at 20. During the arrest, a police officer wrapped his arm around Mr. Johanson's neck, placing Mr. Johanson in a chokehold or a "vascular neck restraint hold". RP at 212. These types of holds can and do result in death, and they have recently been banned in Washington. RCW 10.116.020 (effective July 25, 2021). Mr. Johanson swatting away an officer's hand was a reasonable use

of force to resist an unlawful arrest that resulted in a risk of strangulation and death.

1. Police unlawfully detained Mr. Johanson.

Police unlawfully detained Mr. Johanson by placing restrictions on his movements. They then unlawfully arrested him by moving in to handcuff Mr. Johanson after he stepped off the curb in an officer's direction.

Mr. Johanson did not challenge his unlawful detention or arrest at trial. This Court should review his argument regardless for two reasons. First, as explained below, Mr. Johanson received ineffective assistance of counsel. Second, the actions of police officers in this case impinged Mr. Johanson's right to be free from unlawful restraint. Both of these errors were manifest and impacted Mr. Johanson's constitutional rights. RAP 2.5(a)(3).

a. Mr. Johanson was seized when three police officers surrounded him and ordered him not to take steps towards them.

Police officers seized Mr. Johanson without a warrant. Under the totality of the circumstances, a reasonable person in Mr. Johanson's position would not have felt free to leave as soon as officers gave him an order that restricted his movement.

The Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. This provision protects "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). A warrantless search or seizure is "per se unconstitutional" unless it falls within one of the few exceptions to the warrant requirement. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004).

When analyzing police-citizen interactions, courts must determine (1) whether a warrantless search or seizure has taken

place, and if it has, (2) whether the action was justified by an exception to the warrant requirement. *Id*. (citing *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)). A seizure occurs when, "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *Id*. This is an objective determination made by looking at the actions of the law enforcement officer. *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id*.

All investigatory detentions constitute a seizure. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997). However,

"not every encounter between a police officer and a citizen is an intrusion requiring an objective justification." *Rankin*, 151 Wn.2d at 695 (citing *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)). For example, "a seizure does not occur simply because a police officer approaches an individual and asks a few questions." *State v. Johnson*, 8 Wn. App.2d 728, 738, 440 P.3d 1032 (2019). As long as a "reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *Id*. (quoting *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L.Ed.2d 389 (1991)) (internal citation omitted).

"Other cases have found permissive encounters ripening into seizures when an officer commands the defendant to wait or blocks the defendant from leaving." *State v. Coyne*, 99 Wn. App. 566, 573, 995 P.2d 78 (2000). In *Coyne*, an officer seized two people by directing them to sit on the hood of his patrol car while the officer performed a warrant check. *Id*. at 572. In *State v.*

Ellwood, an officer seized the defendant when the officer told him to "wait right here" while he ran a warrant check. 52 Wn. App. 70, 73, 757 P.2d 547 (1988); *see also State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999) (defendant seized when officer "requested that Mr. Barnes wait" while the officer checked his warrant status). In *State v. O'Day*, police seized a passenger by ordering her out of the car, placing her purse out of reach, asking if she had drugs or weapons, and asking if she would consent to a search. 91 Wn. App. 244, 252, 955 P.2d 860 (1998).

Here, like in the cases described above, a reasonable person in Mr. Johanson's place would not feel free to leave. Mr. Johanson was flanked on two sides by police officers, and a total of three officers were at the scene. Ex. 100. Officers were giving Mr. Johanson orders, including limiting his freedom of movement, by telling him not to approach. RP at 170. Presumably the police officers were armed. At the very least, the officers used potentially lethal force by placing Mr. Johanson in

a chokehold. RP at 212. At trial, police testified that Mr. Johanson was free to leave, but the videos show that they did not communicate this to Mr. Johanson at the time. RP at 178; *Barnes*, 96 Wn. App. at 224 ("Officer Moran's subjective belief that Mr. Barnes was free to walk away is immaterial on the issue of whether a reasonable person would feel free to leave, unless Officer Moran communicated that information to Mr. Barnes."). Under these circumstances, police detained Mr. Johanson at the bus stop.

b. Police lacked reasonable suspicion for a *Terry* stop.

Police lacked reasonable suspicion to detain Mr. Johanson. An investigative *Terry* stop is a recognized exception to the rule that seizures are appropriate only with a warrant or probable cause. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see also State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). These seizures are reasonable if, based on the totality of the circumstances known to the police officer at the

inception of the stop, there are "specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity.'" *Armenta*, 134 Wn.2d at 10 (internal quotations omitted).

Police lacked reasonable suspicion to stop Mr. Johanson in this case. Refusing to wear a mask was not a crime, nor was being loud in public. The state only charged Mr. Johanson with assault; he was not charged with disorderly conduct or a similar offense. CP 11-12. Officers testified that they gave orders to Mr. Johanson in the interest of officer safety. RP at 164, 170. However, Mr. Johanson did not have a weapon. CP 2. His hands were visible during the encounter. Ex. 100. He was verbally antagonistic, but officers testified that he was not physically threatening. RP at 165.

Mr. Johanson was upset and vocalized it, but he had the right to verbalize his frustration in public. Officers testified that they could have walked away, but they chose not to do so. RP at

214-15. Police did not have reasonable suspicion of criminal activity and had no basis to detain Mr. Johanson.

c. Police lacked probable cause to arrest Mr. Johanson.

Even if police did not initially detain Mr. Johanson, police unlawfully arrested him when they moved in to handcuff Mr. Johanson after he stepped off of the curb.

A *Terry* stop "must not exceed the duration and intensity necessary to dispel the officer's suspicions." *State v. Mitchell*, 80 Wn. App. 143, 144, 906 P.2d 1013 (1995). Courts use an objective standard to determine whether an encounter with the police rises to the level of a formal arrest. *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004). The test is whether a reasonable detainee under the circumstances would consider themselves under custodial arrest. *State v. Radka*, 120 Wn. App. 43, 49, 83 P.3d 1038 (2004); *State v. Rivard*, 131 Wn.2d 63, 75, 929 P.2d 413 (1997).

Here, there were multiple police officers and Mr. Johanson did not have a weapon. Handcuffing him was not necessary to protect officers during a *Terry* stop; it was a custodial arrest. *See State v. Pines*, 17 Wn. App. 2d 483, 492-93, 487 P.3d 196 (2021) (defendant arrested when he did not have a weapon and multiple officers tackled and handcuffed him). A reasonable person, surrounded by three police officers placing them in handcuffs, would consider himself to be under arrest. *Id*.

Mr. Johanson's arrest was unlawful because it was not supported by probable cause. Courts use an objective standard to determine whether probable cause supports an arrest. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Probable cause exists "when the arresting officer is aware of facts or circumstances" sufficient to cause a reasonable officer to believe a person committed a crime. *Id*. The burden is on the State to establish probable cause for an arrest. *State v. Grande*, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

Here, police did not have probable cause that Mr. Johanson committed, or was about to commit, a crime. Verbal agitation in public is not illegal. Refusing to wear a mask is not illegal. Stepping off a curb in the direction of police is not illegal. Police had no reason to move in to arrest and handcuff Mr. Johanson. His arrest was unlawful because it was not supported by probable cause.

2. Mr. Johanson was in actual and imminent danger of serious injury from police officers.

A person "who is being unlawfully arrested has a right" to use "reasonable and proportional force to resist an attempt to inflict injury on him or her" during the course of that arrest." *Valentine*, 132 Wn.2d at 21. However, that person "may not use force against the arresting officers if he or she is faced only with a loss of freedom." *Id*. The person may only use force if he or she is at risk of "serious injury or death" due to the unlawful arrest. *Id*. at 20.

Here, Mr. Johanson was at risk of serious injury or death due to this unlawful arrest. Police outnumbered him three to one. An officer approached him from behand and wrapped his arm around Mr. Johanson's neck, placing him in a chokehold. RP at 212. The officer testified that this was a "vascular neck restraint hold". *Id*.

Chokeholds or neck restraints are now prohibited by Washington law. RCW 10.116.020. Police choked Mr. Johanson on April 14, 2021, and this law did not go into effect until July 2021. However, on March 29, 2021, the Washington Association of Sheriffs and Police Chiefs (WASPC) sent a letter to the state Senate regarding HB 1054, the bill prohibiting chokeholds. App. at 1-5. Gary Jenkins, Chief of Police for the City of Pullman, is on the executive board for this organization, and his name is on the first page of this letter. App. at 1.

In their letter, the Sheriffs and Police Chiefs wrote that they "recognize the inherent danger associated with chokeholds and neck restraints" but requested "that both techniques be

authorized ***only when the use of deadly force is justifiable*** under chapter 9A.16 RCW." App at 1 (emphasis added). The letter reiterated: "To be clear, this request does not seek to authorize chokeholds or neck restraints to be used in any circumstance other than where the use of deadly force is justifiable." App. at 2.

The Legislature ultimately disagreed with the Sheriffs and Police Chiefs and chose to ban chokeholds and neck restraints altogether. RCW 10.116.020. However, this letter establishes that Pullman police officers knew that chokeholds and neck restraints are potentially lethal and comparable to deadly force. App. at 1-2.

In *Valentine*, the Washington Supreme Court wrote that: "In Washington today the law provides those arrested with numerous protections that did not exist when the common law rule arose." 132 Wn.2d at 15. The Court used these rights and procedures to modify the common law rule and prohibit self-defense when a person only faces the loss of liberty. The Court

wrote that in "this era of constantly expanding legal protection of the rights of the accused in criminal proceedings, an arrestee may be reasonably required to submit to a possibly unlawful arrest and to take recourse in the legal processes available to restore his liberty." *Id*. at 16-17 (quoting *Commonwealth v. Moreira*, 388 Mass. 596, 447 N.E.2d 1224, 1227 (1983)).

Mr. Johanson does not ask to change the rule articulated in *Valentine*. However, this Court should acknowledge that an unlawful arrest carries with it a far greater risk than the temporary loss of liberty. Here, Mr. Johanson swatted at a police officer's hand when he was unlawfully detained, and for that he was placed in a chokehold. Officers had no reason to employ this potentially lethal force. Mr. Johanson had no weapon, and he was outnumbered three to one. The "use of deadly force" was not "justifiable", and Mr. Johanson should not have been subjected to the "inherent danger associated with chokeholds and neck restraints". App. at 1.

Under these circumstances, Mr. Johanson had the right to resist an unlawful and potentially deadly arrest. Swatting away a police officer's hand was "reasonable and proportional force" to resist this unlawful arrest. *Valentine*, 132 Wn.2d at 6. The officer testified that it hurt when Mr. Johanson struck him, but otherwise he was not injured. RP at 185. On the other hand, Mr. Johanson was subjected to a chokehold. The force used by Mr. Johanson was reasonable and proportional self-defense. This Court should reverse because Mr. Johanson did not commit third-degree assault; he justifiably defended himself.

B. Defense Counsel Provided Ineffective Assistance.

This Court should also reverse and remand because Mr. Johanson received ineffective assistance of counsel. His attorney did not challenge the lawfulness of this arrest and did not request that a jury instruction about self-defense. This prejudiced Mr. Johanson because, as explained above, he was entitled to protect himself from an unlawful and potentially lethal arrest.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687-88. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. *See, e.g.*, *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000). Here, both prongs of the legal standard are met.

1. Counsel performed deficiently.

Mr. Johanson's attorney performed deficiently. This inquiry focuses on whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. "When counsel's conduct can be characterized as legitimate

trial strategy or tactics, performance is not deficient." *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). Conversely, a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130. Not all strategies are immune from attack. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). To succeed on an ineffective assistance claim, the defendant must prove that the trial court would likely have given the jury instruction at issue if requested. *State v. Classen*, 4 Wn. App. 2d 520, 536, 422 P.3d 489 (2018).

Here, counsel performed deficiently by failing to challenge the lawfulness of Mr. Johanson's detention and arrest and by failing to request a jury instruction regarding self-defense. Specifically, counsel should have requested the following, or a similar, instruction:

> It is a defense to a charge of assault in the third degree that 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 as to this charge.

11 WPIC 17.02.01. This instruction is based on *Valentine* and similar cases. *See* Comments to 11 WPIC 17.02.01; *Valentine*, 132 Wn.2d at 20-21.

Mr. Johanson's attorney should have challenged the lawfulness of this arrest because, as explained above, police unlawfully detained Mr. Johanson. Had counsel made this argument, the trial court likely would have permitted a self-defense instruction because 11 WPIC 17.02.01 accurately states the law about when a person can use force to resist an unlawful arrest. *See Valentine*, 132 Wn.2d at 20-21. Reasonable counsel would have raised this issue.

2. Counsel's deficient performance prejudiced Mr. Johanson.

Counsel performed deficiently, and this prejudiced Mr. Johanson. Prejudice occurs if, but for counsel's deficient performance, there is a reasonable probability that the defendant's sentence would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Police officers in this case unlawfully detained Mr. Johanson and unlawfully arrested him. They outnumbered him three to one, and Mr. Johanson did not have a weapon, yet an

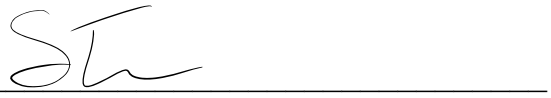
officer still needed to place him in a potentially lethal chokehold. Mr. Johanson reasonably resisted this unlawful arrest by swatting at an officer's hand. Had counsel presented this argument and the self-defense instruction to the jury, Mr. Johanson likely would have been acquitted. Mr. Johanson was thus prejudiced by counsel's failings.

VI. CONCLUSION

For the reasons stated above, this Court should reverse Mr. Johanson's conviction and remand.

Pursuant to RAP 18.17, this document is proportionately spaced using Times New Roman 14-point font and contains 4121 words, excluding the caption, tables, signature blocks, appendix, and certificate of service (word count by Microsoft Word).

RESPECTFULLY SUBMITTED on January 18, 2022.



STEPHANIE TAPLIN
WSBA No. 47850
Attorney for Appellant, Jason Allan Johanson

VII. APPENDIX