
IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,)
)
 Plaintiff-Respondent,) Lincoln County Circuit Court
 Respondent on Review,) Case No. 050245
)
 vs.)
)
 JESSICA LEE OLIPHANT, fka) Appellate Court No. A131381
 Jessica Lee Rilatos, fka Jessica Lee)
 Bayya fka Jessica Lee Fairman)
)
 Defendant-Appellant,) Supreme Court No. S056404
 Petitioner on Review.)

STATE OF OREGON,)
)
 Plaintiff-Respondent,) Lincoln County Circuit Court
 Respondent on Review,) Case No. 050246
)
 vs.)
)
 FRANCISCA DARLENE RILATOS,) Appellate Court No. A131382
)
 Defendant-Appellant,)
 Petitioner on Review,)

STATE OF OREGON,)
)
 Plaintiff-Respondent,) Lincoln County Circuit Court
 Respondent on Review,) Case No. 050824
)
 vs.)
)
 KENNETH ROBERT WOOD,) Appellate Court No. A131519
)
 Defendant-Appellant,)
 Petitioner on Review.)

PETITIONERS' BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on appeal from a judgment
of the Circuit Court for Lincoln County
Honorable Thomas O. Branford, Judge

..... *continued*

Affirmed Without Opinion: July 16, 2008
Before Sercombe, Presiding Judge
Brewer, Chief Judge and Riggs, Senior Judge

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PETITIONER'S BRIEF ON THE MERITS

QUESTION PRESENTED

When a defendant asserts the defense of self-defense, is the question for the jury whether the defendant reasonably believed that he was responding to the use or imminent use of unlawful physical force in the circumstances, or is the question whether the victim reasonably believed that his own use of force was unlawful?.

STATEMENT OF THE CASE

Nature of the Proceedings Below

In these consolidated cases, defendants seek review of the Court of Appeals decision affirming their convictions and sentences arising out of their encounters with police that began when an officer stopped defendant Rilatos for using profanity in public. *State v. Oliphant*, ___ Or App ___, ___ P3d ___ (Slip opinion July 16, 2008).

Defendant Oliphant (A131381; Control) appeals her conviction on one count of Interfering with a Police Officer. ORS 162.247(1)(a). Defendant Rilatos (A131382) appeals her convictions on one count of Resisting Arrest, ORS 162.315; one count of Interfering with a Police Officer, ORS 162.247(1)(a); and two counts of Disorderly Conduct, ORS 166.025. Defendant Wood (A131519)

appeals his convictions on two counts of Assaulting a Public Safety Officer, ORS 163.208; one count of Interfering with a Police Officer, ORS 162.247; and one count of Resisting Arrest, ORS 162.315.

All three defendants requested the self-defense instruction as to each of the charges for which they were convicted, and they requested an instruction concerning the use of excessive force taken from *State v. Wright*, 310 Or 430, 799 P2d 642 (1990). The trial court declined to give the instruction in the language that this court used in *Wright*, saying:

“Um, as I explained yesterday, um, my intent is not to give [defendant’s requested] 101 because, as I, as I explained in chambers, in my – from my perspective, um, although the word ‘excessive’ is one that is apt, uh, in terms of a description of a person’s conduct, legally, I think the standard is that – set forth in the statute and, uh, that’s the standard by which a police officer’s conduct needs to be judged. If the jury finds that, um, the police officer, uh, reasonably believed it was necessary to use whatever level of force he did and the jury believes that, then the force used is legal.

“The statute also sets forth limitations on the use of deadly physical force, and it’s that that’s the standard. And if, um, if the jury finds that the conduct fit within those permissible uses, then it’s lawful; if they don’t, it’s not lawful.

“And I don’t want to substitute the word ‘excessive’ as some kind of undefined, um, nebulous standard that is different than what the statute sets forth, that it would become a subjective reading in a part of a juror’s mind of what do they think is excessive.

“So I, I – That’s why I don’t want to give 101.”

Tr. 1527-29.

It instructed the jury in the language of ORS 161.209, the general self-defense rule, only as to the charges against Wood in Counts 1 and 2 for Assaulting a Public Safety Officer:

“A person is justified in using physical force on another person to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force. In defending, a person may only use the degree of force which he reasonably believes to be necessary.”

Tr. 1663.

It then gave an extensive modified “Limits on Police Use of Force” instruction explaining a police officer’s justification defense, which applies when a police officer is charged with a crime for using physical force in the course of his official duties, followed by an allusion to the general self-defense defense in the context of the charges for Resisting Arrest:

“A peace officer is justified in using physical force on a person being arrested when, and to the extent, that *he reasonably believes* it necessary to make an arrest and/or – excuse me, or to prevent the escape from custody of an arrested person, unless he knows that the arrest is not lawful.

“The use of deadly physical force by a peace officer is justified only in the following circumstances – and there are five – when the crime committed by the person being arrested was a felony or an attempted felony that involved the use or threatened imminent use of physical force against a person; or when the crime committed by the person being arrested was Kidnapping, Arson, First Degree Escape, First Degree Burglary, or any attempt to commit one of these offenses; or when, regardless of the offense, it is necessary to defend the officer or another person from what *he reasonably believed* to be the use or threatened imminent use of deadly physical force; four, when the crime committed by the other person under

arrest was a felony or an attempted felony and, under the totality of the circumstances existing at the time and place, the use of deadly physical force is necessary; and fifth, the officer's life or personal safety was endangered in the particular circumstances involved. So those are the five limits regarding the use of deadly force by a police officer.

“What is deadly force? Deadly physical force means physical force that, under the circumstances in which it is used, is readily capable of causing death or serious physical injury.

“What is serious physical injury? Serious physical injury means a physical injury – which I previously defined to you – that either creates a substantial risk of death, or causes serious and protracted disfigurement, or causes protracted impairment of health, or causes protracted loss or impairment of the function of any bodily organ.

“Finally, with regard to the charge of Resisting Arrest, the self-defense has been raised. A peace officer may use physical force on a person being arrested only when, and to the extent, that *the officer rea – reasonably believes* it necessary to make an arrest.

“If a person being arrested physical[ly] opposes an arresting officer, the officer may use reasonable force to overcome the opposition. If, however, the officer uses unreasonable force to arrest a person who is offering no unlawful resistance – as I have defined that term for you^[1] – that person may use physical force for self-defense from what the person reasonably believes to be the use or imminent use of unlawful physical force by the officer. In

¹ Counsel found no definition of “unlawful resistance” in the instructions. Possibly the court was referring to this instruction:

“Oregon law provides that a person commits the crime of Resisting Arrest if the person intentionally resists a person known by him or her to be a peace officer in making an arrest.”

defending, the person may use only that degree of force which he reasonably believes to be necessary.”

Tr. 1665-67.

The court declined to instruct as to the defense of self-defense at all concerning the charges for Interfering with a Peace Officer or for Disorderly Conduct with respect to any charge against any defendant.

This court should vacate the convictions on each count as to each defendant and remand for a new trial in which the court instructs the jury on each defendant’s defense of self-defense as to each count in the language of ORS 161.209 plus the excerpt from this court’s decision in *State v. Wright*, or in the language of ORS 161.209 alone; but in any event, the court should remand for a new trial on the assault and resisting arrest counts without the instructions that the court gave concerning the justification of police use of force based on the police officers’ beliefs.

Summary of Facts

Events of December 21, 2004

At about 8:49 p.m. on December 21, 2004, Officer Eric Gulbranson of the Toledo Police Department (TPD) was driving his patrol car north on Main Street

in Toledo.² Tr. 210, 214-15. As he approached The Timbers Restaurant & Lounge (“The Timbers”), he saw a person enter the crosswalk nearby and decided that it was “a good time to get sunflower seeds.” Tr. 215-16. He came “just about to a stop” and reached for a handful of seeds. Tr. 216. When he looked up, he recognized 19-year-old defendant Francisca “Cissy” Rilatos. Tr. 217, 547.

As Gulbranson drove closer, Rilatos left the crosswalk and “just walked directly across the street.” Tr. 217. He continued driving, and as he drove by, Rilatos yelled at him to slow down and said some profanities “loud enough to hear it across the street.” Tr. 217, 1010. He decided to stop her and investigate, because she was “being very upset, using profanity in a public place.” Tr. 218, 371. He backed up and stopped the car near Rilatos. Tr. 1073-74

He notified dispatch that he would be “out with Cissy Rilatos” and contacted TPD Officer Chris Miller³ to request a “Code 3” backup. Miller activated his overhead lights and drove to the location. Tr. 432-34, 519. Meanwhile, Gulbranson turned on his overhead lights, got out of his car and walked to the back of the car to contact Rilatos. Turning on the overhead lights on

² Three weeks before trial, Gulbranson began working as a Deputy for the Lincoln County Sheriff’s Office. Tr. 210.

³ Three months before trial, Miller also began working as a Deputy for the Lincoln County Sheriff’s Office. Tr. 429.

a Toledo PD patrol car activates the video camera and audio recorder in that car.

Tr. 221. Tr. 237, 239, 435; Ex. 2; Ex 14.⁴

Gulbranson had had a few contacts with Rilatos before. He testified, “Um, and if I recall, the times it has it’s been – she’s been a little unreasonable, a little volatile. But by the end of the contact it’s usually calmed down just by using verbal skills.” Tr. 242. Gulbranson said to Rilatos, “Cissy Rilatos.” She replied something inaudible, and began walking up the stairs to her apartment. Tr. 237-38; Ex. 2.

Gulbranson, who is 6-feet, 3-inches tall and weighs 260 pounds, testified, “And in my training and experience, you don’t let the person that you’re trying to contact get to a position of advantage. * * * Through our training and experience, we have to level the playing field and make sure that we’re both on the same level.” Tr. 240-41. He said to Rilatos, “Hey! Come here! You’re – Get over here. Get over here right now.” The exchange continued:

RILATOS: “You know, I was in the crosswalk.

GULBRANSON: “Get over here.

RILATOS: “You were speeding.

⁴ The state’s videotape exhibits were transcribed as portions of each were played at various points during the trial. All quotations from the videotape exhibits that appear in this brief were taken from the transcript.

GULBRANSON: "Get down here right now.

RILATOS: "Why? You were speeding. I was in the crosswalk.

GULBRANSON: "Get down here right now.

RILATOS: "No.

GULBRANSON: "Get down here right now.

RILATOS: "Why? (Inaudible.)"

Tr. 237-38; Ex. 2.

At about that time, defendant Kenneth Wood crossed the street from The Timbers. Tr. 244. Gulbranson knew that Rilatos and Wood had been a couple, which caused Gulbranson concern. Tr. 245. Wood is approximately five feet, eight inches to five feet, 10 inches tall and weighs about 180 pounds. Tr. 549. Gulbranson felt that he had to "figure out which is the bigger threat." Tr. 245.

Exhibit 2 continued:

WOOD: "(Inaudible.)"

GULBRANSON: "Yeah.

WOOD: "(Inaudible.)"

GULBRANSON: "How about you stay over there.

RILATOS: "How about pedestrians got the fuckin' right-of-way?"

GULBRANSON: "[To Rilatos] Turn around.

RILATOS: "No. Why?"

GULBRANSON: “[To Rilatos] Turn around. Do it. [To Wood] Get away from me! Right now. Get away from me right now!

Tr. 243-44, 251-52; Ex. 2.

Gulbranson testified that Wood did not stop. He could not see Wood’s left hand and thought that Wood might have a weapon. “And the way he was approaching me, I was getting very nervous to the point of, uh, he was taking steps of the sign of aggression towards me.” Tr. 246. Wood “kind of threw up his hands and walked – started a little quicker actually.” Tr. 247. Gulbranson said, “What can I do for you?” Tr. 243; Ex. 2. Wood replied that he was just going home or words to that effect. Tr. 360-61. Gulbranson testified that, when Wood came within three feet, he pushed Wood in the chest. Tr. 249. In his report, he wrote: “So I grabbed him by the neck and started dealing with him, and then [Rilatos] starts flipping out.” Tr. 293; Ex. 2. His testimony continued:

“I needed to get him away from me and I pushed him, ‘cause I remember looking up and then he was still coming. And as I looked up, he was still there, and I – by his chest, I believe right around his chest, I believe, right around his chest, to get him out of the situation, ‘cause I needed to separate him from me, and me from her, and I needed to get him away from the situation so I could deal with him, ‘cause this is now the major threat in this instant.”

Tr. 249.

Gulbranson ordered Wood to get on the ground, intending to arrest him for interfering with a police officer. Tr.252.

WOOD: “(Inaudible.)

GULBRANSON: “(Inaudible.)

WOOD: “(Inaudible.)

GULBRANSON: “Get on the ground. (Inaudible.)

WOOD: “I didn’t do nothin’.

GULBRANSON: “(Inaudible.)

WOOD: “I didn’t do nothin’.

GULBRANSON: “Get on the ground.

RILATOS: “You know, what? You’re a fuckin’ (inaudible).

GULBRANSON: “Get on the ground.”

Tr. 251-52; Ex. 2.

Wood got on the ground face down and tucked his arms under his body.

Tr. 254-55. Gulbranson placed his knee and left arm on Wood’s back “to prevent him from getting up,” while reaching for his handcuffs with his right hand. Tr.

257. He testified:

“Um, because I had to escalate, I had to use a different – I had physical – I was attempting to have physical control at this point, meaning me on top of him preventing him from getting up. I was ordering to give me – have him give me his hands. He was not doing so. So at this point I needed to use something else to – for him to comply with my orders to get his hands behind his back, so I, um, used my OC spray, uh, pepper spray.”

Tr. 258.

In his report, Gulbranson wrote that he “struck Wood about eight times in the right side of his rib cage.” Tr. 427-28. He sprayed Wood with pepper spray on the right side of his face from a distance of between six and 12 inches, though

the aerosol canister has sufficient pressure to reach someone six to eight feet away. Tr. 262, 366. When he did that, he said, “[Wood’s] legs go up. His level of resisting actually increased, which is not consistent with someone that is pepper sprayed.” Tr. 264. Rilatos screamed at Gulbranson to get off of Wood. Tr. 526-27; Ex. 2. Then, he said, Rilatos “starts advancing [on] me. And I, I actually, very briefly, pepper spray in her direction, kind of a deterrent, like, ‘Stay away or this will happen.’” Tr. 263.

Miller arrived, and Gulbranson told him that he needed Wood in cuffs and needed Rilatos “in cuffs and out of here.” Tr. 519. Miller told Rilatos that she was under arrest, and she headed up the stairs toward her apartment. Tr. 520-21, 530. The bottom of the stairway was 29.84 feet away from where Gulbranson had Wood on the ground. Tr. 746-47. Miller followed Rilatos, and defendant Jessica Oliphant stepped between them and pushed at Miller’s chest, saying, “That’s my daughter.” Tr. 456-57, 521. Miller pushed her back, yelling, “Get away from me!” and she fell onto a park bench. Tr. 456, 521-22. Miller told Rilatos that she was under arrest and to place her hands behind her back. Tr. 541. He grabbed her arm, and she pulled away. He lost his grip on her arm and grabbed her jacket. The jacket split down the back and pinched the inside of her elbow, leaving a red mark that was four or five inches long. Tr. 458, 495, 530. Then he got her in handcuffs and “brought her down to the sidewalk and all the way down to the ground.” Tr. 458, 461.

While Miller was dealing with Rilatos, Gulbranson told Wood to get his hands behind his back. He used “focused blows” on the “lat muscle” on Wood’s back to force him to comply. Tr. 265, 269; Ex. 2. He was able to get a handcuff on Wood’s left wrist. Tr. 370. Gulbranson then noticed that about ten people had come out of The Timbers, and they were “actually starting to come up the street at, at us.” Tr. 268.

Gulbranson “looked around, um, to see what was going on with Officer Miller.” When he looked back, Wood had gotten to his feet. Gulbranson explained, “So then I then stepped back to get to my feet and he, ah – you can see – we’ll play it again – but he wrapped his arms around my waist.” Tr. 275. He was concerned that Wood might be able to grab for one of the weapons on his duty belt. Tr. 275. He said, “Give me your goddam arm,” because he was “trying to de-escalate.” Tr. 276. Gulbranson “was pushed” into some landscaping rocks and landed on his hip and elbow. He later discovered that he also sprained his right thumb.⁵ Tr. 277. Wood still had his hand on Gulbranson’s waist, touching the front edge of the holster on Gulbranson’s duty belt. Tr. 280-81. Gulbranson yelled to Officer Miller for help, saying, “Got a gun! Got a gun!” Tr. 281-82; Ex. 2.

Miller left Rilatos on the ground and went to assist Gulbranson place Wood's left wrist in a handcuff. Tr. 263-64, 370, 461. The officers were concerned that Wood could use the dangling handcuff as a weapon. Tr. 283, 479. Gulbranson told Wood, "I need your right hand. You're going to be hurt real bad here." Tr. 282. He testified that Wood was rocking back and forth trying to push up; "trying to kick, kick at me." Tr. 285. A neighbor, _____ and a bystander, _____ testified that Miller kicked Wood while he was on the ground. Tr. 944, 962, 1037, 1039. _____ thought that the officers were out of control. Tr. 1032. _____ testified that "Officer Gulbranson had his knee in his back and had his hand on his head shoving him into the rocks." Tr. 906.

Miller placed a hand on Wood's legs to get them out of the way and told him to stop resisting. Tr. 469. Wood drew his legs back and kicked Miller in the right hip, causing a painful bruise that kept him from working for three days. Tr.

⁵ Gulbranson went to the hospital for treatment and had to wear a cast/splint device for some time afterward. Tr. 497.

469, 498. Miller delivered focused blows to Wood's right shoulder to get him to give them his right arm. Tr. 477-78. When that failed, he delivered two strikes to the brachial nerve, which is the nerve that runs from the neck down to the shoulder, to temporarily weaken the arm. Tr. 482. He was then able to get Wood's right wrist handcuffed. Tr. 482. Deputy Shanks arrived and helped to place Wood in Gulbranson's patrol car. Tr. 487.

Meanwhile, Rilatos had gotten to her feet and was "stomping towards" the officers and yelling at them, or she was simply running down the street, depending on which testimony is believed. Tr. 472, 945. Miller testified that she was "acting as though she [was] going to kick us," but she never touched either of them. Tr. 472, 544-45. Rilatos continued yelling profanities as they placed her in Miller's patrol car. Tr. 488, 494. Once inside, she positioned herself on her back and kicked at the windows. Tr. 488.

Miller told Oliphant that she was under arrest, placed her in handcuffs, patted her down for weapons, and placed her in Deputy Shanks' patrol car. Tr. 484-85.

Gulbranson contacted emergency medical personnel, who took Wood to the hospital for treatment of an injury to his mouth. Tr. 635, 637. The next morning Wood's grandmother saw that he had numerous cuts, bruises, and red marks on his body that were much darker and deeper red than they appear in the photos taken at the jail. Tr. 972; Exs. 15-18. In particular, she pointed to the photos of the marks

on the left side of his torso, the redness to his neck and his right shoulder blade, the long horizontal and vertical red marks in his left kidney area, and red marks on the center of his back. Tr. 972-75. She also noted that the pictures show the swollen lip, scrapes on his face, scratches and marks on his arms, elbows, neck and shoulder. Tr. 976-83.

The officers called for another ambulance to have Oliphant checked, because she complained of pain in her back, but she declined medical treatment. Tr. 641. The next day she had bruises on her leg from being pushed onto the park bench. Tr. 963, 1220; Exs. 203, 204.

Evidence Concerning Standards for Use of Force

Gulbranson testified that the permissible use of force by police officers varies depending on the “totality of a lot of circumstances.” Tr. 350-51. In general, the kind of force that is permissible depends on the level of threat that the officer perceives. Tr. 353-54. Use of focused blows would be considered “serious physical control,” which includes any force that could cause physical injury. Tr. 352. The next level of force, “deadly force,” would be any means that could cause serious physical injury, such as long-term disfigurement, loss of a body part, or death. Tr. 353-54.

Gulbranson knew that Wood had a reputation as a successful high school wrestler.⁶ Tr. 404-05. He also testified: “His reputation was that, uh, he has – had been involved in, uh, some sort of use or possession of weapons” and that “he also has, uh, resisted arrest in the past.” Tr. 403. He further testified that where the videotape shows him with his hand on Wood’s throat, he was not cutting off the airway. He said: “I did not have my left hand closed any. There was no pressure. It was pressure like almost, just li – it was a stiff arm type of pushing away not a grasping.” Tr. 410.

With respect to spraying the pepper spray directly into Wood’s face while Wood was face down on the ground, Gulbranson said that “they teach you, the closer the better,” because it prevents the officer or other people from being affected. Tr. 416. He explained that when he gets the spray in his own face, his eyes swell up, his breathing becomes “very difficult,” and “it’s almost a uncontrolled amount of blo – body fluid that can be coming out at the time.” Tr. 417.

Miller testified that, on a previous occasion, he and a deputy tried to contact Wood at a house on Fruitdale Road. Patrol cars were parked in view of the window and they used their “PA system” several times to ask Wood to come out

and talk with them. Wood looked out a window, but never came out of the house. They did not “make contact” with him that day. Tr. 618-19.

On September 7, 2004, Gulbranson and Miller had taken Wood into custody near The Timbers. Tr. 621-22. They ordered Wood to turn and face away from them, get down on his knees, and place his hands on the back of his head. Tr. 622. Wood complied with those orders, but when Miller took control of his left arm, Wood “tensed up” and “tried to turn his body towards me, towards his left side.” Tr. 622. Miller used his body to pin Wood against the wall and then used pepper spray on him. Tr. 622-23. After that, they took him all the way to the ground so that he was prone on the sidewalk and placed him in handcuffs. Tr. 623. Miller said that Wood had a reputation among Toledo officers “[t]o be aggressive and resistive toward officers.” Tr. 624.

Vern Hoyer testified as a defense expert. He had 17 years of law enforcement experience in Oregon before becoming a private investigator. He has had over 3000 hours of training. Tr. 737. He testified that a call for “Code 3” backup is a call for emergency assistance when the officer is in dire need due to threat to life or of injury, yet Gulbranson called for Code 3 backup before he even talked to Rilatos. Tr. 827-29. He said, “I have absolutely no idea why he would

⁶ Wood’s grandmother testified that Wood won the county championship and
(Footnote continues on next page.)

need a Code 3 cover when he's just making contact for a pedestrian violation.”

Tr. 829.

Where Gulbranson characterized Wood as throwing his hands up, Hoyer said the tape shows that Wood's hands never went higher than his waist. In Hoyer's opinion, Gulbranson's conduct was inappropriate: “I feel that the officer escalated the situation to a combative, uh, fight there in the street.” Tr. 837.

Hoyer added,

“And, in fact, in 300 different – 303 different communications between the officers and everybody involved in this whole scene, only one person is ever told that they're under arrest, and that was long after she was handcuffed, and that was, uh, Ms. Oliphant.”

Tr. 839.

Hoyer testified that, when Wood was on the ground, Gulbranson instigated Wood's struggle by spraying pepper spray into his face and sitting on his back, causing positional asphyxiation. Tr. 847, 855. Moreover, he said, “Seventeen years I've been in law enforcement. I was never trained to strike somebody in the kidneys or in the back or in the ribs like that.” Tr. 850. Those blows could have fractured a rib, risking a punctured lung or heart. Tr. 850. Hoyer testified that he was never taught to use focused blows to the back to control an arrestee, and that he never did that. Tr. 895.

placed sixth in the State Championships. Tr. 994-95.

William Hollis, executive partner in Integrated Force Options, has had over 23 years of law enforcement experience. He is a consultant and trainer for police use of force and a part-time employee of the Oregon Department of Public Safety Standards and Training (DPSST) Academy. Tr. 1102-04. He has instructed over 1,230 hours of classes in the use of force to various police departments in Oregon and has provided expert opinions for the Lane County Sheriff's Office, Lane County District Attorney's Office, Florence Police Department, Lane County Council, Federal Bureau of Investigation, United States Department of Justice, and private investigation firms. Tr. 1105. In this case, he testified on behalf of defendants.

Hollis summarized the Use of Force Continuum, which is a published document used as part of the force curriculum for the Oregon DPSST. It is a model for police officers concerning how to determine what force an officer reasonably may use based on the level of the threat presented by the circumstances. Tr. 1106.

Level 1 is the lowest level of force. It includes responsive body language, demeanor, and identification of authority, which is used when the person contacted is compliant. Verbal threats do not call for force elevated above Level 1, if the person is otherwise compliant. Tr. 1107-09.

Level 2 force is used when the person contacted is engaging in conduct that indicates an intention to engage in non-compliant behavior. The appropriate force

response at that level would be persuasion, questioning, and direct orders. Tr. 1109.

Level 3 force is used when the person's actions indicate probable non-compliance, such as pulling away, tensing muscles, clenching fists, and the like. The level of force that is appropriate in such circumstances is the use of an escort position or directional control, such as control of the elbow and wrist. Tr. 1110.

Level 4 force is used to respond to a person who offers "static resistance" or "active static resistance." "Static resistance" includes such conduct as "hulking up," becoming dead weight, or holding on to a solid object. "Active static resistance" involves physically countering the officer's control effort. The appropriate response in this category includes temporary restraints, such as using a joint come-along, applying pressure to various nerve centers where the muscle turns to tendon and attaches to bone, or using an electronic stun device. Tr. 1115-16.

Level 5 force is applied in response to an "ominous threat." The appropriate response to that level of threat is a neck restraint, a focused blow, or use of an impact weapon, such as a baton. Tr. 1121-24. Level 5 threats include circumstances in which the contacted person is actively assaulting the officer or engaging in menacing behavior, such as trying to bite or shove, or displaying a weapon. "Menacing," he explained is defined by statute to mean "by word or

action, attempting to place another person in fear of imminent, serious physical injury.” Tr. 1500.

Level 6 force, “deadly force,” is any force that is reasonably likely to cause serious bodily injury – such as dislocation of a joint, dysfunction of an organ, loss of a body part – or death. Such force is an appropriate response only to lethal resistance. Lethal resistance ordinarily includes brandishing a weapon, but can include the use of a focused blow, if it is targeted at a vulnerable part of the body. A person lying on his stomach is unlikely to be able to deliver a potentially lethal strike against someone standing over him. Tr. 1127-29.

Hollis testified that the United States Supreme Court opinion in *Tennessee v. Garner*, 471 US 1, 105 S Ct 1694, 85 L Ed 2d 1 (1985), and *Graham v. Connor*, 490 US 386, 109 S Ct 1865, 104 L Ed 2d 443 (1989), set the standard for what level of force an officer can use. He said that the main facts to consider are (1) the nature of the immediate threat that the person is displaying and whether that person has the means and opportunity to carry out the threat, and (2) the physical resistance that the officer is applying to overcome the threat and whether it presents a substantial risk of injury. The test for determining whether the force that the officer used was excessive is whether a reasonable officer would have used such force in the same or similar circumstances. Tr. 1103, 1274-75, 1501-02.

Hollis viewed the videotapes and read the police reports in this case. In his opinion, Wood never presented a lethal level of resistance to the officers. Tr.

1128. In fact, Hollis characterized Wood as compliant or offering merely static level resistance throughout the encounter. Tr. 1135-61. He testified that the bucking and kicking behavior that he saw on the tape was “a common reaction of pain.” He explained that pepper spray never should be used at a distance less than three feet, regardless of the brand used. It never should be applied at “point-blank” range. Moreover, Officer Gulbranson was on Wood’s back for one minute and 20 seconds, and Wood likely was feeling panic as a result of positional asphyxia from the weight. Tr. 1140, 1153, 1170-71, 1209. Hollis concluded that Gulbranson used deadly force against Wood, and that was excessive force in the circumstances. Tr. 1209. Similarly, he concluded that Miller’s behavior in forcing Rilatos to the ground also was an excessive use of force. Tr. 1332-33.

In rebuttal, Deputy Lance Cummings of the Lincoln County Sheriff’s Office testified on behalf of the state. At the time of trial, he worked in the same office with Gulbranson and Miller and had discussed the case with both men. Tr. 1482. He has been certified as a use of force instructor since 1998 and is a part-time instructor for DPSST. Tr. 1373-75.

In his view, when Gulbranson put his hand on Wood’s “upper chest and neck area,” he was merely using a directional control, not a “neck restraint,” because Gulbranson was not choking him. Therefore, that was not a use of deadly force. Tr. 1384-86. He would assess Wood as presenting a Level 5 “ominous threat” when he was first walking toward Gulbranson, because Wood did not

answer when Gulbranson said, “Can I help you?” When Gulbranson said, “How about you stay over there,” Wood continued walking toward him with a “strong, powerful stride.” Tr. 1390, 1400-04; Ex. 2. Cummings testified that a Level 4 or Level 5 use of force includes using a canine, an impact weapon, focused blows, or pepper spray. Tr. 1416. He testified that the DPSST use of force continuum document does not take into account that certain statutes give officers discretion to decide what level of force to use. Tr. 1381. He said:

“[O]fficers have discretion in the decision that they’re making based upon the totality of the circumstances, all the information they have available to them.

“There’s nowhere in writing, whether it’s on this Force Continuum, Oregon statute, case law, Supreme Court ruling, anywhere, that says that as long as an officer’s justified in using physical control that they must first attempt temporary restraints, and if that fails, then they can try electronic stun device, and if that fails, they can try pressure points. Okay? So nobody can tell an officer what they can do on that.”

Tr. 1419-20.

Summary of Arguments

The text, context, and legislative history of the justification statutes demonstrate that the defense of self-defense depends on the reasonable beliefs of the defendant concerning the force being used against him, and not on the beliefs of the person against whom the self-defense is applied. That rule applies even

when the defensive force is used in response to excessive force being used by police officers in making an arrest.

The court in this case instructed the jury to apply the special justifications statutes that provide police officers a defense to criminal charges for their use of force in the course of their official duties so as to require the jury to find that, if the officers believed that their use of force was reasonable, any use of force by defendants was unlawful. That was an incorrect statement of the law, was confusing and misleading to the jury, and likely resulted in one or more erroneous verdicts. Each conviction as to each defendant therefore should be vacated, and the case should be remanded for a new trial with correct instructions.

ARGUMENT

I. Introduction

The trial court erred by refusing to give defendants' requested instruction in the language of ORS 161.209 with respect to the charges for interfering with a police officer in defense of self or another and with respect to the charges for disorderly conduct. Nothing in the text or context of the statutes suggests that a defendant cannot assert the defense of self-defense as justification for those charges, when use of force constitutes the gravamen of the offenses, as they did in this case.

The charge against Oliphant for Interfering with a Police Officer was alleged to have been committed when she “intentionally act[ed] in a manner that prevented and/or attempted to prevent Chris Miller * * * from performing the officer’s lawful duties with regard to another person.” The evidence that the state presented on that count was that, while Miller was attempting to arrest Rilatos, Oliphant pushed Miller in the chest. That was the use of physical force, which Oliphant argued was justified in the defense of Rilatos because, in her view, Miller was using unlawful physical force against Rilatos.

The specific factual basis for the charge against Rilatos for Interfering with a Police Officer is less clear, but the state presented evidence that Rilatos engaged in various overt behaviors that the officers believed were threatening physical force in the course of preventing Miller from taking her into custody and in the course of trying to intimidate the officers into ceasing their activity associated with taking Wood into custody. In Rilatos’ view, her conduct was justified in defense of herself and in defense of Wood.

The charge against Rilatos for Disorderly Conduct included an allegation that she engaged in “violent, tumultuous and threatening behavior.” Like the conduct that formed the basis of the Interfering charge, Rilatos believed that her behavior was necessary to protect herself and Wood from the unlawful use of force by the officers.

In addition, the court erred by adding the justification defense applicable to police officers' use of force as an exception to the self-defense defense to the charges for Assault on a Public Safety Officer and Resisting Arrest. The instructions as given were not a correct statement of the applicable law and were highly likely to confuse and mislead the jury. On those grounds, each of the convictions as to each count alleging Assault on a Public Safety Officer or Resisting Arrest should be vacated and remanded for a new trial with correct instructions.

Because the conduct that formed the basis of each charge against each defendant involved the use or threatened use of force, each defendant was entitled to have the jury instructed to consider the defense of self-defense on each charge. Moreover, the instructions should not have been augmented by the instruction concerning the justification defense applicable to police officers' beliefs concerning their use of force. However, the court should have added to the statutory instruction an instruction in the language from this court's decision in *State v. Wright*, as requested by each defendant.

II. The text, context, and legislative history of the justification statutes demonstrate that the defense of self-defense depends on the reasonable beliefs of the defendant concerning the force being used against him, and not on the beliefs of the person against whom the self-defense is applied.

Which justification statutes apply to a defendant's defense depends on the interpretation and construction of the statutes. To determine the legislature's

intent in enacting a statute, the court looks first to the text and context of the statute, and if legislative intent remains unclear, then it looks to legislative history. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). With respect to the statutes concerning justification defenses, the text and context of the statutes make clear that, when a defendant raises the defense of self-defense to a crime charged for his use or attempted use of force against a police officer, the defense turns on *the defendant's* reasonable beliefs concerning the officer's use of force; it does not turn on the beliefs or the officer concerning his own use of force.

A. The text and context of the justification statutes demonstrate that ORS 161.195 (police officers' justifiable use of force) is not an exception to the applicability of self-defense under ORS 161.209.

ORS 161.195 through ORS 161.275 enumerate the justification defenses in Oregon law. ORS 161.190 provides: "In any prosecution for an offense, justification, as defined in ORS 161.195 to 161.275, is a defense." ORS 161.209 is the statutory section that provides the criteria for the justification defense of self-defense, which the defendants in this case raised as to all counts against them:

"Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose."

(Emphasis added.) By the plain language of that statute, the issue presented by each defendant's defense is whether *the defendant reasonably believed* that the

officers' use or imminent use of force was unlawful, and *not* whether the use of such force is *in fact* unlawful.

Only two exceptions are provided in that statute. One is contained in ORS 161.215, which provides the statutory limitations on the use of physical force in defense of a person:

“Notwithstanding ORS 161.209, a person is not justified in using physical force upon another person if:

“(1) With intent to cause physical injury or death to another person, the person provokes the use of unlawful physical force by that person; or

“(2) The person is the initial aggressor, except that the use of physical force upon another person under such circumstances is justifiable if the person withdraws from the encounter and effectively communicates to the other person the intent to do so, but the latter nevertheless continues or threatens to continue the use of unlawful physical force; or

“(3) The physical force involved is the product of a combat by agreement not specifically authorized by law.”

The other statutory exception to ORS 161.209 is ORS 161.219, which sets forth the limitations on use of deadly physical force in defense of a person:

“Notwithstanding the provisions of ORS 161.209, a person is not justified in using deadly physical force upon another person unless the person reasonably believes that the other person is:

“(1) Committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person; or

“(2) Committing or attempting to commit a burglary in a dwelling; or

“(3) Using or about to use unlawful deadly physical force against a person.”

Neither of the express statutory exceptions to the right of self-defense says anything concerning the beliefs – reasonable or otherwise – of the alleged victim of the charged offense.

The statutory provision that governs justification of a police officer’s use of physical force is ORS 161.195. In contrast with ORS 161.209 – which provides only the two specified exceptions – ORS 161.195 expressly provides that its terms do not apply if it is inconsistent with *any other provision of law*:

“(1) *Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971 [codified in ORS 161.195 to 161.275], defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of official powers, duties or functions.*

“(2) As used in subsection (1) of this section, ‘laws and judicial decrees’ include but are not limited to:

“(a) Laws defining duties and functions of public servants;

“(b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;

“(c) Laws governing the execution of legal process;

“(d) Laws governing the military services and conduct of war;
and

“(e) Judgments and orders of courts.”

(Emphasis added.) ORS 161.235 governs a peace officer’s use of physical force

in making an arrest or in preventing an escape:

“Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when and to the extent that the peace officer reasonably believes it necessary:

“(1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or

“(2) For self-defense or to defend a third person from what the peace officer reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape.”

ORS 161.209 (the basic self-defense rule) contains *only two exceptions*.

Neither of those is ORS 161.195 and neither is ORS 161.235 and neither involves anything about police officers’ use of force. Therefore, by the plain text of the statutes, ORS 161.195 is not an exception to the right to self-defense set out in ORS 161.209. In contrast, ORS 161.195 expressly provides that the justification for a police officer’s use of force *does not apply if it is inconsistent with any other provision of law*. Therefore, the plain text of both statutes denotes that the justification defenses for police use of force are not exceptions to the general right of self-defense set out in ORS 161.209. Accordingly, the trial court erred by giving the instructions that it did as a limitation on defendants’ defenses of self-defense or defense of a third person.

B. The legislative history of the statutes confirms that the applicability of the self-defense depends on the defendant’s reasonable belief concerning the use of force in the circumstances, and *not* on the beliefs of the named victim

concerning the lawfulness of the victim's use of force, even if the named victim is a police officer effecting an arrest.

When construing a statute, this court's task is to discern the intent of the legislature. *PGE*, 317 Or at 610. The court looks first to the text and context of the statute. If the text and context yield an unambiguous meaning, then the court proceeds no further. If the meaning still is unclear, then the court examines legislative history. If the legislative history coupled with the text and context does not clarify the meaning of the term, then the court turns to legal maxims of statutory construction. *PGE*, 317 Or at 610-12. Because the meaning of the statutes at issue in this case is clear from the text and context, this court need not consider the legislative history. However, if the court discerns any ambiguity in the language of the statutes, then it should consider the legislative history.

With the exception of ORS 161.267 (which pertains to use of physical force by corrections officer or official employed by Department of Corrections) and the 1987 amendments to ORS 161.270 (which defines the defense of duress), the statutes governing justification defenses in the current version of Oregon Revised Statutes were drafted by the Criminal Law Revision Commission established by the 1967 Oregon Legislative Assembly to prepare a thorough modernization of the criminal and correctional laws of Oregon. The revised criminal code was presented to the legislature in the Proposed Oregon Criminal Code, Final Draft and Report (July 1970) and was enacted by the 1971 Legislative Assembly. ORS

161.190 (the basic self-defense rule) was § 22 of Article 4 of the Proposed Oregon Criminal Code. ORS 161.215 (the initial aggressor rule) and 161.219 (limitations on use of deadly physical force in defense of a person) were §§ 23 and 24, respectively.

With respect to the legislature's intent concerning § 22 (the general justification defense of self-defense and defense of others), the Commentary explains:

“Sections 22, 23 and 24 attempt to describe more precisely than do the existing statutes those situations in which force and the degree thereof may be employed in defense of a person. The provisions of the sections, except for subsection (3) of § 23, relating to the duty to retreat in the face of deadly force, are basically a codification of Oregon case law doctrines.”

Commentary to Criminal Law Revision Commission Proposed Oregon Criminal Code, Final Draft and Report §§ 22-24 at 24 (July 1970). The Commentary continues, addressing with particularity that the test is *the defendant's* reasonable belief concerning the need to use force in the circumstances, and not the belief of the named victim:

“The Oregon Reports abound in self-defense opinions, particularly homicide cases. The leading cases in this area are *State v. Gray*, 43 Or 446, 74 P 927 (1904), and *State v. Rader*, 94 Or 432, 186 P 79 (1919).

“* * * * *

“It is not necessary that the assault made by the deceased at the time upon the defendant Woodson Gray, if you find that an assault was made, should have been made

with a deadly weapon. An assault with the fist alone, if there was an apparent purpose and the ability to inflict death or serious bodily injury by the deceased upon the defendant Woodson Gray, is sufficient to justify the killing in self-defense, if the *defendant*, Woodson Gray, at the time he shot and killed the deceased, had reason to believe and did believe, that he was in imminent danger of death or great bodily harm at the hands of the deceased.’”

Commentary, §§ 22-24 at 24 (July 1970) (quoting *Gray*, 43 Or at 454) (emphasis added). Similarly, the Commentary quotes this court’s decision in *Rader* in emphasizing that the defendant’s perception is paramount – whether the danger is real or merely apparent – and the danger need not be one that arises from the commission of a crime:

“The *Rader* case is quite similar on its facts to *Gray* in that the defendant was indicted for second degree murder and convicted of manslaughter, was armed with a gun and fatally shot an unarmed, but larger, more powerful adversary. In reversing the judgment of conviction the Oregon Supreme Court discussed several different aspects of self-defense:

"Although many expressions have been used to the effect that a man rightfully may defend himself against a felonious attack, yet it is not reasonable or just to say that the attack must in all cases be a felonious one before the defendant is allowed to repel it with sufficient force to prevent not only danger to his life but also great bodily harm, irrespective of whether the latter is effected by felonious means or not.

“It is not the intent of the assailant which harms the one he attacks, neither is the latter bound by it nor required to ascertain it. . . . It is the imminent danger, *real or apparent*, of great bodily harm to himself which justifies a defendant in protecting himself.”

"It is essential that the defense must not be excessive nor disproportionate to the force involved in the attack upon the defendant, *all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time, under all the circumstances surrounding him.*"

Commentary, §§ 22-24 at 25 (July 1970) (quoting *Rader*, 94 Or at 456, 458)

(emphasis added).

With respect to § 19, the justification defense for police officers codified at ORS 161.195, the Commentary states:

"Subsection (1) merely provides that statutes or court decisions which impose a duty or grant a privilege to act may be followed *without the actor incurring criminal liability thereby.*"

Commentary, § 19 at 19 (July 1970) (emphasis added). In other words, the Commentary makes clear that the legislative intent in enacting ORS 161.195 was merely to provide peace officers *a defense to criminal prosecution*, and *not* to create an exception to anyone else's defense for acts committed in self-defense or in defense of others against the use of force by police.

The Commentary to §§ 27 through 31, which set out in more detail the justification defense for using force in making an arrest, reinforce the understanding that the statutes with regard to police officers pertain to an officer's defense to criminal charges for his own use of force, and not a basis to negate the defense of a person against whom he used force. For example, with respect to § 29, codified at ORS 161.235, the Commentary states:

“Section 29 sets out the standard for what constitutes a reasonable belief by the officer. It requires the officer to know the legal rules which affect his right to interfere with the citizen, and to know the legal gravity of conduct he encounters. For example, his belief that violation of the basic rule is a felony and that he can arrest a person for such an offense committed outside his presence would not constitute an acceptable mistake by the officer. On the other hand, if he is correct on the law, but makes a reasonable misinterpretation of the facts, *then the defense is available to him.*”

Commentary, §§ 27-31, at 30 (July 1970) (emphasis added).

For all of those reasons, the court in this case should not have instructed the jury that defendants’ defenses were circumscribed by the police officers’ reasonable beliefs about their own use of force.

III. The court should have given defendants’ requested instruction from *State v. Wright*.

In *Wright*, the court wrote:

“If a peace officer uses excessive force in making an arrest, the arrestee has a right to use physical force in self-defense against the excessive force being used by the officer. In that circumstance, the arrestee is not ‘resisting arrest,’ but, rather, is defending against the excessive force being used by the arresting officer.”

310 Or at 435 (citing Commentary to Proposed Oregon Criminal Code §§ 21-22, at 21-25 (1970)) (footnote omitted). The trial court in this case rejected this court’s holding, because it considered the term “excessive force” too vague for the jury to apply. It therefore substituted what it viewed as a statutory definition for the term: the statutory elements of the defense available to police officers facing

criminal charges for their use of force. That was improper for at least three reasons.

First, the trial court need not have looked so hard for a definition of the word “excessive.” The meaning of the word is found in the *Wright* opinion in the paragraph, quoted from *Rader*, that immediately precedes the holding that comprises the instruction that defendants requested. This court said:

“In *State v. Rader*, 94 Or 432, 458, 186 P 79 (1919), this court stated:

“‘It is essential that the [self-defense] must not be excessive or *disproportionate to the force involved in the attack upon the defendant, all to be judged by the jury from the standpoint of a reasonable man in the situation of the defendant at the time, under all the circumstances surrounding him.*’

“Although our opinion in *Rader* predated the 1971 Criminal Code, the Code employs the same principle. We conclude that, if an officer making an arrest uses excessive force, the permissible use of physical force by the arrestee is limited to the use of such force as is reasonably necessary under the circumstances for self-defense against the excessive force being used by the arresting officer.”

Wright, 310 Or at 436. Thus, as used by this court in *Wright*, the phrase “excessive force” is not a legal term of art, but rather a term about which conflicting testimony may be presented – and was presented in this case – and is to be decided by the jury as a factual issue. To determine whether the officers’ use of force was “excessive,” the jury must decide whether the defendants reasonably believed that the officers’ use of force was “disproportionate” in the

circumstances, and *not* whether the officers would have had a defense, if the prosecutor charged them with a criminal offense for their conduct rather than charging defendants. Then the jury must decide whether the defendants *reasonably* believed that their own use of force in response was necessary in the circumstances.

Second, the meaning of the term “excessive force” was thoroughly litigated by the parties as a question of fact. Experts testified on behalf of both parties concerning competing views about the appropriate standards to apply to determine whether police use of force was “excessive” or disproportionate to the threat in a particular case. At base, all of that testimony amounts to training and experience about how to determine whether an officer’s use of force was reasonable in the circumstances. Although a court may conclude that a person’s conduct is “unreasonable as a matter of law” in some circumstances, generally the decision about what is reasonable is a factual determination for jurors based on their conclusions about the credibility of the witnesses and their resolution of competing factual inferences. Which standards should be applied was the subject of substantial and conflicting expert testimony. By thereafter instructing the jury about what standards to apply, resorting to the statutes providing police officers a defense to criminal prosecution for their conduct, the court effectively directed the jury to find a fact based on inapplicable law. In addition, it effectively – and improperly – substituted its own resolution of the factual issue about the correct

standards for that of the jury *Cf. Creasey v. Hogan*, 292 Or 154, 156, 637 P2d 114 (1981) (it is improper for a trial court to read a dictionary definition concerning the meaning of technical words referred to in the testimony, the meaning of which may have reflected on the jurors' evaluation of the evidence or the credibility of the witnesses). Worse still, by instructing the jury on the elements of a police officer's defense, it simultaneously substituted the judgment of the officers themselves in the place of the jurors' determination of the credibility of the defendants' testimony and the reasonableness of their conduct.

Third, the legislature placed the burden of proof on the state to disprove the reasonableness of a defendant's beliefs about police use of force. ORS 161.190 expressly provides that the defense of self-defense or defense of another is a justification *defense*, not an affirmative defense. ORS 161.055 provides:

“(1) When a ‘defense,’ other than an ‘affirmative defense’ as defined in subsection (2) of this section, is raised at a trial, *the state has the burden of disproving the defense beyond a reasonable doubt.*

“(2) When a defense, declared to be an “affirmative defense” by chapter 743, Oregon Laws 1971, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

“(3) The state is not required to negate a defense as defined in subsection (1) of this section unless it is raised by the defendant. ‘Raised by the defendant’ means either notice in writing to the state before commencement of trial or affirmative evidence by a defense witness in the defendant's case in chief.”

(Emphasis added). If the text is not sufficiently clear, the Commentary to § 4 removes all doubt: “Self-defense is an ‘ordinary defense’ and not an ORS 161.055(2) affirmative defense. The state must, therefore, disprove it beyond a reasonable doubt.” Commentary, Proposed Oregon Criminal Code-Final Draft and Report § 4, at 5 (July 1970); *see also State v. Freeman*, 109 Or App 472, 475, 820 P2d 37, 39 (1991) (the state has the burden of disproving that the defendant acted in self-defense beyond a reasonable doubt). By instructing the jury that a defendant has no defense, unless the police officer’s use of force was unlawful, and then instructing the jury that a police officer’s use of force is unlawful only if the officer did not reasonably believe that his use of force was necessary, the court effectively shifted the burden of proof to the defendants. Taken together, the instructions required defendants to prove that police conduct was unlawful because either the officers *in fact* did not subjectively believe that their use of force was necessary or that any such belief was *in fact* unreasonable; and if defendants failed to prove either of those facts, then the court’s instruction directed the jury that defendants had no defense as a matter of law.

The factual issue for the jury to resolve as an element of the defense was only the reasonableness of defendants’ beliefs. Although the officers’ beliefs were factually *relevant* to that inquiry, the reasonableness of those beliefs were not dispositive as a matter of law, as the court’s instructions directed. By substituting the elements of a complex statutory defense available to persons who were not

defendants, the court misstated the law, conflated the factual issues, and misled the jury. It should not have given that instruction. It should have given the statutory self-defense instruction as to all counts. It also should have given the defendants' requested instruction concerning this court's holding in *Wright*. Because each of those errors alone and all of those errors in combination necessarily affected the verdicts, this court should vacate the convictions and remand for a new trial as to each count alleged against each defendant.

CONCLUSION

For each and all of the foregoing reasons, defendant respectfully asks this court to reverse the decision of the Court of Appeals, vacate the convictions on each and all counts, and remand this case to the trial court for a new trial.

Respectfully submitted,

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