70438-9

70438-9

No. 70438-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

JOSHUA THOMAS, Appellant.

BRIEF OF RESPONDENT

DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By KIMBERLY THULIN
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #21210 / ADMIN. #91075

Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Supreme Court

Washington State Supreme Court

Court of Appeals

Statutes

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the court's instructions to the jury relieved the state of its burden of proof where the jury was instructed on all of the essential elements of assault in the second degree in the 'to convict' instruction and separately fully instructed on self-defense, including that the state had the burden of proving beyond a reasonable doubt that Thomas did not act in self-defense.

2. Whether Thomas' attorney was constitutionally ineffective for proposing a definitional instruction on assault that set forth two means of committing assault and omitted the phrase "without lawful authority" in one of the defined means, where the jury was not misled and was fully instructed on the essential elements of assault in the second degree and self-defense.

3. Whether any instructional error alleged was harmless beyond a reasonable doubt where the instructions in their entirety sufficiently set forth the essential elements of the charged offense, self-defense including the state's burden of proof and where there was overwhelming evidence to support that Thomas assaulted Jache with a deadly weapon and did not act in self-defense.

C. FACTS

1. Procedural facts

Thomas was charged with assault in the second degree with a deadly weapon. RCW 9A.36.021(1)(c). CP 4-7. Over the state's objection, after hearing the evidence presented, the trial court permitted Thomas to present a theory of self-defense and proposed lesser included

instructions on assault in the fourth degree and unlawful display of a weapon. Following a jury trial, Thomas was convicted of assault in the second degree by assaulting Jache with a deadly weapon. The jury also found, by special verdict that Thomas was armed with a firearm during the commission of the crime. CP 63-72. Thomas was sentenced to the low end of the standard range of 39 months incarceration. Id. Thomas filed a motion for new trial and following the trial court's denial, now appeals. CP 50-52, 73-84.

2. Substantive Facts

On July 19th, 2011 15 year old Jache Cocchi was riding his dirt bike, a motorcycle, down Camp 2, a privately maintained gravel road, in a rural area along the border of Whatcom and Skagit Counties. RP 31, 73. Jache was headed to some off trial roads that lie above Camp 2 road wearing a helmet, goggles and a chest protector. RP 31-2. While on his way to the trails, Jache stopped on Camp 2 Road to talk to his childhood friend, 14 year old Kaitlyn who happened to be biking to her grandmother's house. RP 35, 36.

While talking to Kaitlyn for a few minutes, Thomas stepped out of a wooded area behind Jache wanting to talk to Jache. RP 100. Kaitlyn, feeling uncomfortable asked Jache to stay with her but instead Jache laughed, said no way and then took off. RP 102. Jache thought Thomas

looked scary. RP 36. Thomas was then about 10 feet behind Jache and while he took off normally, Jache's motorcycle sprayed gravel in Thomas' direction. RP 38. Thomas testified that when Jache left he gave Thomas the one finger salute. RP 335.

Kaitlyn testified Thomas was angry Jache left yelling and cursing telling her he wanted to talk to Jache and that next time Jache rode by he would shoot his tires out and if he crashes, not call for help. RP 102-3. Kaitlyn just tried to stay calm with Thomas as he also mentioned he was armed. Id. Jache road the trails above camp 2 road and after a few minutes camp back down Camp 2 road. RP 57 (Jache initially testified he thought he rode the trails for a long time but upon reflection acknowledged it could have been a few minutes. RP 57. Jache was intending to wait until Thomas was gone. Id.

As Jache came up Mullen hill on Camp 2 road he saw Thomas and Kaitlyn step out from the brush apparently still talking. As Jache stopped his bike approximately 50-or 60 feet away, his motorcycle stalled out. RP 103. Upon seeing Jache, Thomas immediately stopped talking to Kaitlyn and began walking quickly toward Jache pulling a gun out his pocket and pointing it at him. RP 107. Thomas was yelling, cursing and telling him to stop. RP 106-107. Kaitlyn testified Thomas held the gun to Jache's helmet and then at one point, was waiving the gun in her direction. RP

107. Scared, Kaitlyn hopped on her bike, road home and immediately told her mom that she was worried Thomas was going to shoot Jache. RP 106. When Jache initially tried to re-start his bike, Thomas got into his face and then grabbed him by the helmet removing him from his bike telling Jache "don't move or I will shoot you you little bastard. RP 107, 39, 43. Jache saw Thomas cock the hammer of a small silver handgun into the ready to fire position as Thomas quickly approached him. RP 44. Jache just remembered Thomas was saying fuck this and fuck that, that he didn't like motorcycles. RP 44. Jache was afraid he was going to be shot. Id. After pulling Jache off his motorcycle, yelling at him and dragging him about 10-15 feet away, Thomas uncocked his handgun and let Jache go. RP 45.

Law enforcement responded after Jache's father called 911. Thomas told officers that, as a former bar tender he used to 'act crazy' to intimidate people and that he was irritated and angry with the motorcycles because they were loud. RP 407. He admitted he tried to confront Jache the first time but was hit with kicked up gravel when Jache sped off. RP 233. Thomas asserted he was calm the whole time but acknowledged that when Jache came back down Camp 2 road, he pulled out his weapon holding it by his side and only pointed to Jache with his other hand telling him to stop. RP 234. Thomas then said he approached Jache and grabbed him by the shirt collar. Id. Thomas said he didn't pull Jache off the bike

but acknowledged the motorbike may have fallen over. RP 266. When confronted with whether Thomas had pointed his gun at Jache, Thomas didn't respond instead insisting that Thomas didn't yell or swear at Jache when he confronted him. RP 239.

Investigators found a silver single action handgun, capable of firing, on Thomas' person. RP 288. They also found an oil or gas spill on an area of Camp 2 road where Jache and Kaitlyn reported the incident took place, corroborating that Jache's bike was at some point, fell or was laid on the ground. RP 249.

For the first time at trial, Thomas claimed he pulled out his weapon and held it over his head in the air (not at his side or pointed at Jache) because he was afraid for his life as Jache approached him on his motorcycle while he was talking to Kaitlyn. RP 342. Thomas said Jache stopped about 50-60 feet away but was hunkered down like he was going to drive into him. RP 343. In response Thomas decided to take the offensive, took his gun out held it straight in the air and quickly approached Jache and put his other arm on his shoulder to stop him. RP 344. Thomas said he wasn't mad, didn't yell or swear but that he did do what he described as "the mad dog act" testifying at home point "maybe I scared the hell out of him. RP 34-6. Thomas ultimately believed he thought he had the right to use minimal force to detain this gentleman in

light of neighborhood concerns of noise and possible damage to the roadway from motorcycles. RP 388, see also RP 222, 346.

D. ARGUMENT

1. The trial court's instructions, taken in their entirety, did not relieve the state of its burden of proof and properly instructed the jury on all of the essential elements of the charged offense and self-defense.

Thomas proffered several instructions in the trial court below, including instruction 11 defining assault pursuant to WPIC 35.50 (providing two definitions of what constitutes an assault), a display of a firearm instruction, an act on appearance instruction (instruction 15), no duty to retreat instruction (instruction 17) and an instruction on self-defense (instruction 14) consistent with his request that the trial Court instruct the jury on self-defense and lesser degree crimes. CP 8-37, RP 467, 534.

Thomas did not offer his own 'to convict' instruction and did not take exception to the other instructions proposed or otherwise given. Thomas now argues that despite the trial court utilizing many of the instructions he proposed below and not making any other exceptions to the instructions given, that the 'to convict' instruction was defective because it did not include the absence of self-defense as an element that the state

must prove beyond a reasonable doubt and that the definition of the assault instruction was given relieved the state of its burden of proof. Br. of App. At 23, 25.

Thomas waived his right to assert the "to convict" instruction was flawed by failing to take exception to the instruction below and because, the instruction contained all of the requisite essential elements of the charged crime. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1998), CrR 6.15, RAP 2.5(a)(3). Thomas invited the error he alleged pertaining to the assault definition instruction because he proposed and advocated for the very instruction he now complains of. Therefore, unless Thomas can demonstrate the "to convict" instruction omitted an essential element or that his attorney was constitutionally deficient and that deficiency sufficiently prejudiced his ability to obtain a fair trial in proposing the assault definitional instruction, Thomas' arguments should be rejected.

a. ***The absence of self-defense is not explicitly required to be set for the in the "to convict" instruction where a separate instruction sets out the law of self-defense including that it is the state's burden to prove beyond a reasonable doubt that Thomas did not act in self-defense.***

To warrant any consideration of the error's pertaining to the "to convict" instruction, Thomas has the burden of demonstrating the error alleged is a manifest error of constitutional magnitude because he did not

object or take exception below. RAP 2.5(a)(3). Specifically, Thomas must identify the error and demonstrate how the alleged error actually affected his fundamental rights at trial. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). An error is manifest when it has practical and identifiable consequences in the trial. State v. Green, 80 Wn.App. 692, 694, 906 P.2d 990 (1995) *(citing* State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1991). Furthermore, even if this court determines the error alleged is manifest, it may still be subject to harmless error analysis. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Jury instruction challenges are reviewed in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." Id. It is reversible error for the court's instructions to relieve the state of its burden of proof. State v. Byrd, 125 Wash. 2d 707, 887 P.2d 396 (1995). The sufficiency of a challenged to the "to convict" instruction is reviewed on appeal de novo. State v. Mills, 154 Wash. 2d 1, 7, 109 P.3d 415 (2005). 7.

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. State v. Walden, 131 Wash. 2d 469, 473-74, 932 P.2d 1237 (1997). Self-defense negates the 'intent' element of the charged crime. See, State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984*), abrogated on other grounds*, State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989). Thus, the 'to convict' jury instructions are sufficient if the to convict sets forth the elements of the charged crime, in this case assault in the second degree so long as a separate instruction defining self-defense explains the defense, including that the state has the burden to prove beyond a reasonable doubt that Thomas did not acted with intent to commit a crime and not in self-defense. State v. Hoffman, 116 Wash. 2d 51, 109, 804 P.2d 577 (1991), State v. Ng, 110 Wash. 2d 32, 750 P.2d 632 (1988).

In State v.Acosta, 101 Wash. 2d at 615, the Court confirmed that a separate instruction stating that the state has the burden of proving the absence of self-defense beyond a reasonable doubt is the preferable practice to ensure the jury understands the state has the burden of proving the absence of such defense beyond a reasonable doubt. Id. at 622. Then, in Hoffman, 116 Wash. 2d 51, our state supreme court concluded consistent with Acosta contrary to Thomas' argument, that a 'to convict' instruction that did not list an absence of self-defense as an element of

murder "to convict" instruction, where self-defense was separately instructed, did not relief the state of its burden of proof.

Thomas' reliance on State v. Smith, 131 Wash. 2d 258, 930 P.2d 917 (1997), to argue otherwise is not persuasive because there the court determined that the conspiracy to commit first degree murder 'to convict' instruction was constitutionally deficient because not all of the correct essential elements of the offense were set forth in the 'to convict' instruction –instead, the instruction stated the wrong underlying crime to which the conspirators were required to have agreed to commit. Here, the 'to convict' instruction was not so flawed, listing all of the required elements of assault in the second degree as approved in Hoffman and Acosta.

Thomas' argument should therefore be rejected where, based on Hoffman and Acosta, the jury could not, with the instructions given in this case, find Thomas intentionally assaulted another unless the jury found the state proved beyond a reasonable doubt Thomas did not act with lawful force as explained in the self-defense instruction. The assault definition instruction explained what conduct constituted an intentional assault; whereas, the self-defense instruction explained what forceful conduct constitutes a complete defense even if one commits an intentional assault. As Acosta explained, the absence of self-defense is embedded within the

intent to assault element of the "to convict" instruction that requires the jury to find Thomas acted intentionally.

Where the "to convict" instruction sufficiently set forth the essential elements of assault in the second degree and Thomas did not object or propose an alternative instruction, Thomas cannot demonstrate the issue he asserts constitutes a manifest error of constitutional magnitude warranting further review. RAP 2.5(a)(3).

Thomas also argues the prosecutor inappropriately focused on the 'to convict' instruction during closing arguments over other jury instructions, thereby exacerbating the instructional error he alleges. Thomas' argument takes the prosecutor's statement in closing out of context. Furthermore, how the prosecutor argued the case should be viewed in the context of the entirety of argument and is not error, short of alleging and demonstrating prosecutorial error when the jury is otherwise appropriately instructed as to the essential elements of the crime charged. Jurors are presumed to follow their instructions. State v. Lord, 117 Wash. 2d 829, 861, 822 P.2d 177 (1991). Furthermore, juries are specifically instructed that the lawyers arguments during closing are just that, arguments and that they must rely on the law as instructed and the evidence, as they remember it, to decide the case. CP 8-37. Thomas' argument should be rejected.

b. ***The assault definition instruction also did not relieve the state of its burden of proof or confuse the jury where the jury was fully instructed on self-defense including that the state carried the burden of disproving self-defense in a separate instruction as approved in Acosta.***

Next, Thomas contends the instruction he proposed defining assault did not define assault as an act done 'with unlawful force' to create in another apprehension and fear of bodily injury and therefore the instruction read in conjunction with the 'to convict' instruction doesn't provide a sufficient connection to the self-defense instruction thereby alleviating the state's burden of proof as to the assault in the second degree charge. Br. of App. at 25.

Thomas requested the instruction he now complains of because he wished to argue his actions constituted a misdemeanor assault and not an assault with a deadly weapon that constitutes a felony. CP 8-37, 467, 534. Pursuant to the doctrine of invited error, even where a constitutional issue is raised, appellate review is precluded when the defendant proposed the instruction below. State v. Bradley, 141 Wash. 2d 731, 736, 10 P.3d 358

(2000). Thomas should not be permitted to complain on appeal that the very instruction he requested was erroneous based on the invited error doctrine. State v. Henderson, 114 Wash. 2d 867, 876, 792 P.2d 514 (1990).

Where instructional error is the result of alleged ineffective assistance of counsel, the invited error doctrine does not preclude review. State v. Kyllo, 166 Wash. 2d 856, 215 P.3d 177 (2009). However, to order to warrant reversal it is Thomas' burden to demonstrate from the record that his attorney's performance fell below an objective standard of reasonableness and that the alleged deficient performance prejudiced his ability to obtain a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The prejudice prong requires Thomas to demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different had the error not occurred. Id. If either element of deficient performance or prejudice are not met, the inquiry ends. An ineffective assistance of counsel claim is reviewed on appeal de novo. Kyllo, 166 Wash. 2d 856.

Thomas contends, relying on Kyllo, 166 Wash. 2d 856, that counsel in this case was deficient in proposing an instruction defining

assault that omitted the phrase "without lawful authority" in the second paragraph of the instruction defining a second means of committing assault as recommended when self-defense is alleged. WPIC 35.50. Contrary to Thomas' argument, the error in Kyllo, in contrast to the error asserted here, was significant and warranted reversal because Kyllo's attorney proposed an instruction that *affirmatively misstated* the law regarding the harm the person must apprehend in order to defend oneself. Where the jury should have been instructed that a person is entitled to act in self-defense when he reasonably apprehends that he is about to be injured, the jury was instead instructed based on Kyllo's proposed instruction, that he was only entitled to act in self-defense if he believed in good faith and on reasonable grounds that he was "in actual danger of great bodily harm." Id. Predicated on this error, the court reversed for ineffective assistance of counsel.

The error alleged in this case is not comparable. Here, counsel omitted the phrase "unlawful force" in the second paragraph. Nobody caught the oversight. More importantly however, the definitional instruction as given did not affirmatively misstate the law as was the case in Kyllo. The instruction could not alleviate the state's burden of proof because the remaining instructions given, read as a whole, sufficiently explained the that is a complete defense to the charges if the force Thomas

used was lawful explaining both what constituted lawful conduct and that the state had the burden of proving beyond a reasonable doubt that the force used by Thomas was not lawful. Thomas attorney's conduct was therefore not constitutionally deficient for proposing this instruction, in light of the remaining instructions given.

And even if considered deficient performance, Thomas cannot demonstrate the requisite prejudice to prevail on his ineffective assistance of counsel claim. Jury instructions are to be read in a common sense manner and are sufficient if they properly inform the jury of the applicable law. State v. Bowerman, 115 Wash. 2d 794, 802 P.2d 116, 116 (1990). Instructions are reviewed de novo "within the context of the jury instructions as a whole." State v. Jackman, 156 Wash. 2d 736, 743, 132 P.3d 136 (2006). An appellate court will "review the instructions in the same manner as a reasonable juror." State v. Hanna, 123 Wash. 2d 704, 719, 871 P.2d 135 (1994).

The assault definition instruction defined assault accurately but not ideally, in light of Thomas' self-defense claim by omitting the 'without lawful authority' in the second paragraph of the definition. This isolated omission however, could not have affirmatively confused or mislead the jury or deprive Thomas of a fair trial when the essential elements of the crime were otherwise appropriately set forth in the 'to convict' and self-

defense instructions. Particularly, where the self-defense instruction accurately defined and explained the term 'lawful force'-that it is a defense to the charges if the force Thomas used in assaulting Jache was lawful, that force is lawful when offered by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than necessary and that is the state's burden to demonstrate beyond a reasonable doubt Thomas did not act with lawful force in self-defense. CP 8-37(instruction 14). Instructions satisfy the requirement of a fair trial when, taken as a whole, they properly inform the jury of the applicable law, are not misleading and permit the defendant to argue his theory of the case. State v. Long, 19 Wn.App. 900, 902, 578 P.2d 871 (1978). In light of the instructions given, viewed in their entirety, Thomas cannot demonstrate the requisite prejudice to support an ineffective assistance of counsel claim or warrants reversal.

c. ***Thomas' cannot demonstrate his attorney decision to submit instruction defining two means of committing an intentional assault was sufficiently prejudicial to warrant reversal where the jury was instructed that the state had the burden of proving Thomas intentionally assaulted Jache with a deadly weapon in order to convict him of felony assault.***

Next, Thomas claims the instruction he proposed defining assault relieved the state of the burden of proving the assault was committed "with" a deadly weapon and permitted being convicted of assault in the second degree by merely being in possession, displaying or being armed with a deadly weapon when Thomas touched Jache on the shoulder. Br. of App. at 37.

Again, Thomas' argument should not be reviewed on appeal because he invited the error by proposing the definitional instruction he now complains contributed to the error. Bradley, 141 Wash. 2d 736. (Review precluded when the defendant proposes the instruction complained of). Where instructional error is the result of alleged ineffective assistance of counsel, the invited error doctrine does not preclude review. Kyllo, 166 Wash. 2d 856.

Even if reviewed as an ineffective assistance of counsel claim, Thomas cannot demonstrate from this record that his attorney's performance was constitutionally deficient or that the alleged deficient performance prejudiced his ability to obtain a fair trial where the jury had to find Thomas intentionally assaulted Jache ***with*** a deadly weapon. Particularly, where it is clear from closing arguments, that the state was relying on the reasonable apprehension of bodily injury predicated on

Thomas pointing the weapon at Jache to prove the offense. Strickland, 466 U.S., 687; McFarland, 127 Wash. 2d, 334-35, CP ___(instruction 13).

The legislature has codified four degrees of criminal assault and delineated many alternative means of committing first, second and third degree assault. RCW 9A.36.011-031. As to assault in the second degree, the statute sets forth a single criminal offense but then lists separate subsections of alternative means of committing assault in the second degree. RCW 9A.36.021. The term 'assault' is not defined by the criminal code therefore courts use common law to define the term –a term referenced extensively throughout RCW 9A.36.

Three definitions of assault are recognized in Washington: (1) an attempt, with unlawful force to inflict bodily injury; (2) unlawful touching with criminal intent; (3) putting another in apprehension of harm whether or not the actor intents to inflict or is incapable of inflicting that harm. State v. Winings, 126 Wash. App. 75, 107 P.3d 141 (2005). Definitional instructions defining the different ways assault may be committed do not create alternative means of committing an offense such that unanimity or substantial evidence for each definition given is required to support a conviction. State v. Smith, 159 Wash. 2d 778, 154 P.3d 873, 873 (2007), State v. Linehan, 147 Wash. 2d 638, 56 P.3d 542 (2002).

In Smith, the Court held the assault definition given in that case, defining three of the four means by which assault may be committed, did not create additional alternative means or essential elements that the state was be required to prove. *See also*, State v. Laico, 97 Wash. App. 759, 763 n.4, 987 P.2d 638 (1999)(definition of term "great bodily harm" did not create alternative means of committing the crime of assault). As noted in Smith "the common law assault definitions merely elaborate upon and clarify the terms "assault or "assaults" which are used throughout chapter RCW 9A.36."

The definitional instruction proposed by Thomas provided two common law definitions of assault, battery and/or an act done with intent to create in another apprehension and fear of bodily injury. In order to convict Thomas of assault in the second degree assault however, the jury was specifically instructed they had to necessarily find that he committed his intentional assault '***with***' a deadly weapon. See, RP 551 (prosecutor explains it's the state's burden to prove Thomas assaulted Jache with a deadly weapon.) Thus, the concern Thomas alleges on appeal, that he could have been convicted for simply displaying a weapon and separately committing an intentional assault of either means was not possible. Assaulting another with a deadly weapon is not the same as simply displaying a weapon under circumstances that warrants alarm for the

safety of others. State v. Karp, 69 Wash. App. 369, 848 P.2d 1304 (1993). Moreover, it was clear to the jury the state was asserting Thomas intentionally assaulted Jache by intentionally creating apprehension in Jache of fear of bodily injury (being shot) by pointing the gun at Jache. RP 546.

Thomas relies on Byrd, 125 Wash. 2d 707 in part, to argue that the jury could not sufficiently distinguish between felony and misdemeanor assault. Byrd is not on point. There, the trial court failed to instruct the jury they had to find Byrd ***intended*** to cause reasonable apprehension of bodily harm. Without the required mens rea element in the definitional instruction, the jury could find Byrd guilty of second degree assault without the state proving the requisite mens rea under the particular means of assault alleged by the state. Here, the jury instructions had no such comparable error.

Any of the concerns expressed by Thomas are squarely put to rest by the jury's consideration of the separate "to convict" instruction and the verdict form A and the special verdict form. These instructions and conclusions reached by the jury demonstrate the jury did not predicate their assault with a deadly weapon on conduct constituting unlawful display of a weapon. The jury found Thomas assaulted Jache 'with' a

weapon and separately concluded Thomas was armed with a deadly weapon at the time of the offense.

Thomas contends nonetheless, that jurors affidavits demonstrate the jury did not understand the applicability of the term "with" in the "to convict" instructions and that Thomas could therefore have been convicted of assault in the second degree if they believed Thomas may have been holding the gun during his confrontation with Jache. Br. of App. at 35. Thus, he argues the instruction he proposed generally defining assault by an intentional touching and by intentionally creating fear of bodily injury relieved the state of its burden of proving assault "with" a deadly weapon and that the court should have further defined "with" for the jury. Id.

Thomas made no such request below and therefore should be precluded from litigating this issue for the first time on appeal. Additionally, contrary to Thomas argument that "with" is ambiguous or a term of art that needs to be further defined has no merit. "With" is a common word, that in context of the sentence used in the "to convict" instruction would be reasonably understood by jurors. Thomas' argument should be rejected.

Moreover, Juror affidavits that impeach the verdict may only attest to matters which do not inhere in the verdict. While it may be appropriate to consider statements of fact set forth in an affidavit, the court may not

consider a juror's statement of the effect such facts had upon the verdict. State v. Forsyth, 13 Wash. App. 133, 533 P.2d 847 (1975). The affidavits obtained, filed below and relied upon by Thomas speak to the process and considerations the jurors made during deliberations to reach their verdict. These affidavits therefore inhere in the verdict and should be stricken and not be considered in addressing whether the jury could not understand the plain language of the jury instructions given.

Finally, Thomas' argument that the judge in this case misstated the underlying charge prior to trial is without merit where the trial court correctly stated that Thomas was charged with assault in the second degree while armed with a firearm. CP 4-5. Any error in not further elaborating on the charge, pursuant to WPIC 1.01 recommendations, does not constitute reversible error where the jury was otherwise given appropriate instructions further delineating the essential elements of the offense, including the state's burden to disprove that Thomas acted in self-defense when he did the "mad dog" act and scared Jache into thinking he was going to shoot him.

2. Any error by Thomas in submitting an alleged defective instruction defining assault is harmless beyond a reasonable doubt where the instruction did not mislead or confuse the jury, the jury was appropriately instructed on the essential elements of the offense, including self-defense and the error could not have contributed to the verdict in the face of the overwhelming evidence presented below.

Even if this court determined the omission of "without lawful authority" from the second paragraph defining assault in the second degree rises to the level of omitting an element of the offense, reversal notwithstanding this error is not warranted. Erroneous jury instructions on self-defense are not automatically of constitutional magnitude or presumed prejudicial such that a trial is considered fundamentally unfair. State v. O'Hara, 167 Wash. 2d 91, 101-103, 217 P.3d 756 (2009)(*abrogating* State v. LeFaber, 128 Wn.2d 896, 913 P.3d 369) Neder v. United States, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Error is harmless when "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 15.(*quoting* Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

To determine whether the omission of an element is harmless error; the court considers whether the omitted element was supported by uncontroverted evidence. Id. at 19, State v. Hartzell, 156 Wash. App. 918,

237 P.3d 928 (2010)(instruction defining assault adequately informed jury of requisite element of intent omitted from 'to convict' instruction.)

Thomas' argument- that nothing in the instruction defining assault relates back to the "to convict" instruction, without the 'unlawful force language' in the definition instructions wholly ignores that 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. Pertaining to self-defense, the instruction given sufficiently explained that it is a complete defense to the charge of assault in the second degree, fourth degree and unlawful display of a weapon, 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." The "to convict', self-defense and assault definition instructions in this case were cohesive and complimentary and not contradictory or misleading such that they could relieve the state from its burden of disproving Thomas acted in self-defense beyond a reasonable doubt.

Moreover, there is overwhelming evidence in the record below to support the jury verdict that Thomas intentionally assaulted Jache with a firearm and did not act in self-defense. Thomas admitted he did a "mad

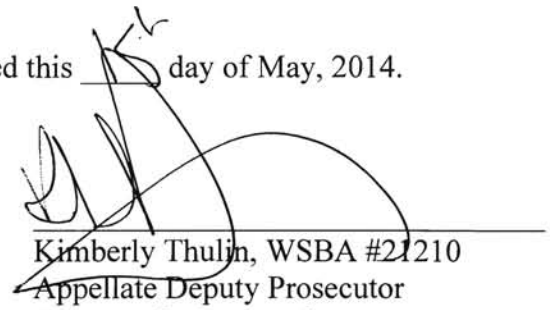
dog" act with Jache, used his weapon to intimidate and make his point and likely scared the hell out of Jache when he confronted him. Both Jache and Kaitlyn corroborated each other's testimony that Thomas did point his weapon at Jache's head and that they were both afraid Thomas was going to shoot Jache. Thomas' contention that he acted in self-defense, under the facts of this case, is flimsy at best.

Under these circumstances, Thomas' attorney's error in proposing a defective definition instruction on assault, to the extent it was defective by omitting the required "with unlawful force" language from the second means of committing assault, can only be construed as harmless. See, State v. Johnson, ___Wn.2d ___, __P.3d___(2014) slip Op. #88683. (not error to give generic definition of "reckless" so long as the jury is also instructed state is required to prove including charge specific language for reckless to render a guilty verdict.), *see also*, State v. Robinson, 38 Wn.App. 871, 691 P.2d 213 (1984), *review denied*, 103 Wn.2d 1015 (1985) (first degree murder and second degree assault convictions affirmed; error in instructions on self-defense were harmless in light of overwhelming evidence of guilt.) Thomas' argument should be rejected.

E. CONCLUSION

Based on the foregoing, the state respectfully requests this Court affirm Thomas' conviction for one count of assault in the second degree with a deadly weapon.

Respectfully submitted this 15 day of May, 2014.



Kimberly Thulin, WSBA #21210
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Lenell Rae Nussbaum
Attorney at Law
Market Place One, Suite 330
2003 Western Avenue
Seattle, WA 98121-2161

Legal Assistant

5/15/14
Date