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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff/Respondent, v. MICHAEL D. CORNELSEN Defendant/Appellant.	APPELLANT'S RESPONSE BRIEF Kootenai County Case CR-10-0014343 SUPREME COURT NO. 40623

APPELLANT'S RESPONSE BRIEF

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT, IN AND FOR THE COUNTY OF KOOTENAI

HONORABLE JOHN STEGNER
District Judge

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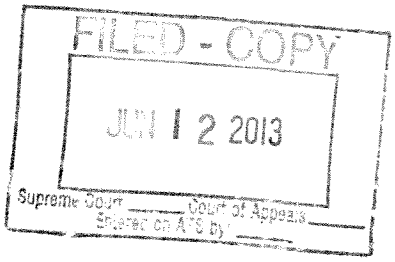

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STATEMENT OF THE ISSUES PRESENTED

1. The state incorrectly defines battery and misconstrues the force used in this case.
2. The state fails to adequately answer the question of whether self defense is allowed a trespasser facing even reasonable force in ejection.

ARGUMENT

1. The state incorrectly defines battery and misconstrues the force used in this case.

The state on appeal argues to the Court that taking one by the arm, moving it behind them, and forcing them from a room "do not even constitute a technical battery." Respondent's Brief at 10. The state does not cite anything for its concept of a "technical battery." The Idaho Code describes battery as:

> (a) Willful and unlawful use of force or violence upon the person of another; or
>
> (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
>
> (c) Unlawfully and intentionally causing bodily harm to an individual.

I.C. § 18-903. The state does not explain why the actions it acknowledges Tomasini took do not describe a battery, though clearly they involved intent, willfulness, touching, and force. Further, they were quite clearly against the will of the defendant.

The state may be assuming that the word "unlawful" in the statute prevents the actions of Tomasini from being a technical battery. However, that is the incorrect definition of "unlawful." Though no Idaho Court has ever defined the term "unlawful" in the battery statute, it has been defined by various other states in the context of their own battery statutes. The Washington Court of Appeals for example found:

> Defendant's argument mistakenly assumes that an assault must be an attempt to injure. An assault is an attempt to commit a battery, which is an unlawful touching; a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.

State v. Garcia, 579 P.2d 1034, 1036 (1978) citing R. Perkins, Criminal Law, ch. 2, s 2.A.1, at 107-08 (2d ed. 1969); 6 Am.Jur.2d, Assault and Battery, s 5, 10 (1963). In other words, the term "unlawful" in the battery statute is the lynch pin that prevents "battery" from defining almost all touching that takes place in society, it is not simply a redundancy or a reference to some other statute outside the chapter. *See Idaho Dep't of Health & Welfare v. McCormick*, 153 Idaho 468, 472 (2012) (It is incumbent upon a court to give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant). As Judge Burnett wrote in his special concurrence in *State v. McDougall*, 113 Idaho 900, 905-6 (1988):

> Such a distinction was recognized at common law. "The basic premise[,] that for criminal liability some mens rea is required[,] is expressed by the Latin maxim *actus non facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty)." Fn.1. With respect to crimes consisting of proscribed acts, mens rea traditionally has been thought to mean a *criminal* intent—that is, culpability grounded in a wrongful purpose. Criminal intent is more than the mere "intent" which denotes that an act is not accidental.
>
> FN1. The common law concept of mens rea has diminished application to statutory crimes which consist of negligence or of failure to perform affirmative duties. My focus here is on crimes consisting of proscribed acts.
> Despite its antiquity, mens rea is a seminal concept in modern criminal law. To illustrate, I.C. § 18–903(c) prohibits the "[a]ctual, intentional and unlawful touching or striking of another person against the will of the other...." If a person suddenly pushes another away from an oncoming motor vehicle, the act is without contemporaneous consent and it is far from accidental. But there is no crime because the act is unaccompanied by a criminal intent. Similarly, if a person genuinely entertains the delusion that a motor vehicle is about to strike another, and he pushes the other out of the way, his act is intentional but he has committed no crime because, again, his intent was not criminal.

citing Black's Law Dictionary (5th ed. 1979); 1 W. LaFave & A. Scott, Substantive Criminal Law 297 (1986). Similarly, at common law, the tort of battery requires an offensive or harmful contact without consent. See *White v. University of Idaho*, 119 Idaho 564, 565 (1989).

Further, the state dismisses Tomasini's actions as nonharmful by misconstruing the evidence. Tomasini admitted to placing a hand on the defendant's injured shoulder. Tr. p. 18, L. 18 - p. 19, L. 2. The state therefore fails to argue on the basis of all the evidence presented to the Court as to whether the force used was reasonable.

2. The state fails to adequately answer the question of whether self defense is allowed a trespasser facing even reasonable force in ejection.

The state, in misconstruing the battery statute, fails to address whether a right to self defense exists for a trespasser. The relevant Idaho statutes I.C. §§ 19-202A, 19-201, and 19-202 provide no guidance. There is, at this point in time, no law that prevents a criminal from using self defense if they are being assaulted or battered. Further, even a person violating the law has a right to secure his safety. See IDAHO CONST. Art. I § 1.

Even if this Court were to find that where a person recognizes their own conduct as criminal, they would not be allowed self defense against reasonable force, the Court must also find that where the defendant is unaware, their resistance would be as protected as that of the person using force against them. That was essentially the holding of the Supreme Court in *Pettibone v. U.S.*, 148 U.S. 197 (1893). The Court held:

> [i]t seems clear that an indictment against a person for corruptly, or by threats or force, endeavoring to influence, intimidate, or impede a witness or officer in a court of the United States in the discharge of his duty, must charge knowledge or

notice, or set out facts that show knowledge or notice, on the part of the accused that the witness or officer was such; and the reason is no less strong for holding that a person is not sufficiently charged with obstructing or impeding the due administration of justice in a court unless it appears that he knew or had notice that justice was being administered in such court. Section 5399 is a reproduction of section 2 of the act of congress of March 2, 1831, c. 99, (4 St. p. 487,) 'declaratory of the law concerning contempts of court,' though proceeding by indictment is not exclusive if the offense of obstructing justice be committed under such circumstances as to bring it within the power of the court, under section 725. In maters [sic] of contempt, persons are not held liable for the breach of a restraining order or injunction unless they know or have notice, or are chargeable with knowledge or notice, that the writ has been issued or the order entered, or at least that application is to be made; but without service of process, or knowledge or notice or information of the pendency of proceedings, a violation cannot be made out.

Undoubtedly it is a condition of penal laws that ignorance of them constitutes no defense to an indictment for their violation, but that rule has no application here. The obstruction of the due adminstration [sic] of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such obstruction can only arise when justice is being administered. Unless that fact exists the statutory offense cannot be committed, and while, with knowledge or notice of that fact, the intent to offend accompanies obstructive action, without such knowledge or notice the evil intent is lacking. It is enough that the thing is done which the statute forbids, provided the situation invokes the protection of the law, and the accused is chargeable with knowledge or notice of the situation; but not otherwise.

It is insisted, however, that the evil intent is to be found, not in the intent to violate the United States statute, but in the intent to commit an unlawful act, in the doing of which justice was in fact obstructed, and that, therefore, the intent to proceed in the obstruction of justice must be supplied by a fiction of law. But the specific intent to violate the statute must exist to justify a conviction, and, this being so, the doctrine that there may be a transfer of intent in regard to crimes flowing from general malevolence has no applicability. It is true that, if the act in question is a natural and probable consequence of an intended wrongful act, then the unintended wrong may derive its character from the wrong that was intended; but, if the unintended wrong was not a natural and probable consequence of the intended wrongful act, then this artificial character cannot be ascribed to it, as a basis of guilty intent. The element is wanting through which such quality might be imparted.

Id. at 206 citing *Savin, Petitioner*, 131 U. S. 267 (1889); *Winslow v. Nayson*, 113 Mass. 411 (1873); 1 Bish. Crim. Law, § 335; 2 Daniell, Ch. Pr. (4th Amer. Ed.) 1684; 2 High, Inj. (3d Ed.) §§ 1421, 1452. In sum, where the defendant would not reasonably have recognized the rightfulness of his attacker's actions, he cannot be proven guilty of violating the law when he defends himself. A contrary ruling puts citizens in an impossible position: on the one hand, the person physically attacking them may be in the right and so to respond in self defense will result in violating the law, on the other, the attacker may be in the wrong, or may be using excessive force, and therefore to do nothing would mean they must accept the attack. Such a ruling would effectively put an end to self defense in the state of Idaho.

A better understanding of the law is that while a citizen may use reasonable force against a lawbreaker without himself breaking the law, that lawbreaker will be allowed to reasonably respond in kind without further violating the law, with the exception of dealings with the police. In a situation dealing with police officers, the presumption is that the officer's command is lawful. A similar presumption may arise for the burglar in a person's home.

This case, however, is the antithesis of the above examples. The defendant is in a public place and is asked to leave by security guards he is arguing with. When he refuses, the guards take it upon themselves to physically eject him. The question for the trier then is whether a reasonable person would have recognized the guard's right to physically eject him under the circumstances, and further, whether what the guard did, by grabbing the defendant and placing a hand upon his injured shoulder, was a reasonable amount of force, and further, whether a person

might reasonably under the circumstances have worried that there was an imminent danger of bodily harm in excess of what was required. No rational trier of fact could find that the defendant was aware that he was violating the law when the security guard asked him to leave and he remained in the midst of a heated argument- the public is well aware that employees have supervisors, and that when a conflict occurs with the employee, one does not have to simply accept it. Further, no rational trier of fact would have thought that the much larger security guard, flanked by his fellow security guards, needed to cause the defendant pain by placing a hand on his injured shoulder. A rational trier of fact would recognize that in causing the defendant this unwarranted pain and suffering, the security guard in essence consents to receiving a kick to convince him to stop, and further, that the defendant had a right to stop the security guard from causing him such pain.

DATED this 7 day of April, 2013.

THE LAW OFFICE OF THE KOOTENAI COUNTY PUBLIC DEFENDER

BY: Jay Logsdon
JAY LOGSDON
DEPUTY PUBLIC DEFENDER

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing was personally served by placing a copy of the same in the interoffice mailbox on the 7 day of June, 2013, addressed to:

X	Coeur d'Alene Prosecutor	[X]	Interoffice Mail
		[ ]	Facsimile (208) 769-2326
X	Lawrence G. Wasden Attorney General P.O. Box 83720 Boise, Idaho 83720-0010	[X] [ ] [ ]	First Class Mail Certified Mail Facsimile (208) 854-8071
X	Reporter for District Judge John R. Stegner, Sheryl Engler Latah County Courthouse PO Box 8068 Moscow, Id 83843	[X] [ ]	First Class Mail Facsimile (208) 799-3058
X	Stephen W Kenyon Clerk of the Courts Idaho Supreme Court of Appeals P.O. Box 83720 Boise, ID 83720-0101	[X]	First Class Mail