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May 3, 2019

Chief Randy Harrison
East Wenatchee Police Department
271 9th St. NE
East Wenatchee, WA 98802

Subject: Usco Gonzalez, 19E01450
Charging Decision

Chief Harrison,

This is to inform you of my decision to not file felony charges in this matter and that instead I am referring the matter to the East Wenatchee Prosecutor for misdemeanor charges.

The basis for my decision is that from the reports and video I have reviewed there is insufficient evidence beyond a reasonable doubt to obtain a felony conviction for assault in the third degree. There is ample evidence, however, that Mr. Gonzalez resisted arrest and obstructed a police officer.

The uncontroverted essence of the report is that Mr. Gonzalez physically struggled with Officers Sheats and Caballero during an investigation of whether Gonzalez had been driving with a suspended license. The controverted part of this incident is whether the physical struggle escalated into an assault on Officer Sheats.

Mr. Gonzalez was arrested for assault third, resisting arrest, and obstructing. However, Judge Hotchkiss, based on his review of the information in the initial probable cause report declined to find probable cause. Even after Officer Sheats filed a supplemental report the court still declined to find probable cause.

A more complete report was later submitted to our office requesting the filing of the charges that were rejected by the court at the probable cause hearing. The full report contained other materials that the judge was not able to review when making his initial decision to include the hotel's surveillance video, Officer Caballero's report, the witness statement of the hotel clerk, a photograph of Officer Sheats' finger, and the reports of assisting DCSO deputies.

A review of these additional materials, however, does not, in my opinion, support the charge of assault in the third degree. The elements of assault in the third degree in this situation are: 1) the defendant had the intention of inflicting bodily injury on another person; and 2) the person assaulted was a law enforcement officer who was performing

his official duties. RCW 9A.36.031(1)(g). The second element is not in question. It is the first element, the intent to injure, that is not supported by the evidence.

The primary purpose of the statute is "to prohibit **assaultive** behavior which interferes with the custodian's lawful obligations to insure a peaceful and orderly custody." *State v. Goree*, 36 Wn.App. 205, 673 P.2d 194 (1983); *State v. Jury*, 19 Wn. App. 256, 269, 576 P.2d 1302 (1978). A "person may not use force against the arresting officers if he or she is faced only with a loss of freedom." *State v. Valentine*, 132 Wn.2d 1, 20-21, 935 P.2d 1294 (1997).

However, even during a lawful arrest, an arrestee has the right to defend himself and resist excessive force if he is about to be seriously injured. *State v. Bradley*, 141 Wn.2d 731, 733, 10 P.3d 358 (200); *State v. Westlund*, 13 Wn.App. 460, 466, 536 P.2d 20 (1975). The use of force to protect against excessive force during a lawful arrest is not assaultive behavior.

The problem I had in determining the suspect's intent is that there was a clear discrepancy between what I read in the officers' reports and what I saw in the video.

Officer Sheats writes, in part:

I attempted to perform an arm bar on Gonzalez, but I believe the wall to the motel caught him and he bolted to the front entrance. Officer Caballero was just walking into the front entrance at this moment. I told Gonzalez to stop and advised him he was under arrest. **Gonzalez ran into Officer Caballero** and he then tried to find another exit to the north of the motel, near the inside pool area.

I ran towards Gonzalez where he was at now, **but he positioned himself against the walls, facing the officers. As I approached him, he squared up towards me in a fighting stance and he attempted to tackle me.** Officer Caballero and I grabbed ahold of Gonzalez and he actively resisted us.

Officer Caballero writes, in part:

I observed Gonzalez running towards me as I blocked the exit. Gonzalez noticed me and stood in a fighting stance with his fists clenched. I advised Gonzalez to stop but he continued to find another exit. Gonzalez continued running towards the north side of the building. **Gonzalez momentarily stopped as he encountered the wall, once again Gonzalez stood in a fighting stance facing Officer Sheats and myself. Gonzalez attempted to tackle Officer Sheats.**

During this time, Gonzalez was ordered repeatedly to stop and get on the ground. Officer Sheats and I grabbed hold of Gonzalez as he began to actively resist.

What I observed on the video is that after Gonzalez bolted away from Sheats and towards the front exit is that he veered and spun away from Caballero. Sheats' description led me to believe that Gonzalez had purposely run into Caballero. Caballero's description that "Gonzalez stood in a fighting stance with his fists clenched" led me to believe that Gonzalez had stopped when this happened. The moments on the video in which Sanchez encountered Caballero do not support the descriptions that Gonzalez deliberately "ran into Caballero" or that Gonzalez stopped and "stood in a fighting stance."

The next two scenes in the video are clearly in contradiction with what was written. After Gonzalez spins away from Caballero and runs to the north end, Gonzalez stops and turns and raises his hands palms out. I've included a still shot of this scene. Both officers' description of Gonzalez being squared up in a fighting stance with his fists clenched is not borne out in the video.

The video next shows Officer Sheats tackling Gonzalez at full speed. The video does not show Gonzalez attempting to tackle Sheats as described by both officers. Sheats never mentions that he tackled Gonzalez. Instead the video shows Gonzalez attempting to duck protectively as he is being tackled with full force by Sheats.

I viewed the video at full speed, half speed, and in one-quarter speed. The time stamp on the video from the moment Gonzalez encounters Caballero in the lobby is 01:11:48. The time stamp for when Sheats tackles Gonzalez is 01:11:51. In these three seconds of video I did not see Gonzalez deliberately running into an officer, taking a fighting stance towards officers, and attempting to tackle an officer.

I fully appreciate that in the excitement and heat of the moment that perceptions of those involved can be different from the detached observer. In pointing out the discrepancies between the video and the officers' versions of events I am not impugning the integrity of the officers. I have no doubt the officers believe their versions and perceptions of the events to be accurate.

However, it is not the officers' mindset that controls this discussion – it is the intent of the defendant that must be ascertained.

The rest of what happens is not captured by the video because it occurs outside the view of the camera, and so I have to rely on the officers' reports for the rest of this discussion. Sheats writes that after he and Caballero grabbed ahold of Gonzalez "I punched Gonzalez in the face a couple of times." Sheats writes further:

Gonzalez was still actively resisting us as we tried to control him. During most of the fight, Gonzalez had his hands in a fist and was trying to grab at us. During the middle of the fight, Gonzalez bit one of my hands. I placed my fingers in his eyes momentarily and punched him. (Note: Sheats describes this first as "actively resisting", then immediately changes the description to a "fight").

Between what can be objectively seen on the video and what Sheats writes about after the scrum cannot be seen in the video is that it is Sheats who throws the first punches. And these punches were landed before Gonzalez supposedly bit Sheats' hand. After the supposed bite, Sheats gouges Gonzalez' eyes and lands another punch. Sheats is actually the only person throwing punches throughout this incident. Although Sheats writes that Gonzalez had his hands in a fist, he goes on to describe Gonzalez as "trying to grab at us." There is no mention of Gonzalez swinging his fists or punching.

As to the bite, Sheats fails to mention what he was doing with his hands at that moment. I am left to guess whether Sheats' hand was in or over the suspect's mouth and the suspect was unable to breathe and so he bit to remove the obstruction to his breathing. Or if Sheats' hand was somewhere else on or near the suspect's head and the suspect bit for no reason. It is this kind of speculation because of the lack of a clear description of the bite that establishes reasonable doubt. Further, the pictures of Sheats' hand do not show any definitive bite marks or broken skin. It could be argued Sheats' hand was injured while he was punching Gonzalez in the head.

A few years ago our office prosecuted a similar assault third case involving Sgt. James Marshall. The jury acquitted primarily because they could not be certain that the biting was intentional where Marshall had his hand in the defendant's mouth.

In this instance prior to being punched in the head, what I could see on the video and from Sheats' own description, the suspect had resisted arrest, fled, veered and spun away from Caballero, and then stood with hands in the air just before being tackled at full speed by Sheats. As Sheats further describes, the suspect was offering "resistance" just prior to being punched in the head.

With all of the information in mind, it is my opinion that Gonzalez would be allowed to argue to the jury that he used force to protect himself from excessive force, the legality of the arrest notwithstanding. I am not confident under these circumstances that a jury would return a guilty verdict for assault third.

Sincerely,


Gordon Edgar
Prosecutor



cc: Devin Poulson