9-24-2015

State v. Garner Appellant's Brief Dckt. 42769

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DENNIS JAMES GARNER, Defendant-Appellant.	)	NO. 42769 ADA COUNTY NO. CR 2014–7802 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE TIM HANSEN
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

MAYA P. WALDRON
Deputy State Appellate Public Defender
I.S.B. #9582
P.O. Box 2816
Boise, ID 83701
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

Nature of the Case 1

Statement of the Facts and Course of Proceedings 2

ISSUE PRESENTED ON APPEAL 6

ARGUMENT 7

The District Court Committed Reversible Error By Rejecting Mr. Garner's Proposed Self-Defense Instruction 7

A. Introduction 7

B. Standard Of Review 7

C. The District Court Committed Reversible Error By Rejecting Mr. Garner's Self-Defense Instruction 8

1. An Arrestee Has The Right To Defend Himself Against A Detention Deputy's Use Of Excessive Force 11

2. The District Court's Error Violated Mr. Garner's Constitutional Right To Present A Complete Defense And Thus Requires Reversal 13

CONCLUSION 15

CERTIFICATE OF MAILING 16

TABLE OF AUTHORITIES

Cases

Aldini v. Johnson, 609 F.3d 858 (6th Cir. 2010) 7

Beard v. United States, 158 U.S. 550 (1895) 11

Bell v. Wolfish, 440 U.S. 520 (1979) 7

California v. Trombetta, 467 U.S. 479 (1984) 13

Chapman v. California, 386 U.S. 18 (1967) 8

Com. v. Francis, 511 N.E.2d 38 (Mass. Ct. App. 1987) 13

Graham v. Connor, 490 U.S. 386 (1989) 12

Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) 12

Montana v. Egelhoff, 518 U.S. 37 (1996) 12

State v. Bojorquez, 675 P.2d 1314 (Ariz. 1984) 13

State v. Bradley, 10 P.3d 358 (Wash. 2000) 13

State v. Draper, 151 Idaho 576 (2011) 8, 14

State v. Eastman, 122 Idaho 87 (1992) 8

State v. Fetterly, 126 Idaho 475 (Ct. App. 1994) 8

State v. Galvan, 156 Idaho 379 (Ct. App. 2014) 14

State v. Johns, 112 Idaho 873 (1987) 8

State v. Kerchusky, 138 Idaho 671 (Ct. App. 2003) 14

State v. Martinez, 596 P.2d 734 (Ariz. Ct. App. 1979) 13

State v. McGreevey, 17 Idaho 453 (1909) 11

State v. Parsons, 153 Idaho 666 (Ct. App. 2012) 14

State v. Pearce, 146 Idaho 241 (2008) 8

State v. Perry, 150 Idaho 209 (2010) 8, 14

State v. Schevers, 132 Idaho 786 (Ct. App. 1999) 8

State v. Spurr, 114 Idaho 277 (Ct. App. 1988) 4, 12

Taylor v. Withrow, 288 F.3d 846 (6th Cir. 2002) 11, 14

United States v. Gore, 592 F.3d 489 (4th Cir. 2010) 12, 13

Washington v. Texas, 388 U.S. 14 (1967) 13, 14

Whitley v. Albers, 475 U.S. 312 (1986) 12

Statutes

I.C. § 18–903 18

I.C. § 18–915(2) 2, 14

I.C. § 19–201 11

I.C. § 19–202 11

I.C. § 19–610 11

I.C. § 19–2132 10

18 U.S.C. § 111 ..... 12, 13

42 U.S.C. § 1983 12

Constitutional Provisions

ID. CONST., art. I, § 1 11

ID. CONST., art. I, § 13 ..... 13, 14

U.S. CONST., amend. VI 14

Additional Authorities

Idaho Criminal Jury Instructions, Introduction and General Directions for Use

https://www.isc.idaho.gov/main/criminal-jury-instructions 10

ICJI 1263 ..... *passim*

ICJI 1264 5

STATEMENT OF THE CASE

Nature of the Case

A jury found Dennis James Garner guilty of battery on, and propelling bodily fluids at, a detention deputy as he was being booked into jail. Mr. Garner's theory of the case was that, to the extent he committed a battery, he was merely defending himself against the detention deputies' unreasonable use of force. But the court refused to instruct the jury accordingly because it did not believe there is a right to post-arrest self-defense. This appeal raises an apparent issue of first impression in Idaho: Whether an arrestee who is being booked into jail has a right to defend himself against a detention officer's unreasonable use of force. The answer to that question is "yes." The right to self-defense, conferred without qualification by the Idaho Constitution and the common law, if not the U.S. Constitution, does not evaporate after the individual acting in self-defense is arrested. Similarly, the U.S. Supreme Court has recognized that the U.S. Constitution protects an individual's right to be free from an officer's use of unreasonable force, regardless of his status as an arrestee, pretrial detainee, or inmate. Finally, an arrestee should not have to choose between suffering serious injury or death on the one hand, and earning a felony conviction and prison term on the other. This Court should therefore recognize an arrestee's right to use reasonable force to defend himself against an officer's use of unreasonable force during the booking process, vacate Mr. Garner's battery conviction, and remand his case to the district court for a new trial on that charge.[1]

[1] Mr. Garner does not challenge his conviction for propelling bodily fluids.

Statement of Facts and Course of Proceedings

On May 14, 2014, the Boise Police arrested Mr. Garner for public intoxication. (Tr. Vol. I,[2] p.20, Ls.11–16; PSI, p.13.) As he was being booked into the Ada County Jail, Mr. Garner allegedly kicked and spat at a detention deputy. (PSI, pp.20–24.) When the kicking took place, four officers held Mr. Garner, who was handcuffed, face-down on the ground. (Tr. Vol. I, p.284, Ls.19–22; Tr. Vol. II, p.28, Ls.13–14). Mr. Garner kicked out of the leg-lock that one of the deputies had him in, and in turn allegedly kicked that deputy. (Tr. Vol. I, p.360, Ls.10–12; Vol. II., p.35, L.5 – p.36, L.4; p.44, 13–16.) The State later charged Mr. Garner with battery on, and propelling bodily fluids at, a detention deputy. I.C. §§ 18–915(2), 18–915B; R., pp.6–7, 34–35, 83–84.

At trial, six detention deputies testified about the incident.[3] They said that Mr. Garner was increasingly uncooperative as they tried to search him during intake, so they took him to a holding cell to complete the search. (*See, e.g.*, Tr. Vol. II,[4] p.14, L.6 – p.15, L.24 (testimony of Deputy Huffaker).) As the deputies escorted Mr. Garner into the holding cell, Mr. Garner allegedly spit at Deputy Huffaker (Tr. Vol. II, p.21, Ls.2–9, p.22, L.4 – p.23, L.5, p.25, L.23 – p.26, L.24), which prompted the deputies to take Mr. Garner to the ground (Tr. Vol. II, p.25, Ls.13–22).

At that point, multiple deputies were trying to control Mr. Garner, who was on his stomach on a cement slab in the holding cell. (Tr. Vol. II, p.28, Ls.13–14). Deputy Huffaker put Mr. Garner's legs into a figure-four leg-lock (Tr. Vol. II, p.29, Ls.1–24), Deputy Johnson helped Deputy Huffaker with Mr. Garner's legs (Tr. Vol. II, p.31, Ls.5–7), Deputy McKinley was on

---

[2] Volume I contains the first two days of trial (October 20 and 21, 2014) and the sentencing hearing (December 17, 2014).

[3] The court admitted a video of the incident, which was captured by the jail's surveillance cameras, as State's Exhibit 1. (Tr. Vol. I, p.233, L.16 – p.236, L.3.)

Mr. Garner's upper body (Tr. Vol. II, p.30, Ls.20–24, p.73, L.11 – p.74, L.8), and Deputy Burnett was trying to control Mr. Garner's head (Tr. Vol. II, p.27, Ls.19–23). Around that time, Deputy Lusby heard Mr. Garner making "guttural-type noises" and say things like "I can't breathe," and "get your hands off me." (Tr. Vol. I, p.446, Ls.8–15.) Deputy Burnett remembers Mr. Garner saying "[g]et off my fucking back." (Tr. Vol. I, p.189, Ls.20–22.) Mr. Garner eventually kicked out of the leg lock and hit Deputy Huffaker, after which Officer Huffaker tased Mr. Garner. (Tr. Vol. II, p.35, L.5 – p.36, L.4, p.46, L.11 – p.49, L.1.)

At the close of the evidence, the court took up Mr. Garner's proposed self-defense instruction. That instruction provides:

> An officer is not permitted to use unreasonable or excessive force [in making or attempting to make an arrest] [in detaining or attempting to detain a person for questioning].
>
> If an officer does use unreasonable or excessive force [in making or attempting to make an arrest] [in detaining or attempting to detain a person for questioning], the person being [arrested] [detained] may lawfully use reasonable force to protect himself.
>
> The state must prove beyond a reasonable doubt:
>
> (1) that the officer did not use unreasonable force, or
>
> (2) if the officer used unreasonable force, that the defendant used unreasonable force in response.
>
> If the state fails to do so, you must find the defendant not guilty [of [Resisting][,] [Delaying] [or] [Obstructing] an Officer].

(R., p.76; Idaho Criminal Jury Instruction ("ICJI") 1263.) Defense counsel acknowledged that the instruction, which he took verbatim from the Idaho Criminal Jury Instructions, would need to be modified to fit the facts of this case. (Tr. Vol. I, p.213, Ls.1–25.)

The State objected to the proposed instruction, explaining that (1) the officers involved were detention officers, not peace officers or public officers as defined by statute (Tr. Vol. I, p.461, L.3 – p.462, L.2); (2) the altercation took place while Mr. Garner was being booked into jail, not while the officers attempted to arrest or detain him (Tr. Vol. I, p.460, L.12 – p.461, L.2;

---

[4] Volume II contains the third day of trial (October 23, 2014).

Tr. Vol. II, p.127, L.12 – p.128, L.1); (3) there was no evidence that Mr. Garner was scared or that the force the officers used against him was unreasonable (Tr. Vol. II, p.126, Ls.8–15, p.126 L.23 – p.127, L.10, p.128, Ls.2–7, p.129, L.23 – p.130, L.5); and (4) the instruction was irrelevant and would be distracting, confusing, and misleading (Tr. Vol. II, p.126, Ls.16–22, p.127, Ls.10–11).[5]

Mr. Garner argued that (1) the right to defend oneself against excessive force is grounded in the U.S. and Idaho Constitutions, not in statute, and so it does not matter whether the officers were peace officers or detention officers (Tr. Vol. II, p.124, Ls.18–24, p.125, L6 – p.126, L.5); (2) that right did not evaporate after he was arrested or detained (Tr. Vol. II, p.125, Ls.2–24, p.131, Ls.18–23); (3) there was sufficient evidence to support the instruction, including the testimony that Mr. Garner said "I can't breathe" during the altercation (Tr. Vol. II, p.129, Ls.17–22, p.130, L.21 – p.131, L.1); and (4) the instruction was extremely relevant to Mr. Garner's defense and would not distract the jury (Tr. Vol. II, p.131, Ls.2–17).

The district court acknowledged that an officer testified that Mr. Garner said "I can't breathe" (Tr. Vol. II, p.130, Ls.6–20), but reasoned that (1) the instruction applied only to peace officers or public officers, not detention officers (Tr. Vol. II, p.132, Ls.1–17), and (2) the case referenced in the model jury instruction, *State v. Spurr*, 114 Idaho 277, 279 (Ct. App. 1988), addressed only force used during arrests and detentions, not force used after a defendant was already in custody (Tr. Vol. II, p.132, L.1 – p.134, L.12). The court explained:

> In this case the court wants to first briefly address the original comment on Tuesday from [the State]. In this case, although [ICJI] 1263, the one that is being

[5] The State also argued that, if the court were to give the instruction, it should instruct the jury that the instruction should only be considered with respect to the lesser included charge of resisting and obstructing, and not the battery charge. (Tr. Vol. II, p.128, L.8 – p.129, L.12.) The court did not reach that issue. (Tr. Vol. II, p.131, L.25 – p.134, L.21.) As demonstrated by the analysis below, however, the self-defense instruction is warranted with respect to both the battery and resisting and obstructing charges.

asked to be given to the jury in this case concerning the use of excessive force, does not specifically use the word "peace officer."

Nonetheless, in the "Comments" second, it does refer the court or refer to [ICJI] 1264 where the definition of public or peace officer is contained.

And as we had talked about previously concerning the request for the instruction on resisting and obstructing an officer, there is a distinction between a peace officer and a detention officer statutorily.

The court would also note and it does agree with the state here that the *Spurr* case, which is cited in the comments section which the defense is relying on, did indeed simply involve a situation of either an attempted arrest or certainly an attempt to detain a defendant for questioning.

And the cases, as [the State] has correctly noted, relied upon in the *Spurr* decision, all dealt with the use of force during an arrest. And there was no authority of which I was aware of, appellate authority, that talks about this instruction being given in the case of someone being in a detention facility, whether in a correctional facility or a county detention or correctional facility there.

The court agrees that the *Spurr* court did indicate that a person has a constitutional right not to be subjected to excessive force by officers in the performance of their duties. But having said that, the instruction itself contains two alternatives for the court as to how a jury could be instructed, either that an officer is not permitted to use unreasonable or excessive force in making or attempting to make an arrest, or in detaining or attempting to detain a person for questioning.

And, again, this language is consistent with the decision in *Spurr*, which is one of those situations where it was either an arrest or certainly an attempt to detain an individual for questioning.

Considered as a whole, the court does not find, based upon the case authority, that in *Spurr* the appellate court intended to have the defense applied so broadly as to encompass individuals who are in a correctional or detention facility.

And, therefore, because the instruction sought in this case is applied to either arrests or detention for questioning and because neither one of those things applied in this case, I do not believe it is appropriate to give the requested instruction number 1263, and I will not do so then at this time.

(Tr. Vol. II, p.132, L.1 – p.134, L.12.)

The jury found Mr. Garner guilty of both charges (Tr. Vol. II, p.219, L.7 – p.220, L.5), and Mr. Garner timely appealed (R., pp.146–48).

ISSUE

Did the district court commit reversible error by rejecting Mr. Garner's proposed self-defense instruction?

ARGUMENT

The District Court Committed Reversible Error By Rejecting Mr. Garner's Proposed Self-Defense Instruction

A. Introduction

The district court erred when it found that an arrestee being booked into jail[6] has no right to defend himself against a detention deputy's use of unreasonable or excessive force. The court mistakenly limited its analysis to ICJI 1263 and *Spurr*, without considering defense counsel's argument that an individual, regardless of his status within the criminal justice system, has a right to be free from, and use reasonable force to defend against, an officer's use of excessive force. Indeed, there is no meaningful difference between a police officer's use of excessive force during an arrest and a detention deputy's use of force after the arrest. In either situation, the arrestee does not have to choose between suffering serious injury or death on the one hand, and earning a felony conviction and prison term on the other. The arrestee instead has a limited right to self-defense. He can respond to the deputy's use of excessive force with a reasonable amount of force. This Court should therefore hold that an arrestee has the right to defend himself against excessive force during the booking process, vacate Mr. Garner's battery conviction, and remand this case to the district court for a new trial.

B. Standard Of Review

If an error was followed by a contemporaneous objection at trial, and the appellant shows that a violation occurred, the burden shifts to the State to prove the error was harmless beyond a

---

[6] Although Mr. Garner contends his status within the criminal justice system does not affect the outcome of this case, he refers to himself as an "arrestee" for clarity's sake. *See Aldini v. Johnson*, 609 F.3d 858, 866 (6th Cir. 2010) ("The Court noted in dicta in *Wolfish* that individuals who have not had a probable-cause hearing are not yet pretrial detainees for constitutional purposes.") (citing *Bell v. Wolfish*, 440 U.S. 520, 536 (1979)).

reasonable doubt. *State v. Perry*, 150 Idaho 209, 227 (2010); *see also Chapman v. California*, 386 U.S. 18 (1967). This requires the State to prove, beyond a reasonable doubt, "that the constitutional violation did not contribute to the jury's verdict." *Perry*, 150 Idaho at 227.

"Whether a jury has been properly instructed is a question of law over which this Court exercises free review." *State v. Pearce*, 146 Idaho 241, 247 (2008). To determine whether a defendant's requested instruction should have been given, the appellate court "must examine the instructions that were given and the evidence that was adduced at trial." *State v. Johns*, 112 Idaho 873, 881 (1987). This Court also exercises "free review over the trial court's determination of whether due process standards have been satisfied." *State v. Schevers*, 132 Idaho 786, 788 (Ct. App. 1999).

C. The District Court Committed Reversible Error By Rejecting Mr. Garner's Self-Defense Instruction

"A defendant is entitled to an instruction where 'there is a reasonable view of the evidence presented in the case that would support' the theory" articulated in the proposed instruction. *Pearce*, 146 Idaho at 247–48 (2008) (quoting *State v. Eastman*, 122 Idaho 87, 90 (1992)). When a reasonable view of the evidence supports the instruction requested, the subject matter of the proposed instruction is not covered elsewhere in the instructions, and the proposed instruction does not improperly comment on the evidence, the "requested instruction on governing law must be given." *State v. Fetterly*, 126 Idaho 475, 476–77 (Ct. App. 1994). "If the foregoing criteria are met, but the requested instruction incorrectly states the law, the trial court is 'under the affirmative duty to properly instruct the jury.'" *Id.* (quoting *Eastman*, 122 Idaho 87, 91 (1992)). Erroneous instructions amount to reversible error if "the instructions as a whole misled the jury or prejudiced a party." *State v. Draper*, 151 Idaho 576, 588 (2011).

Mr. Garner's theory of the case regarding the battery charge was that, to the extent that he committed a battery, he acted in self-defense. A reasonable view of the evidence presented at trial supports that theory. After Mr. Garner allegedly spit at one of the deputies during intake, the deputies took Mr. Garner to the ground. (Tr. Vol. II, p.22, L.4 – p.23, L.19, p.25, Ls.13–22.) Four deputies tried to control Mr. Garner, who was on his stomach on a cement slab with his hands cuffed behind his back. (Tr. Vol. II, p.28, Ls.13–14). Deputies Huffaker and Johnson held Mr. Garner's legs (Tr. Vol. II, p.29, Ls.1–24, p.31, Ls.5–7), Deputy Burnett was trying to control Mr. Garner's head (Tr. Vol. II, p.27, Ls.19–23), and Deputy McKinley was on Mr. Garner's upper body (Tr. Vol. II, p.30, Ls.20–24, p.73, L.11 – p.74, L.8). (*See also* Tr. Vol. I, p.284, Ls.19–22 (Deputy Burnett answering "yes" when asked "[s]o hands behind his back and his body is prone on the floor and there is [sic] at least three officers on top of him at that time, correct?"); Tr. Vol. II, p.73, Ls.2–5 (Deputy Huffaker testifying that Deputy Burnett was putting pressure on Mr. Garner's shoulder blades).)

Around that time, Deputy Lusby heard Mr. Garner making "guttural-type noises" and say things like "I can't breathe," and "get your hands off me" (Tr. Vol. I, p.446, Ls.8–15), and Deputy Burnett heard Mr. Garner say "[g]et off my fucking back" (Tr. Vol. I, p.189, Ls.20–22). Mr. Garner then kicked out of the leg lock and hit Deputy Huffaker. (Tr. Vol. I, p.360, Ls.10–12 (Deputy McKinley testifying that Mr. Garner "kicked out of [the leg lock]. And in the process of kicking out, he kicked [Deputy Huffaker] in the stomach and moved him back."); Tr. Vol. II., p.35, L.5 – p.36, L.4) (Deputy Huffaker testifying that Mr. Garner was "starting to kick out of the leg-lock," "was bucking his body, kind of using his upper body pushing off, using his legs, and pushing [Deputy Huffaker] with his feet." and kicked Deputy Huffaker).) Although the district court did not squarely address the issue, it appears that the court found that the testimony provided a factual basis for Mr. Garner's self-defense instruction. (Tr. Vol. II, p.130, Ls.6–20

("I did recall hearing some testimony on that issue. Not much, but again, I did recall hearing at least some testimony.").)

Instead, the court refused to give Mr. Garner's instruction because it concluded that there was no legal basis for self-defense under these circumstances. (Tr. Vol. II, p.131, L.25 – p.134, L.12.) Specifically, the court rejected Mr. Garner's proposed instruction because it believed a defendant could only assert self-defense against excessive force used by peace officers, not detention officers, in situations in which the officer used excessive force during an arrest, not after the defendant was already arrested. (Tr. Vol. II, p.132, L.1 – p.134, L.12.) The court based its conclusion on ICJI 1263 and *Spurr*, without ever really addressing defense counsel's argument that the right of self-defense is grounded in the U.S. and Idaho Constitutions. (*Id.*)

The court erred in several respects. As an initial matter, model jury instructions are not the law, and the court must modify such instructions, or create completely new instructions, in order to communicate the applicable law to the jury. *See* Idaho Criminal Jury Instructions, Introduction and General Directions for Use[7]; *see also* Tr. Vol. I, p.213, Ls.1–25. What's more, the Court never squarely addressed defense counsel's argument that the U.S. and Idaho Constitutions give a person the right to defend himself against a government officer's use of excessive force, and that right does not disappear depending on the person's status within the criminal justice system or the title of the officer using excessive force. Because Mr. Garner had

---

[7] According to the Introduction and General Directions For Use:

> [T]he law prevailing during the period of drafting is reflected in the instructions. As the law in any respect becomes more refined or is modified by statute or appellate decision, the ICJI instructions must be modified accordingly.
>
> In addition, judges and lawyers should note that these instructions cannot possibly cover all of the legal issues on which a jury may need guidance in a particular case. . . . A trial judge should remain vigilant in observing the duty set forth in Idaho Code § 19–2132: "In charging the jury, the court must state to them all matters of law necessary for their information."

Id. at p.1, available at https://www.isc.idaho.gov/main/criminal-jury-instructions.

a right to use reasonable force against the deputies' use of excessive force, the district court erred by refusing to give his proposed instruction. That error violated Mr. Garner's constitutional right to present a complete defense and so the State cannot prove that it did not contribute to the jury's verdict. The error requires reversal.

1. An Arrestee Has The Right To Defend Himself Against A Detention Deputy's Use Of Excessive Force

The U.S. Supreme Court and Idaho courts have long recognized an individual's right to defend himself against another's use of force. *See, e.g.*, *Beard v. United States*, 158 U.S. 550 (1895); *State v. McGreevey*, 17 Idaho 453 (1909). Although this right is reaffirmed in statute, I.C. §§ 19–201, 19–202, 19–202A,[8] the right undoubtedly predated the statutory right, and is rooted in the U.S. Constitution, the Idaho Constitution, and common law. *See, e.g.*, *Beard*, 158 U.S. at 561–64; *Taylor v. Withrow*, 288 F.3d 846, 852 (6th Cir. 2002), ID. CONST., art. I, § 1 ("All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety."). As the Sixth Circuit in *Taylor v. Winthrow* explained:

> The right to claim self-defense is deeply rooted in our traditions. Blackstone referred to self-defense as the primary law of nature, and claimed that it is not, neither can it be in fact, taken away by the law of society. According to him, the common law held self-defense an excuse for breaches of the peace, nay

[8] The Idaho Code outlines self-defense generally, without limiting the circumstances under which an individual can claim self-defense. "Lawful resistance to the commission of a public offense may be made: 1. By the party about to be injured. 2. By other parties." I.C. § 19–201. "Resistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his person, or his family, or some member thereof. 2. To prevent an illegal attempt by force to take or injure property in his lawful possession." I.C. § 19–202. "No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary, or when coming to the aid of another whom he reasonably believes to be in imminent danger of or the victim of aggravated assault, robbery, rape, murder or other heinous crime." I.C. § 19–202A. The statute governing the use of force to make an arrest, I.C. § 19–610, similarly does not speak to the use of force after the point that an arrest is made.

> even for homicide itself. Even *Egelhoff*,[9] a case taking a decidedly narrow view of which rights are "fundamental," the Court commented that the right to have the jury consider self-defense evidence may be a fundamental right. We know of no state that either currently or in the past has barred a criminal defendant from putting forward self-defense as a defense when supported by the evidence.

Id. at 852 (internal citations, alterations, and quotation marks omitted; footnote added).

In the context of arrestees, pretrial detainees, and inmates, the line between this right of self-defense and the corollary right to be free from a government actor's use of excessive force is somewhat blurred. *See Spurr*, 114 Idaho at 279 ("A person has a constitutional right not to be subjected to excessive force by law enforcement officers in the performance of their duties. Furthermore, a defendant has a right to defend himself against the use of excessive force by an officer.") (internal citations omitted); *United States v. Gore*, 592 F.3d 489, 491–92 (4th Cir. 2010) (in which the government conceded that "[s]ome minimal right of self-defense must be available to inmates charged [with assaulting, resisting, or impeding certain officers or employees] under 18 U.S.C. § 111 because disabling an inmate entirely from protecting himself . . . would violate the Eighth Amendment's prohibition of cruel and unusual punishments."); *see also* Tr. Vol. II, p.124, L.18 – 125, L.18. Like 42 U.S.C. § 1983 cases alleging an officer's use of excessive force, the source of the right to self-defense within the U.S. Constitution may vary depending on when the force is used. *Graham v. Connor*, 490 U.S. 386, 388 (1989) (the Fourth Amendment applies to excessive force used during seizures), *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (the Eight Amendment applies to excessive force used after conviction); *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475–76 (2015) (approving of an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment's Due Process Clause).

Regardless of its origins, the right of self-defense does not evaporate if the individual acting in self-defense is an arrestee, detainee, or inmate. Instead, the right is modified.

---

[9] *Montana v. Egelhoff*, 518 U.S. 37, 55–56 (1996) (Scalia, J., plurality opinion).

See Gore, 592 F.3d at 495 (holding that "a prisoner charged with a violation of 18 U.S.C. § 111 must, to succeed on the affirmative defense of self-defense, demonstrate that he responded to an unlawful and present threat of death or serious bodily injury."); *State v. Bradley*, 10 P.3d 358, 358 (Wash. 2000), (analogizing to the arrest context to hold that an inmate "may claim self-defense and use force to resist only when that [inmate] is in actual, imminent danger of serious injury."); *Com. v. Francis*, 511 N.E.2d 38, 40 (Mass. Ct. App. 1987) ("The right of an individual to defend himself is modified where a police or correction officer is involved. Even in circumstances where the defendant would be justified in using force in lawful defense of his person against a third person, he may not do so against a police or correction officer unless the officer uses excessive or unnecessary force."); *State v. Bojorquez*, 675 P.2d 1314, 1317 (Ariz. 1984) (analogizing to *State v. Martinez*, 596 P.2d 734 (Ariz. Ct. App. 1979), which held that an arrestee has right to self-defense against a police officer's use of excessive force during arrest, to find that an inmate has the right to defend himself against a prison official's use of excessive force).)

Therefore, the court should have instructed the jury that, if the detention deputies used unreasonable or excessive force, Mr. Garner could use reasonable force to protect himself. *See* ICJI 1263. This instruction accurately states the law, is supported by the facts, and is not covered by any other instruction. (*See* R., pp.95–133; Tr., Vol. II, p.148, L.14 – p.160, L.10.) The court erred by refusing to give the self-defense instruction.

2. The District Court's Error Violated Mr. Garner's Constitutional Right To Present A Complete Defense And Thus Requires Reversal

The Sixth Amendment protects a defendant's right to present a complete defense. *Washington v. Texas*, 388 U.S. 14, 17–19 (1967); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *see also* ID. CONST., art. I, § 13 ("No person shall . . . be deprived of life, liberty or

property without due process of law."). "A necessary corollary . . . is the rule that a defendant in a criminal trial has the right, under appropriate circumstances, to have the jury instructed on his or her defense, for the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions." *Taylor*, 288 F.3d at 851–52. Further, "[a]n erroneous instruction that relieves the State of its burden to prove an element of a charged crime can be characterized as either a violation of due process, or as a violation of the Sixth Amendment's jury trial guarantee." *State v. Parsons*, 153 Idaho 666, 669 (Ct. App. 2012) (internal citations omitted). When the defendant has been denied a fair opportunity to defend against the charge, his conviction must be overturned. *State v. Kerchusky*, 138 Idaho 671, 676 (Ct. App. 2003) (overruled on other grounds as recognized by *State v. Galvan*, 156 Idaho 379, 383 (Ct. App. 2014)); *see also Perry*, 150 Idaho at 227 (the appellate court will reverse and remand unless the State proves "that the constitutional violation did not contribute to the jury's verdict."); *Draper*, 151 Idaho at 588 (an erroneous instruction constitutes reversible error "if the instructions as a whole misled the jury or prejudiced a party").

As explained above, a reasonable view of the evidence supports Mr. Garner's requested instruction and the instruction accurately states the law. By refusing to instruct the jury regarding Mr. Garner's defense, the district court denied him a fair opportunity to defend against the battery charge. *See Washington*, 388 U.S. at 17–19; U.S. CONST., amend. VI; ID. CONST., art. I, § 13. Indeed, the court relieved the State of its burden to prove both the elements of the battery charge and that Mr. Garner was not acting in self-defense. *See* I.C. §§ 18–915(2), 18–903 (defining battery as the *unlawful* use of force, an *unlawful* touching or striking, or *unlawfully* causing bodily harm); ICJI 1263. That error cannot be harmless.

CONCLUSION

Mr. Garner respectfully requests that the Court vacate his battery conviction and remand that charge to the district court for a new trial.

DATED this 24th day of September, 2015.

MAYA P. WALDRON
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of September, 2015, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

DENNIS JAMES GARNER
INMATE #42163
ISCC
PO BOX 70010
BOISE ID 83707

TIM HANSEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

REED G SMITH
ADA COUNTY PUBLIC DEFENDER'S OFFICE
E-MAILED BRIEF

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.

EVAN A. SMITH
Administrative Assistant

MPW/eas