71248-9

71248-9

No. 71248-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

NANCY WALTON DRAHOLD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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3. The trial court erred, and violated Ms. Drahold's constitutional rights to present a defense and to a jury trial, by refusing to provide the defense proposed "to-convict" jury instruction that included the unlawful use of force as an element of the crime.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Juror misconduct involving the use of extraneous evidence entitles a defendant to a new trial, unless it can be concluded beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict. Here, during trial, a juror revealed to the other jurors that she had met the complaining witness's wife a short time after the alleged incident, and that the wife had told her the complaining witness was recuperating from shoulder surgery. Did the trial court abuse its discretion in denying a mistrial, where a central issue in the case was whether the alleged assault caused the complaining witness to suffer a shoulder injury that amounted to "substantial bodily harm"?

2. A person lawfully uses force in self-defense if she reasonably believes she is about to be injured and the degree of force used to prevent or attempt to prevent the injury is not more than a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. Did the State fail to prove beyond a reasonable doubt that the force used in self-defense by Ms. Drahold and her co-defendant was unlawful, where the alleged victim, a tall, large, bald man covered in tattoos, approached Ms. Drahold aggressively, pushed her, and then grabbed onto her wrist, and the defendants used force sufficient to cause the alleged victim to let go of Ms. Drahold's wrist?

3. When the defense proposes a jury instruction that supports the defense theory, the trial court must provide it, as long as the instruction is an accurate statement of the law and is supported by the evidence. Here, the defense proposed a to-convict instruction that included the lawful use of force as an "element" the State must prove beyond a reasonable doubt. The instruction was an accurate statement of the law, was supported by the evidence, and supported Ms. Drahold's theory that she acted in self- defense. Did the court err in refusing to provide the instruction?

C. STATEMENT OF THE CASE

On June 1, 2012, at around 1:30 p.m., Nancy Drahold was riding as a passenger in a white Mercedes that her husband Tony Combs was driving. RPVolume V at 7-8, 43.[1] The car was traveling northbound on Highway 167 in Renton, near the intersection with South Grady Way. RPVolume V at 35-36. The car stopped at a red light in the right turn lane, waiting to turn right onto South Grady Way. RPVolume V at 35.

Randy Jensen was driving a minivan that stopped two cars behind the Mercedes in the right turn lane. RPVolume V at 37. Mr. Jensen's wife Katie Jensen was in the passenger seat and his daughter was riding in a car seat in back. RPVolume V at 7-8. Mr. Jensen thought the traffic had cleared sufficiently on South Grady Way several times to allow the Mercedes to turn right, yet the Mercedes did not go. RPVolume V at 38. Some people in the surrounding cars honked their horns. RPVolume V at 39; RPVolume VIII at 103, 109, 173. Mr. Jensen then saw Mr. Combs's hand emerge from the sunroof of the Mercedes with its middle finger extended. RPVolume V at 39.

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[1] The verbatim report of proceedings consists of several volumes that are not consecutively paginated. The verbatim reports will be cited by volume number and page number.

Mr. Jensen was frustrated because the Mercedes was not moving. RPVolume V at 42. He loudly yelled "Go" out of his open window. RPVolume V at 43. Eyewitnesses testified that Mr. Jensen seemed angry. RPVolume VIII at 117; RPVolume XII at 174-75. One witness said he stuck his head out of the window and yelled, "Move," "The light is green," and "Go, move." RPVolume VIII at 141, 157.

Mr. Jensen said that immediately after he yelled "Go," Ms. Drahold and Mr. Combs got out of the Mercedes and walked toward him. RPVolume V at 43. He also exited his vehicle at around the same time. RPVolume V at 45. Again, witnesses said Mr. Jensen looked angry and approached Ms. Drahold and Mr. Combs aggressively. RPVolume XII at 174-75. Mr. Jensen was a large man who weighed about 200 to 210 pounds and was five foot nine inches tall. RPVolume VI at 77. He had a shaved head and was wearing a short-sleeve T-shirt that revealed tattoos covering his arms. RPVolume VI at 78, 86, 88; RPVolume V at 5; RPVolume VIII at 175.

Mr. Jensen happened to be a Renton police officer who was off duty that day. RPVolume IV at 172, 198. He said that as he got out of the minivan, he pulled out his badge, which he kept in his pants pocket, and displayed it in front of him while identifying himself verbally as a

police officer. RPVolume V at 51. But none of the independent eyewitnesses heard Mr. Jensen identify himself as a police officer; several witnesses confirmed there was no reason to think he was a police officer. RPVolume VII at 150; RPVolume VIII at 161, 196; RPVolume XII at 173.

Mr. Jensen said that Ms. Drahold approached him and screamed in his face, bumping against him unintentionally. RPVolume V at 54; RPVolume VI at 162, 185. Although he did not consider her physical contact to be intentional or aggressive, he forcibly pushed her away. RPVolume V at 56; RPVolume VI at 189. He said as he pushed Ms. Drahold, Mr. Combs attempted to punch him with his right hand. RPVolume V at 58-59. Then Mr. Jensen felt Ms. Drahold behind him, with her hands around his head and her fingernails scratching into his face. RPVolume V at 59-60. He grabbed her hands and the next thing he knew, he was on the pavement. RPVolume V at 59. Mr. Combs had his arm wrapped around Mr. Jensen's neck while he punched him with his other hand. RPVolume V at 61-63. Mr. Jensen threw his right elbow at Mr. Combs several times, trying to get him to stop. RPVolume V at 61, 66. Then, suddenly, Mr. Combs stopped and Mr. Jensen stood up. RPVolume V at 61, 70.

Ms. Drahold then grabbed Mr. Jensen's shirt, which tore and came off. RPVolume V at 71. He grabbed her arms as she grabbed his shirt, and she yelled, "Don't touch me." RPVolume VI at 195. Mr. Jensen then approached Mr. Combs and said, "Come at me again, motherfucker." RPVolume V at 73. Combs refused to engage with him. RPVolume V at 74. Ms. Drahold and Mr. Combs got in their car and drove away. RPVolume V at 73.

One eyewitness testified that, at the beginning of the altercation, Mr. Jensen held onto Ms. Drahold by her arm and appeared to be trying to restrain her as she tried to pull away. RPVolume VII at 136-37, 143, 152. He released her arm only because Mr. Combs punched him several times and caused him to fall to the ground. RPVolume VII at 140, 149. The witness thought Mr. Combs was trying to free Ms. Drahold from Mr. Jensen's grasp. RPVolume VII at 155. Another eyewitness testified that Ms. Drahold was trying to break up the fight between Mr. Combs and Mr. Jensen. RPVolume XII at 167. She seemed frantic, panicked, trying to break up the fight but unable to do so. RPVolume XII at 169. Witnesses said that once Ms. Drahold was released from Mr. Jensen's grasp, she kicked him. RPVolume VII at 143, 173; RPVolume VIII at 131, 184.

Mr. Jensen drove into a parking lot nearby and medics soon arrived. RPVolume V at 77. He was taken to a hospital but only as a precaution and was released less than two hours later. RPVolume V at 79-80. His injuries consisted of bruises on his face and thigh, scratches on his face and arm, and pain in his ribs. RPVolume V at 122. He did not tell the medics that his shoulder hurt and they did not notice any evidence of a shoulder injury. RPVolume XII at 114, 118.

Later that night, Mr. Jensen noticed that his right shoulder was sore. RPVolume V at 81. He was not sure but thought he might have injured his shoulder while elbowing Mr. Combs during the altercation. RPVolume V at 84, 87-88. He returned to work full time but the pain in his shoulder worsened over the next week or two. RPVolume V at 90. An MRI showed he had a torn labrum in his right shoulder. RPVolume V at 93-94, 179. He had surgery to repair the shoulder in August. 2012. RPVolume V at 96, 181. Medical personnel could not say definitively that the altercation had caused the shoulder injury. RPVolume V at 170. The injury was consistent with a degenerative as well as an acute injury. RPVolume VI at 24-26.

The State charged both Ms. Drahold and Mr. Combs with second degree assault, alleging they intentionally assaulted Mr. Jensen

by strangulation and, in the alternative, intentionally assaulted Mr. Jensen and thereby recklessly inflicted substantial bodily harm. CP 31 (citing RCW 9A.36.021(1)(a), (g)).[2]

Ms. Drahold was tried before a jury while Mr. Combs waived his right to a jury trial and was tried by the bench. RPVolume II at 53-54. The jury found Ms. Drahold guilty of second degree assault as charged. CP 98. Additional facts are set forth below.

D. ARGUMENT

1. The court abused its discretion in denying the motion for mistrial following prejudicial juror misconduct

In the middle of the testimony of Katie Jensen, the complaining witness's wife, the jury exited the courtroom and the court announced that Juror 7 had informed the bailiff that she only belatedly realized she knew Ms. Jensen. RPVolume XII at 22. Juror 7 then entered the courtroom and explained that, sometime during the previous summer, she had gone to the Jensens' home to purchase a dog kennel from them.

[2] The State also charged Ms. Drahold and Mr. Combs with third degree assault, alleging they "did intentionally assault Randy Jensen, a law enforcement officer or other employee of a law enforcement agency who was performing official duties at the time of the assault." CP 31-32 (citing RCW 9A.36.031(1)(g)). The jury acquitted Ms. Drahold of the third degree assault charge, apparently concluding that Jensen was not performing his official duties at the time of the assault. CP 100.

RPVolume XII at 25. While she was there, Ms. Jensen told her that her husband could not assist them in carrying the kennel to the car because he was recuperating from shoulder surgery. RPVolume XII at 25-26.

Juror 7 further explained that *she had announced this information to the other jurors*. She said she told them she might know Ms. Jensen because she had bought a dog kennel from her. RPVolume XII at 26. She said that while she was checking her email in the jury room to confirm her suspicions, she said aloud to the other jurors, "[Ms. Jensen] did say that her husband had surgery." RPVolume XII at 28-29. The court dismissed Juror 7, appointing an alternate in her place, but denied the defense motion for mistrial. RPVolume XII at 29-30, 102-03.

a. Juror 7 committed misconduct by injecting extrinsic evidence into the jury deliberation process

A jury commits misconduct by considering extrinsic evidence. State v. Pete, 152 Wn.2d 546, 552-53, 98 P.3d 803 (2004). Extrinsic evidence is defined as evidence that is outside all the evidence admitted at trial and may consist of either oral or documentary evidence. Id. This type of evidence is improper because it is not subject to objection, cross-examination or rebuttal. Id.

Here, it is undisputable that Juror 7 committed misconduct by announcing to the other jurors that she knew Ms. Jensen, and that Ms. Jensen had told her that her husband had shoulder surgery. This was "extrinsic evidence" because it was outside the evidence admitted at trial. Id. The information was undoubtedly considered by the jury during its deliberations. Juror 7 made plain that she made this announcement in the presence of the other jurors, within their earshot.[3] RPVolume XII at 26-29. This was improper because Ms. Drahold did not have an opportunity to object to or rebut the evidence, or cross-examine the juror about it. Id.

b. Because the juror misconduct was prejudicial, the conviction must be reversed

Juror misconduct may be a basis for a new trial if it is prejudicial. Pete, 152 Wn.2d at 552, 554. Juror misconduct involving the use of extraneous evidence during deliberations requires a new trial if there are reasonable grounds to believe the defendant has been

[3] Even if only some of the jurors heard the comments, this is immaterial. Because criminal defendants in Washington have a constitutional right to a unanimous jury verdict, if the information changed even one juror's mind, it prejudiced the verdict. State v. Johnson, 137 Wn. App. 862, 868 n.3, 155 P.3d 183 (2007). Here, the trial court did not question the jurors to determine how many of the jurors heard Juror 7's comments.

prejudiced. State v. Johnson, 137 Wn. App. 862, 869-70, 155 P.3d 183 (2007). This is an objective inquiry into whether the extraneous evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence. Id. A new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict. Id. Any doubt that the misconduct affected the verdict must be resolved against the verdict. Id.

Generally, a trial court's decision to grant or deny a new trial based on juror misconduct is reviewed for abuse of discretion. Id. But although deference should be given to the trial court's determination that no prejudice occurred, less deference is owed to a decision to deny a new trial than a decision to grant a new trial. Id.

Here, there are reasonable grounds to believe Ms. Drahold was prejudiced by the jury's consideration of extrinsic evidence. The State charged Ms. Drahold with second degree assault based on the allegation that she intentionally assaulted Mr. Jensen and recklessly inflicted "substantial bodily harm." CP 31-32. The jury was instructed on this element.[4] CP 79.

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[4] Ms. Drahold was also charged, and the jury was instructed, on the alternative means that she intentionally assaulted Mr. Jensen by

"Substantial bodily harm" means "bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part." CP 90; see RCW 9A.04.110(4)(b). The term "substantial" "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). It requires proof of an injury that is "considerable in amount, value, or worth." Id.

It is likely that the jury would not have found that the injuries Mr. Jensen suffered from the altercation—apart from the alleged shoulder injury—rose to the level of "substantial bodily harm." He said he suffered bruises on his face and thigh, scratches on his face and arm, and pain in his ribs. RPVolume V at 122. Although he went to the hospital, this was only as a precaution and he was there for no more than two hours. RPVolume V at 79-80. He returned right away to work on a full-time basis. RPVolume V at 90.

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strangulation. CP 31-32, 79. But the State did not elect either alternative, and the jury was not provided with a special verdict form to indicate which alternative it relied upon. Therefore, if there is a reasonable basis to conclude that the jury misconduct could have affected the jury's verdict on the "substantial bodily harm" alternative, it was prejudicial and requires a new trial. Pete, 152 Wn.2d at 552, 554; Johnson, 137 Wn. App. at 869-70.

Instead, to prove the "substantial bodily harm" element of second degree assault, the State relied upon Mr. Jensen's alleged shoulder injury, for which he received surgery. See RPVolume XIV at 195 (State closing argument). Mr. Jensen testified he recuperated from the surgery for several weeks, with his arm in a sling. RPVolume V at 97. He was unable to return to work on full duty for about three months following the surgery. RPVolume V at 98. The jury could have found that the shoulder injury amounted to "substantial bodily harm" due to the amount of time it took Mr. Jensen to recuperate from the surgery, which caused him to lose the function of his shoulder and arm for a period of months.

There are reasonable grounds to believe the juror misconduct contributed to the verdict because the extrinsic evidence provided by Juror 7 bolstered the State's allegations regarding the degree of harm Mr. Jensen suffered due to his shoulder injury. Juror 7 informed the other jurors that she had independent evidence that Mr. Jensen underwent shoulder surgery. RPVolume XII at 25-26. The juror further informed the other jurors that Mr. Jensen was disabled due to the surgery and therefore could not assist the juror and Ms. Jensen in carrying the dog kennel to the car. Id. This was prejudicial because it

substantiated the State's allegations that Mr. Jensen's shoulder injury caused a substantial loss or impairment of the function of his arm and shoulder and therefore amounted to "substantial bodily harm."

Because there is a reasonable possibility that the jury relied upon this extrinsic evidence in finding the State had proved an essential element of second degree assault, it was prejudicial and requires a new trial. See Pete, 152 Wn.2d at 552, 554; Johnson, 137 Wn. App. at 869-70.

2. The State did not prove beyond a reasonable doubt that Ms. Drahold's use of force was unlawful

In a criminal prosecution, the State bears the burden to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94

Wn.2d 216, 221, 616 P.2d 628 (1980). To find a defendant guilty beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315.

When the defendant raises the issue of self-defense in a criminal case, the absence of the defense becomes another "element" that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). A person lawfully uses force in self-defense if she reasonably believes she is about to be injured and the degree of force she uses to prevent or attempt to prevent the injury is not more than a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. State v. Walden, 131 Wn.2d 469, 472-74, 932 P.2d 1237 (1997); RCW 9A.16.020(3). Once the defendant produces some evidence of self-defense, the burden shifts to the prosecution to prove beyond a reasonable doubt that the defendant's use of force was unlawful. Walden, 131 Wn.2d at 473-74.

Here, the jury was instructed it could find Ms. Drahold guilty of assault as either a principal or an accomplice. CP 73, 79. In order for Ms. Drahold to be legally accountable as an accomplice to Mr. Combs,

he himself must have committed a crime. State v. Laico, 97 Wn. App. 759, 765, 987 P.2d 638 (1999). A person does not commit a crime if he lawfully uses force in defense of another person. RCW 9A.16.020(3). A person may use force in defense of another if the degree of force used is limited to what a reasonably prudent person would find necessary under the conditions as they appeared to the person using the force. State v. Marquez, 131 Wn. App. 566, 575, 127 P.3d 786 (2006). Defense of another requires only a "subjective, reasonable belief of imminent harm from the victim." State v. LeFaber, 128 Wn.2d 896, 899, 913 P.2d 369 (1996). The jury need not find actual imminent harm. Id.

Thus, if Mr. Combs reasonably used force in defense of Ms. Drahold, he did not commit a crime for which Ms. Drahold could be held accountable. Laico, 97 Wn. App. at 765.

The evidence was insufficient to prove beyond a reasonable doubt that either Ms. Drahold or Mr. Combs unlawfully used force against Mr. Jensen. To the contrary, the evidence showed that both Ms. Drahold and Mr. Combs used a reasonable degree of force in response to their reasonable belief that Drahold was about to be injured. This belief arose initially from Mr. Jensen's angry and aggressive manner.

While he was still in his car, Mr. Jensen stuck his head out of his open window and yelled loudly at Mr. Combs and Ms. Drahold in the Mercedes in an angry voice. RPVolume V at 43; RPVolume VIII at 117, 141, 157; RPVolume XII at 174-75. When he got out of his car, Ms. Drahold and Mr. Combs could see that Mr. Jensen was a large man with a bald head who was covered in tattoos. RPVolume VI at 77-78. He looked angry and approached Ms. Drahold and Mr. Combs aggressively. RPVolume XII at 174-75.

Mr. Jensen was also the first to use intentional force. When Ms. Drahold bumped against him inadvertently, he forcibly pushed her away. RPVolume V at 56; RPVolume VI at 189. It was only at that point that Mr. Combs used force, by punching Mr. Jensen in defense of Ms. Drahold. RPVolume V at 58-59. Mr. Combs continued to punch Mr. Jensen while Jensen maintained a hold on Ms. Drahold's wrist. RPVolume VII at 136-37, 143, 152. He let go of her wrist only after Mr. Combs punched him several times. RPVolume VII at 140, 149. Mr. Combs ceased punching Mr. Jensen soon thereafter. RPVolume V at 61, 70. Mr. Jensen continued to act aggressively even while Mr. Combs and Ms. Drahold walked peacefully back to their car,

challenging Mr. Combs to "come at me again, motherfucker." RPVolume V at 73.

In sum, the evidence shows Ms. Drahold and Mr. Combs used a reasonable degree of force based on their subjective, reasonable beliefs that Ms. Drahold was about to be injured by an angry, aggressive, and mean-looking stranger who initiated the physical confrontation. The State therefore did not prove beyond a reasonable doubt that the force they used was unlawful, and consequently failed to prove an essential element of the crime. Acosta, 101 Wn.2d at 615-16.

The absence of proof beyond a reasonable doubt of an element of the crime requires reversal and dismissal. Jackson, 443 U.S. at 319; North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), reversed on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); Green, 94 Wn.2d at 221. Reversal and dismissal are required here.

3. The trial court erred in refusing to provide the defense proposed to-convict jury instruction

Defense counsel proposed a to-convict jury instruction for the second degree assault charge that included the following element: "That the force used by the defendant was not lawful." RPVolume XIV at 37; CP 47. The State objected and the trial court refused to

provide the instruction, despite its acknowledgement that the State bore the burden to prove the unlawful use of force beyond a reasonable doubt. RPVolume XIV at 37.

The Court reviews the trial court's refusal to give the requested jury instruction *de novo*, as the refusal was based on a ruling of law. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

a. The trial court erred in refusing to provide the defense-proposed to-convict instruction that included the absence of self defense as an element of the crime because the instruction was an accurate statement of the law and supported the defense theory of the case

When the defense of self-defense is properly raised, the jury must be fully instructed, in an unambiguous way, that the State bears the burden to prove the absence of the defense beyond a reasonable doubt. Acosta, 101 Wn.2d at 621. Jury instructions on self defense "must more than adequately convey the law." Walden, 131 Wn.2d at 473.

In addition, a defendant in a criminal case has a constitutional right to fully defend against the charges. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) ("The right of an accused in a criminal trial to due process is, in essence, the right to a

fair opportunity to defend against the State's accusations."); U.S. Const. amend. XIV; Const. art. I, § 3. Moreover, the right to a jury trial is a fundamental right guaranteed by both the state and federal constitutions. Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); State v. Williams-Walker, 167 Wn.2d 889, 895-96, 225 P.3d 913 (2010); U.S. Const. amend. VI; Const. art. I, §21.

A necessary corollary to the constitutional rights to present a defense and to a jury trial is the defendant's right "to have the jury fully instructed on the defense theory of the case." State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). When the defense proposes a jury instruction that supports the defense theory, the trial court must provide it, as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); Staley, 123 Wn.2d at 803.

Here, the trial court erred in refusing to provide Ms. Drahold's proposed to-convict instruction because the instruction supported the defense theory, was an accurate statement of the law, and was supported by the evidence.

Ms. Drahold's proposed to-convict instruction was an accurate statement of the law. It is well-established that the to-convict jury instruction must contain all elements essential to the conviction. State v. Mills, 154 Wn.2d 1, 7-8, 109 P.3d 415 (2005); State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Although, "'as a general legal principle all the pertinent law need not be incorporated in one instruction,'" our Supreme Court has consistently held that "'an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged.'" Mills, 154 Wn.2d at 7-8 (quoting Emmanuel, 42 Wn.2d at 819). A to-convict instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010); Smith, 131 Wn.2d at 263; Emmanuel, 42 Wn.2d at 819. The Court may not look to other jury instructions to supply a missing element from a to-convict jury instruction. Sibert, 168 Wn.2d at 262-63.

As stated already, the absence of self-defense was an "element" of the crime that the State was required to prove beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16. The proposed to-convict

instruction correctly informed the jury of the State's burden to prove the absence of self-defense as an "element" of the crime. CP 47. The instruction supported the defense theory of the case and was supported by the evidence. Therefore, the trial court erred in refusing to provide the instruction to the jury. Sibert, 168 Wn.2d at 311; Mills, 154 Wn.2d at 7-8; Smith, 131 Wn.2d at 263; Staley, 123 Wn.2d 794, 803.[5]

b. The conviction must be reversed

An error in refusing to provide a defense-proposed jury instruction that is a correct statement of the law and is supported by the evidence is presumed prejudicial and requires reversal of the conviction unless it affirmatively appears to be harmless. Wanrow, 88 Wn.2d at 237; State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The error is harmless only if it had no effect on the final outcome of the case. Rice, 102 Wn.2d at 123.

Here, the error in omitting an essential element from the to-convict instruction was not harmless. As in Smith, the proposed to-convict instruction "structured the jury's deliberations by purporting to

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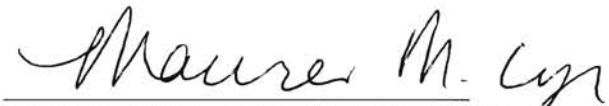
[5] In State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the Supreme Court held that the to-convict instruction need not contain the absence of self-defense as an element of the crime as long as a separate instruction informs the jury of the State's burden of proof on self-defense. But Hoffman predates Mills, Smith, Sibert, and subsequent cases that

set forth the elements of the crime." Smith, 131 Wn.2d at 265. The Court must "assume that the jury relied upon the 'to convict' instruction as a correct statement of the law. The jury was not required to search the other instructions to make sense of the erroneous 'to convict' instruction." Id. Because an essential element was missing from the to-convict instruction, the Court must conclude that the error was not harmless and reversal is required. Id.

E. CONCLUSION

The State did not prove beyond a reasonable doubt that Ms. Drahold's use of force was unlawful, requiring that the conviction be reversed and the charge dismissed. Alternatively, the trial court erred in denying the motion for mistrial following juror misconduct and in refusing to provide the defense proposed to-convict jury instruction, and. Both of those errors require reversal of the conviction and remand for a new trial.

Respectfully submitted this 6th day of November, 2014.



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address the adequacy of a to-convict instruction. It is inconsistent with the principles set forth in those cases and should not be followed.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. NANCY DRAHOLD, Appellant.	)))))))))	NO. 71248-9-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT (CORRECTED)** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF NOVEMBER, 2014.

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