Supreme Court No. 92107-5
COA No. 71248-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NANCY WALTON DRAYHOLD,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Nancy Walton Drayhold requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Drayhold, No. 71248-9-I, filed July 27, 2015. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Should this Court grant review, reconsider its decision in State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), and hold that when self-defense is raised, the defendant's unlawful use of force is an "element" that must be included in the to-convict jury instruction? RAP 13.4(b)(3), (4).

2. 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, who 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 complaining witness's shoulder injury amounted to "substantial bodily harm"?

3. 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 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?

C. STATEMENT OF THE CASE

One day, 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.

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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.

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 in the back seat. 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.

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 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 said 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 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 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 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)).

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. Ms. Drahold appealed and the Court of Appeals affirmed. Appendix. Additional facts are set forth below.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court should grant review, reconsider its decision in State v. Hoffman, and hold that when self-defense is raised, the defendant's unlawful use of force is an element that must be included in the to-convict instruction. RAP 13.4(b)(3), (4)

Defense counsel proposed a to-convict jury instruction 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.

When 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. State v. Acosta, 101 Wn.2d 612, 621, 683 P.2d 1069 (1984). Jury instructions on self defense "must more than adequately convey the law." State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

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 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,'" this 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, the absence of self-defense was an "element" of the crime 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 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.

In State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), this Court held more than 20 years ago 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 address the adequacy of a to-convict instruction. It is inconsistent with the principles set forth in those cases and should not be followed. This Court should therefore grant review, reconsider its decision in Hoffman, and hold that the absence of self-defense was an element that should have been included in the to-convict instruction.

2. 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. 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 *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.[2] 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

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[2] 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 them heard Juror 7's comments.

the use of extraneous evidence during deliberations requires a new trial if there are reasonable grounds to believe the defendant has been 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 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. "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.

To prove "substantial bodily harm," 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.

Thus, 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 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 the jury relied upon this extrinsic evidence in finding the State had proved an essential element of the charge, it was prejudicial and requires a new trial. See Pete, 152 Wn.2d at 552, 554; Johnson, 137 Wn. App. at 869-70.

3. 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, 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, the absence of the defense becomes another "element" the State must prove beyond a reasonable doubt. Acosta, 101 Wn.2d 615-16. 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. Walden, 131 Wn.2d at 472-74; 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 the defendant's use of force was unlawful. Walden, 131 Wn.2d at 473-74.

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 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. 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, 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 the force they used was unlawful, and thus failed to prove an essential element of the crime. Acosta, 101 Wn.2d at 615-16.

E. CONCLUSION

For the reasons given, this Court should grant review.

Respectfully submitted this 17th day of August, 2015.

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NANCY WALTON DRAHOLD, Appellant.	No. 71248-9-I (Consolidated with No. 72040-6-I) DIVISION ONE UNPUBLISHED FILED: July 27, 2015

COX, J. – Nancy Walton Drahold appeals her conviction for second degree assault. The trial court did not abuse its discretion when it denied Drahold's motion for a mistrial. There is sufficient evidence to support the jury's determination that Drahold's use of force was unlawful. The jury instructions were sufficient, and the trial court did not abuse its discretion when it declined to give Drahold's proposed instruction. We affirm.

In June 2012, Drahold was riding as a passenger in a white Mercedes that Tony Combs was driving. The car stopped in the right turn lane, waiting to turn at the intersection. Randy Jensen, an off-duty police officer, was driving a minivan with his wife riding in the passenger seat and his daughter in a car seat in the back. Jensen stopped two cars behind the Mercedes, which was the first car at the intersection.

Jensen testified at trial that traffic cleared the intersection several times, which would have allowed the Mercedes to turn right, but the Mercedes did not

move. Other drivers honked their horns. Jensen saw the driver of the Mercedes put a hand through the sunroof with its middle finger extended. At some point, Jensen yelled "Go!" out of his open window. After he yelled this, Combs and Drahold got out of the Mercedes and walked toward him. Jensen also exited his car.

There are conflicting accounts about what happened next. Suffice it to say, Combs, Drahold, and Jensen got into a physical altercation, which we explain in detail later in this opinion. Eventually, Combs and Drahold left.

Medics arrived and transported Jensen to the hospital as a precautionary measure. His injuries consisted of bruises on his face and thigh, scratches on his face and arm, and pain in his ribs. Later that night, Jensen noticed that his shoulder was sore. Several weeks later, an MRI revealed that Jensen had a torn labrum in his shoulder. He had surgery for this injury in August 2012.

Based on this incident, the State charged both Drahold and Combs with one count of assault in the second degree and one count of assault in the third degree. Combs' case proceeded to a bench trial.

Drahold's case proceeded to a jury trial. During the trial, one of the jurors alerted the court that she recognized Jensen's wife. The juror had purchased a dog kennel from her. The court and the parties questioned the juror out of the presence of the other jurors. She indicated that the other jurors may have overheard information about this encounter when she was talking to herself in the jury room. The court dismissed her. Drahold moved for a mistrial, which the court denied.

Drahold claimed self-defense. She proposed a to-convict instruction that contained the absence of self-defense as an element. The court declined to give Drahold's proposed instruction. The court did give the WPIC and a related instruction for the assault charge.

The jury found Drahold guilty of assault in the second degree for count one and guilty of a lesser degree offense for count two. The second count was later vacated.

Drahold appeals her conviction for second degree assault.

MISTRIAL RULING

Drahold first argues that the court abused its discretion when it denied her motion for a mistrial following juror misconduct. We disagree.

A jury commits misconduct by considering extrinsic evidence.[1] "'[E]xtrinsic evidence is defined as information that is outside all the evidence admitted at trial . . . .'"[2] Such "'evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal.'"[3]

Washington courts "apply the long-standing rule that 'consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been

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[1] State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

[2] Id. (emphasis omitted) (internal quotation marks omitted) (quoting State v. Balisok, 123 Wn.2d 114, 118, 866 P.2d 631 (1994)).

[3] Id. at 553 (quoting Balisok, 123 Wn.2d at 118).

prejudiced.'"[4] "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, and includes consideration of the purpose for which the extraneous evidence was interjected into deliberations."[5] "A new trial must be granted unless 'it can be concluded beyond a reasonable doubt that extrinsic evidence did not contribute to the verdict.'"[6]

A trial court's discretionary ruling regarding a new trial will not be reversed absent an abuse of discretion.[7] A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons.[8]

Here, the trial court did not abuse its discretion because there were no reasonable grounds to believe that Drahold may have been prejudiced.

During Jensen's wife's testimony, one of the jurors alerted the court that she recognized her. The juror had purchased a dog kennel from her. The juror remembered Jensen's wife saying that her husband, Jensen, could not help load the kennel into the car because he had had surgery. When questioned by the

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[4] Id. at 555 n.4 (emphasis omitted) (quoting State v. Rinkes, 70 Wn.2d 854, 862, 425 P.2d 658 (1967)).

[5] State v. Johnson, 137 Wn. App. 862, 870, 155 P.3d 183 (2007).

[6] Id. (quoting State v. Briggs, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989).

[7] Id. at 870-71.

[8] Id. at 871.

court, the juror indicated that the other jurors may have overheard these facts because she was "muttering about it" to herself.

The trial court dismissed the juror but it denied Drahold's motion for a mistrial on the basis that there was no reasonable grounds to believe there was any prejudice.

The court assumed for purposes of its ruling that the other jurors heard the juror's comments. But it concluded that there would be no prejudicial impact because the comments did not go to any material issue. The court noted that the degree of Jensen's shoulder injury after the surgery was not at issue, and the fact that Jensen could not pick up the kennel after surgery had no relevance to the degree of injury in the first place. The court further noted that the fact that Jensen had surgery was also not at issue.

This was a proper exercise of discretion. As the court correctly noted, these facts were not contested at trial. Rather, Drahold's argument was that her use of force was lawful self-defense.

Further, the information described by the juror was cumulative with other properly admitted evidence. Jensen testified that he had surgery to repair his injured shoulder in August 2012. He also testified that after the surgery he was off duty for a few weeks and then he returned to a light, modified duty for a few weeks. About six to eight weeks after the surgery, he returned to full duty but testified that his shoulder would never be 100 percent. Additionally, Jensen's surgeon testified that he operated on Jensen's shoulder in August 2012 and that he requires his patients to wear a shoulder immobilizer for eight weeks after

surgery. Thus, the fact that Jensen had surgery, and that he had limited use of his shoulder after the surgery, were facts already before the jury.

Finally, the court instructed the jury to render a verdict based only on the testimony from the witnesses, stipulations, and exhibits admitted at trial. We presume that the jury follows the court's instructions.[9]

In sum, the trial court did not abuse its discretion when it denied Drahold's motion for a mistrial.

Drahold argues that extrinsic evidence "bolstered the State's allegations regarding the degree of harm [Jensen] suffered due to his shoulder injury" and was prejudicial because it "substantiated the State's allegations that [Jensen's] shoulder injury caused a substantial loss or impairment of the function of his arm and shoulder."[10] But as just discussed, these facts were not in dispute. Thus, this argument is not persuasive.

SUFFICIENCY OF THE EVIDENCE

Drahold next argues that the evidence was insufficient to prove that her use of force was unlawful. We disagree.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged.[11] "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a

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[9] State v. Johnson, 124 Wn.2d 57, 77, 873 P.2d 514 (1994).

[10] Appellant's Opening Brief at 13, 14.

[11] State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

reasonable doubt."[12] "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."[13] "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."[14]

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful.[15] The jury was instructed that a defendant may lawfully use force "when she reasonably believes that she or another person is about to be injured or in preventing or attempting to prevent an offense against herself or another person, and when the force is not more than is necessary."[16]

Here, the jury was instructed that it could find Drahold guilty of assault as either a principal or an accomplice. Thus, the jury could have convicted Drahold either as a principal or as Combs's accomplice. Viewing the evidence in the light most favorable to the State, the evidence is sufficient to allow the jury to conclude that Drahold's use of force was unlawful.

First, the evidence was sufficient for the jury to find that Drahold and Combs did not reasonably believe that either of them was about to be injured when they used force against Jensen, thus making their use of force unlawful.

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[12] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

[13] Id.

[14] Id.

[15] State v. Acosta, 101 Wn.2d 612, 615-17, 683 P.2d 1069 (1984).

[16] Clerk's Papers at 83.

Jensen testified that when the confrontation began, he pulled out his badge and identified himself as a police officer. He said he tried to encourage Combs and Drahold to leave. He said Drahold then approached him, bumped him, and started screaming in his face. Jensen testified that he pushed her back to move her from his personal space, but he said that he did not attempt to hit or grab her. At that point, Combs attempted to punch him and Drahold began scratching his face. Jensen said the next thing he knew, he was on the ground and Combs was choking him and punching him.

Additionally, several witnesses testified that they never saw Jensen attempt to strike or grab either Drahold or Combs. At least three witnesses testified that Combs threw the first punch.

Second, the evidence was also sufficient for the jury to find that both Drahold and Combs used more force than was necessary, which also makes their use of force unlawful.

Several witnesses testified that once Jensen was on the ground, Drahold kicked him several times. One witness testified that Combs was restraining Jensen and Drahold "took that opportunity to kick [Jensen] a bunch of times as he . . . continued to be defenseless."[17] Another witness testified that Drahold kicked Jensen several times while he was on the ground trying to protect himself and cover his head. Witnesses testified that Combs also kicked and punched Jensen several times while he was on the ground.

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[17] Report of Proceedings (Vol. VII) at 189.

In sum, the evidence was sufficient for the jury to conclude that Drahold's use of force was unlawful because neither she nor Combs reasonably believed that either was about to be injured or because she and Combs used more force than necessary.

Drahold argues that the evidence showed that both she and Combs used a reasonable degree of force in response to their reasonable belief that she was about to be injured. She argues that Jensen was angry and aggressive, that Jensen was the first to use intentional force, and that Jensen was holding onto her wrist and did not let go until Combs punched him several times. But the evidence previously discussed supports the jury's determination. And we defer to the finder of fact on issues regarding conflicting testimony, credibility of witnesses, and the persuasiveness of evidence.[18] Thus, we do not address these arguments any further.

JURY INSTRUCTIONS

Finally, Drahold argues that the trial court erred when it declined to provide her proposed to-convict jury instruction. We disagree.

"Jury instructions are sufficient if they permit each party to argue their theory of the case, do not mislead the jury, and when read as a whole, properly inform the jury of the applicable law."[19] We review de novo alleged errors of law

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[18] State v. Ainslie, 103 Wn. App. 1, 6, 11 P.3d 318 (2000).

[19] Anfinson v. FedEx Ground Package Sys., Inc., 159 Wn. App. 35, 41-42, 244 P.3d 32 (2010).

in jury instructions.[20] "[A] trial court's decision whether to give a particular instruction to the jury is a matter that we review only for abuse of discretion."[21]

Here, the trial court's instructions properly informed the jury of the applicable law and permitted the parties to argue their theories of the case. The trial court gave the standard WPIC to-convict instruction for the charge of assault in the second degree. The court also gave a separate instruction on self-defense, which instructed the jury that the State had the burden to prove beyond a reasonable doubt that the force used by the defendant was not lawful.

Drahold argues that the court erred by not providing her proposed to-convict instruction, which included the following element: "That the force used by the defendant was not lawful."[22] She asserts that the absence of self-defense should have been included in the to-convict instruction because the absence of self-defense is an essential element that the State had the burden to prove beyond a reasonable doubt. She contends that omitting this element from the to-convict instruction was reversible error.

State v. Hoffman forecloses this argument.[23] In that case, the supreme court rejected the same argument, holding that to-convict instructions need not contain the absence of self-defense so long as a separate instruction informs the

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[20] State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

[21] Anfinson, 159 Wn. App. at 44.

[22] Clerk's Papers at 47.

[23] 116 Wn.2d 51, 804 P.2d 577 (1991).

jury of the State's burden of proof.[24] In short, Hoffman expressly approved the manner in which the jury was instructed in this case.

Drahold urges this court not to follow Hoffman. She asserts that Hoffman is inconsistent with the principles set forth in subsequent cases that address the adequacy of a to-convict instruction.[25] But none of the cases that Drahold cites question Hoffman's holding. Accordingly, her arguments are best directed to the supreme court because the holding in Hoffman remains binding on this court.[26]

Drahold also argues that the court erred in refusing to provide her proposed instruction because the instruction was an accurate statement of the law, supported her theory of the case, and was supported by evidence. But a trial court is not required to give a requested instruction when another instruction adequately covers the same subject.[27] The instructions in this case were sufficient and the court did not abuse its discretion.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Trickey, J

[24] Id. at 109.

[25] Appellant's Opening Brief at 22 n.5 (citing State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010); State v. Mills, 154 Wn.2d 1, 109 P.3d 415 (2005); State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)).

[26] See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

[27] State v. Passafero, 79 Wn.2d 495, 499, 487 P.2d 774 (1971).

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71248-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: August 17, 2015

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