70438-9

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NO. 70438-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA THOMAS,

Appellant.

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

The Honorable Charles R. Snyder, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

1. THE TO-CONVICT INSTRUCTION REFERRED THE JURY TO THE DEFINITION OF ASSAULT, BUT PROVIDED NO REFERENCE TO LAWFUL FORCE.

The State argues

> the 'to convict' instruction setting forth the general essential elements of assault in the second degree necessarily relates back to both the instruction defining assault and the self-defense instruction.

Resp. Br. at 24. Indeed, Instruction No. 13 incorporated the word "assault," and so referred the jury to Instruction No. 11, which defined that term. CP 21, 23 (see App. Br. at 12-13).

Contrary to the State's assertion, however, Resp. Br. at 10, the assault definition instruction failed to explain what conduct constituted an intentional assault -- because it failed to include the use of unlawful force in the second definition. CP 21.

The 'to convict' instruction made no reference whatsoever to self-defense, the lawful use of force, or any other term that would refer the jury to Instruction No. 14. CP 24.

2. THE SELF-DEFENSE INSTRUCTION CONTAINED NO PHRASE MEANING "NOTWITHSTANDING THE 'TO CONVICT' INSTRUCTION."

The State argues:

> Pertaining to self-defense, the instruction given sufficiently explained that it is a complete defense to the [charges], **notwithstanding the 'to convict' instruction**, if Thomas acted with lawful force as further defined in that instruction and that the state bears the burden of proving beyond a reasonable doubt that the force Thomas used was not lawful "as defined in this instruction."

Resp. Br. at 24 (emphasis added). Notably, the State does not quote the self-defense instruction. CP 24.

The self-defense instruction did not contain any "notwithstanding" language. In fact, the instruction made no reference at all to the "to convict" instruction. CP 24. It certainly did not suggest to the jury how to reconcile the explicit command in the "to convict" instruction that, if it found both of the listed elements proven beyond a reasonable doubt, it had a duty to return a verdict of guilty -- without reference to self-defense. CP 23.

3. THE STATE CONCEDED BELOW THAT IT WAS ERROR TO OMIT "WITH UNLAWFUL FORCE" FROM THE INSTRUCTION DEFINING ASSAULT.

The State now argues that "the assault definition instruction explained what conduct constituted an intentional assault." Resp. Br. at 10. But it conceded in the trial court it was

error to omit "with unlawful force" from the instruction defining assault. RP(5/15) 7.

B. ARGUMENT IN REPLY

1. THE STATE MISSTATES THE DEFENDANT'S BURDEN OF PRESENTING EVIDENCE OF SELF-DEFENSE: THE DEFENDANT NEED ONLY PRESENT SOME EVIDENCE OF SELF-DEFENSE.

In its brief, the State says:

> When a defendant asserts self-defense **and meets his burden by a preponderance of the evidence to put forth such a defense**, the state then has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.

Respondent's Brief at 8-9 (emphasis added). This is not the law.

> In order to raise self-defense before the jury, a defendant bears the initial burden of producing **some evidence** which tends to prove that the killing occurred in circumstances amounting to self-defense. ... "Although it is essential that some evidence be admitted in the case as to self-defense, there is no need that there be the amount of evidence necessary to create a reasonable doubt in the minds of jurors on that issue."

State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (emphasis added). Accord: State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (mistakenly cited by the State).

2. THE STATE CONCEDES THIS COURT MAY ADDRESS THE ERRONEOUS INSTRUCTIONS IF COUNSEL WAS INEFFECTIVE.

The State repeatedly argues the erroneous instructions were invited error and this Court may not consider them on appeal. Resp. Br. at 7, 12-13, 17, 21. Nonetheless, it also concedes if counsel's assistance was ineffective, the issue properly is before this Court. Resp. Br. at 13, 17; State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

In Kyllo, defense counsel proposed an instruction with the wrong definition of an essential element of self-defense -- the standard of the perceived threat. Here, defense counsel proposed an instruction with the wrong definition of assault -- omitting the phrase that required the use of unlawful force. In both cases, "nobody caught the oversight." Resp. Br. at 14.

As in Kyllo, the State has failed to articulate a strategic reason counsel would have proposed this erroneous instruction. There is none.

3. MR. THOMAS RAISED THE ISSUES OF INEFFECTIVE ASSISTANCE OF COUNSEL AND CONSTITUTIONALLY DEFICIENT INSTRUCTIONS BELOW IN HIS MOTION FOR NEW TRIAL.

The State also claims Mr. Thomas waived his right to challenge the "to convict" instruction by failing to raise it below, citing RAP 2.5(a)(3). Resp. Br. at 7, 11, 17.

> **(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

RAP 2.5(a)(3). Mr. Thomas, however, did raise in the trial court his challenge to the sufficiency of the instructions, including the "to convict" instruction, and his claim of ineffective assistance of counsel, in his Motion for New Trial. See Supp. CP (Subnos. 105, 107, 113); App. Br. at 15-19.

Furthermore, the failure to instruct the jury unequivocally on the burden of proof for self-defense and the elements of the charge, and ineffective assistance of counsel are all manifest constitutional errors that can be raised for the

first time on appeal. Kyllo, 166 Wn.2d at 862. See App. Br. at 23.

4. DUE PROCESS REQUIRES THE "TO CONVICT" INSTRUCTION TO INCLUDE EVERY ELEMENT THAT MUST BE PROVEN, INCLUDING THE ABSENCE OF SELF-DEFENSE.

a. Historical Context Illuminates this Issue.

Prior to recodifying the criminal code in 1975, Washington's murder statute provided a killing was murder or manslaughter "unless it was excusable or justifiable." McCullum, 98 Wn.2d at 491-94. Thus in cases under that statute, the charging document and the "to convict" instruction routinely included the phrase "unless it was excusable or justifiable." Even with the direction to "return a verdict of guilty" if it found each "element" proven, the jury had to determine the killing was not "justifiable." A separate instruction usually defined "justifiable," i.e., the self-defense instruction.

The McCullum Court explained that removing this phrase from the statute did not mean the language was not essential in a self-defense case.

> [T]he Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be

> involved in each case. Once the issue of self-defense is properly raised, however, **the absence of self-defense becomes another element of the offense** which the State must prove beyond a reasonable doubt.

McCullum, 98 Wn.2d at 493-94 (emphasis added).

b. Instructions "Read As a Whole" Do Not Correct Instructions that Omit an Element.

The State repeatedly claims the jury instructions must be considered "as a whole." Resp. Br. at 15-16.[1] That phrase, however, does not simply mean reducing the instructions to a pile of words or sentences with no relationship to one another, from which either party may pick and choose phrases from which to argue their theories of the case. The instructions are language with meaning, placed in specific pages, with words that refer to and incorporate others. The "to convict"

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[1] The State's authorities endorsing this phrase did not involve self-defense. State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) (aggravated murder for hire); State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (communication with a minor for immoral purposes, which the Court of Appeals and Supreme Court reversed for instructions that were an unconstitutional comment on the evidence, an issue raised for the first time on appeal); State v. Hanna, 123 Wn.2d 704, 871 P.2d 135 (1994) (vehicular homicide and vehicular assault); and State v. Long, 19 Wn. App. 900, 578 P.2d 871 (1978) (drug charge).

instruction in particular, is self-contained: it requires the jury to convict if it finds **each element listed there** is proven.

Our courts have long recognized the requirement that the "to convict" instruction include every "element" of the offense.

> The "to convict" instruction carries with it a special weight because the jury treats the instruction as a "yardstick" by which to measure a defendant's guilt or innocence. ...
>
> **We review the adequacy of a challenged "to convict" jury instruction de novo.** ... Though, as a general matter, "[j]ury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law," ... and we review jury instructions "in the context of the instructions as a whole," ... **the reviewing court generally "may not rely on other instructions to supply the element missing from the 'to convict' instruction."**

State v. Mills, 154 Wn.2d 1, 6-7, 109 P.3d 415 (2005) (emphases added).

> It is not a sufficient answer to this assignment of error to say that the jury could have supplied the omission of this element ... by reference to the other instructions. Concededly, as a general legal principle all the pertinent law need not be incorporated in one instruction. However, the trial court undertook to specifically tell the jury in instruction No. 5 that they could convict appellant if they found that four

> certain elements of the crime had been proven beyond a reasonable doubt. In effect, the judge furnished a yardstick by which the jury were to measure the evidence in determining the appellant's guilt or innocence of the crime charged. The jury had the right to regard instruction No. 5 as being **a complete statement of the elements** of the crime charged. This instruction purported to contain **all essential elements**, and the jury were not required to search the other instructions to see if another element alleged in the information should have been added to those specified in instruction No. 5.

State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953) (emphases added).

Here, Instruction No. 13 went beyond telling the jury it "could" convict appellant if it found all the listed elements; it told the jury it had a "duty to return a verdict of guilty." Instruction No. 13 referred to "assault" as an element, but did not include "unlawful force." Instruction No. 11, which separately defined assault, similarly omitted "unlawful force" from one of the definitions. The instructions thus relieved the State of the burden of proving Mr. Thomas used unlawful force.

> If the evidence supports the giving of an instruction defining excusable or justifiable [use of force], we believe the better position is to revert to the standard elements instruction ... and include those issues there.

State v. Fondren, 41 Wn. App. 17, 23, 701 P.2d 810 (1985); see also State v. Redwine, 72 Wn. App. 625, 628, 865 P.2d 552 (1994) ("Instructions 4 and 5 explained the elements of second and fourth degree assault, but did not include as an element the absence of lawful force.")

c. State v. Hoffman Does Not Control This Case.

The State relies on State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991).[2] Resp. Br. at 9-11. Hoffman involved a charge of aggravated first degree murder and first degree assault. The Court concluded there was no prejudicial error to exclude the lack of self-defense from the "to convict" instruction for murder. The Court did not address the instructions either defining or setting out the elements of assault; the appellant did not challenge the sufficiency of those instructions.

Hoffman thus does not control here. The Court noted the WPIC Committee recommended a separate

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[2] The State also cites State v. Ng, 110 Wn.2d 32, 39-41, 750 P.2d 632 (1988), which was a duress case, not self-defense. The Court greatly distinguished duress from self-defense, and further expressly limited its discussion "to the facts and law of this case." It is no precedent for this case.

instruction on self-defense for murder. But for assault, as here, the WPIC Committee explicitly requires "unlawful force" in the definition of assault, with no reference to Hoffman. WPIC 35.50.

Even on Hoffman's murder count, the Court did not address the language instructing the jury it had a "duty to return a verdict of guilty" without considering the defense. Not surprisingly, neither does the State address that language. But this Court must.

Other case law developments further challenge the viability of Hoffman. Hoffman was convicted of killing and shooting at two police officers who were trying to arrest the defendants. Under State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997), decided six years later, the law would not have permitted self-defense in such a case. Thus any discussion of self-defense instructions is at most dictum.

The law of self-defense also has changed enormously in the 23 years since Hoffman, requiring that its holding be reconsidered. See, e.g.: State v. Janes, supra; State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996); State v. Walden,

supra; State v. Kyllo, supra. And State v. Mills, supra, has reaffirmed State v. Emmanuel, supra, which squarely conflicts with this language in Hoffman.

Hoffman, a murder case since undercut by authority on self-defense and due process, does not control this assault case.

5. ACOSTA DID NOT APPROVE THE INSTRUCTIONS IN THIS CASE.

The State claims the instructions in this case complied with the requirements of State v. Acosta, 101 Wn.2d 612, 683 P.2d 1069 (1984). Resp. Br. at 9-12. The State is mistaken.

The Acosta Court explained its analysis that the "intent" element of assault incorporates the lack of self-defense, which imposes on the State the burden of proving its absence. Resp. Br. at 10-11. But jury instructions must be more explicit.

> The jury should be informed in some **unambiguous way** that the State must prove absence of self-defense beyond a reasonable doubt. The defendant is entitled to a correct statement of the law, and should not be forced "*to argue* to the jury that the State [bears] the burden of proving absence of self-defense." ... Rather, the defense attorney is only required to argue to the jury that the facts fit the law; the

> attorney should not have to convince the jury what the law is.

Acosta, 101 Wn.2d at 621-22 (bold emphasis added; Court's italics; citation omitted). The Acosta Court also did not address the compulsory language requiring conviction at the end of the to-convict instruction.

Instruction No. 14, standing alone, is unambiguous. But Instruction No. 13 conflicts completely with No. 14: it requires a verdict of guilty without regard to Instruction 14.

> When instructions are inconsistent, it is the duty of the reviewing court to determine whether "the jury was misled as to its function and responsibilities under the law" by that inconsistency. ... [W]here such an inconsistency is the result of a clear misstatement of the law, the misstatement must be presumed to have misled the jury in a manner prejudicial to the defendant.

State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977); State v. Walden, supra, 131 Wn.2d at 478. This erroneous instruction requires the conviction be reversed and remanded for a new trial.

The Acosta Court's analysis of the instructions in that case are instructive. As here, Acosta was a case of second degree assault. As here, the court gave a "to convict" instruction

with the essential elements -- without stating the need for "lawful force" or the absence of self-defense.

> As noted above, the trial court instructed that "to convict" the defendant, the jury must find (1) that the defendant "knowingly assaulted" the victim; (2) that the acts occurred in Clark County; and either (3) that the assault was committed with intent to rape, or (4) that the defendant "knowingly inflicted grievous bodily harm". ... The court further instructed the jury that the State must prove beyond a reasonable doubt elements 1 and 2, and either element 3 or 4.

Acosta, 101 Wn.2d at 622. As here,

> Immediately following this, the court instructed:
>
> > It is a complete defense to the charge of second degree assault that the defendant acted in self-defense.
> >
> > If you find from the evidence, and in accordance with these instructions that the defendant acted in self-defense, then it shall be your duty to return a verdict of not guilty.

Id. at 622-23. The Court found these instructions required reversal.

> We believe that these instructions, when read together, did not adequately inform the jury that the State must prove absence of self-defense. ... **[T]he jury was not told in the "to convict" instruction that the force used must be unlawful, wrongful, or without justification or excuse.**

Acosta, 101 Wn.2d at 623. As in Acosta, the jury was not told in the "to convict" instruction, or any instruction it incorporated by reference, that the assault must be committed with unlawful force.

The Supreme Court reversed.

> We believe that these instructions, when read together, did not adequately inform the jury that the State must prove absence of self-defense. **Unlike Hanton, King, and Savage, the jury was not told in the "to convict" instruction that the force used must be unlawful, wrongful, or without justification or excuse.**

Acosta, 101 Wn.2d at 622-23 (emphasis added).[3]

> If we were to hold that the defendant bore the burden of proving self-defense, we would be relieving the **State of its obligation to prove that the defendant's use of force was unlawful.**

Acosta at 618 (emphasis added).

> The jury should be informed in some **unambiguous** way that the State must prove absence of self-defense beyond a reasonable doubt.

Id. at 621 (emphasis added).

Acosta may endorse having a separate instruction, in addition to the "to convict" instruction, that clearly imposes on the State the

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[3] Citing State v. Hanton, 94 Wn.2d 129, 614 P.2d 1280, cert. denied, 449 U.S. 1035 (1980); State v. King, 92 Wn.2d 541, 599 P.2d 522 (1979); and State v. Savage, 94 Wn.2d 569, 618 P.2d 82 (1980).

burden of proving the absence of self-defense. But without including this mandatory element at least by reference in the "to convict" instruction, a separate instruction conflicts with its terms.

The separate instruction used in this case is, at best, ambiguous when paired with the "to convict" instruction and the duty to convict without reference to justification. Given this ambiguity, this internal inconsistency in the instructions on the essential element of unlawful or wrongful use of force, this Court should reverse this conviction and remand for a new trial.

6. THESE ERRORS ARE PREJUDICIAL, NOT HARMLESS.

a. The Evidence Was Neither Overwhelming Nor Uncontroverted.

The State claims the evidence here was "overwhelming" of guilt, making any error harmless, citing State v. Robinson, 38 Wn. App. 871, 691 P.2d 213 (1984), review denied, 103 Wn.2d 1015 (1985).[4] Resp. Br. at 25. It also argues omission of an element can be harmless if the element was supported by uncontroverted evidence, citing State

[4] State v. Johnson, ___ Wn.2d ___, 325 P.3d 135 (2014), did not involve self-defense.

v. Hartzell, 156 Wn. App. 918, 237 P.2d 938 (2010). Resp. Br. at 23-24.

In Robinson, like Hoffman a murder case, this Court held the error did not require reversal because it was harmless. Mr. Robinson waited in the lobby of his wife's divorce lawyer's office building and shot him four times when he came downstairs to go home. He previously had threatened violence, and had been involved in another shooting. His bare assertion that he thought the lawyer was reaching for a gun to shoot him was not corroborated by any eyewitnesses or physical evidence at the scene. It also conflicted with his statement that night. Robinson, 38 Wn. App. at 877-78.

Hartzell was not a case of self-defense. Defendants did not contest there that someone shot a gun into a home. The defense was the defendants were not the people who did it. 156 Wn. App. at 944-45.

The case here is substantially different. First, Mr. Thomas did not shoot his gun at all. See App. Br. at 29 (cases distinguishing unlawful display from assault). Here the State concedes

Jache sprayed gravel at Mr. Thomas when he took off on his motorcycle, and gave him the "one finger salute." Resp. Br. at 3. No one contradicted Mr. Thomas's testimony that Jache appeared ready to charge at him with his motorbike when Mr. Thomas chose instead to approach him. RP 338-42. And Kaitlyn gave different versions of events, contradicting Jache in a number of ways, and reporting at one time that she did not see Mr. Thomas point the gun at Jache. Resp. Br. at 25; RP 156-60; App. Br. at 8-10.

b. The Issue is Whether Counsel's Deficient Performance was Prejudicial.

The proper standard of prejudice is whether counsel's deficient performance was prejudicial, i.e., whether there is a reasonable likelihood of a different result if counsel had proposed proper instructions. Kyllo, supra.

The prejudice can be seen from the jurors' affidavits, confirmed by the original Declaration of Douglas Hyldahl. CP 85-91, 48. The jury did not find overwhelming evidence that Mr. Thomas pointed the gun at Jache. In fact, at least some of the jurors did not conclude he had done that at

all. The jurors based the conviction on Mr. Thomas touching Jache with one hand while he held a gun in the other -- a theory that under proper instructions would support only convictions for misdemeanor assault and unlawful display of a weapon.

The jurors' affidavits confirm the failure of the instructions to require the jury find the facts sufficient to prove assault "with" a deadly weapon. The prosecutor's argued theory, the facts he asserted in argument, cannot resolve that failure. Resp. Br. at 20-21. The court instructed the jury that counsel's arguments could not prevail over the court's instructions. CP 10.

The prejudice is further seen from the prosecutor's closing argument -- that the State need prove only the two elements listed in the to convict instruction, with no reference to self-defense. RP 545. This erroneous argument merely amplified the instructional failure.

C. CONCLUSION

Counsel was ineffective for proposing jury instructions that permitted the jury to convict Mr. Thomas of felony assault without regard to the

defense theory of self-defense, and without articulating the difference between the felony and the misdemeanors of assault 4° and unlawful display of a weapon. The instruction relieved the State of its burden of proving the force used was unlawful. Thus it violated due process. The erroneous instructions were prejudicial, permitting a wrongful felony conviction. This Court should reverse the conviction and remand for a new trial.

DATED this 17th day of June, 2014.

Respectfully submitted,

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DECLARATION OF SERVICE

ALEXANDRA FAST declares:

On this date I caused a copy of this document to be served on the following entities by depositing them in the United States Mail Service, postage prepaid, addressed as follows:

Ms. Kimberly Thulin
Whatcom County Prosecutor's Office
311 Grand, Suite 201
Bellingham, WA 98225

I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

6·18·2014-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST