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SUPREME COURT
STATE OF WASHINGTON
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No. 97432-2
Court of Appeals No. 77725-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

PERRY LEE SORIANO,

Petitioner.

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

A. IDENTITY OF PETITIONER AND RELIEF REQUESTED . 4

B. OPINION BELOW..... 4

C. ISSUE PRESENTED..... 4

D. STATEMENT OF THE CASE 5

E. ARGUMENT 7

**The trial court’s refusal to include the element of
unlawful force in the “to convict” instruction presents a
significant constitutional question..... 7**

F. CONCLUSION..... 9

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953)..... 8, 9
State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983).... 7, 8, 9
State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008).... 7
State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)..... 8, 9

Court Rules

RAP 13.4 4, 9

A. IDENTITY OF PETITIONER AND RELIEF REQUESTED

Pursuant to RAP 13.4 Perry Soriano asks this Court to accept review of the opinion in *State v. Soriano*, 77725-4-I.

B. OPINION BELOW

The State charged Mr. Soriano with assault in the second degree, and Mr. Soriano raised self-defense. Because this Court has long recognized it is an element, Mr. Soriano requested a “to-convict” instruction which included an element that they jury find the force used by Mr. Soriano was unlawful. The court denied the request, and the jury convicted Mr. Soriano as charged.

The Court of Appeals affirmed that ruling.

C. ISSUE PRESENTED

The right to act in self-defense is protected by due process, by statute, and by article I, section 24. The law of self-defense must be made manifestly clear to the average juror. Here, the court refused to include in the “to-convict” instruction for assault in the second degree an element that the State must prove unlawful force beyond a reasonable doubt.

D. STATEMENT OF THE CASE

Todd Doyle and his wife, Jacqueline Robinson, parked a 20-foot long moving truck with a trailer attached in front of Thelma Spillers's home. RP 196-97. Because the neighborhood frequently has parking disputes, Ms. Spillers's son, Perry Spillers, Jr., asked Mr. Doyle not to leave the large truck in front of their home, but he refused. RP 234; 255. The couple then went to visit a friend's home nearby. RP 210. Meanwhile, Ms. Spillers told her son she wanted the truck moved, so he went to fetch his father, Perry Soriano. RP 234.

When Mr. Soriano arrived, he and his son went to find Mr. Doyle. RP 256. Mr. Soriano knocked on the door and was invited in. *Id.* Mr. Soriano admitted he began "hollering at Todd" to move the truck, while Mr. Doyle responded, "Fuck you, you don't even live there." *Id.*

Mr. Soriano walked outside where the argument continued. *Id.* When he turned back around, Mr. Doyle "ran into [him] with his chest" and continued yelling and cursing at Mr. Soriano. *Id.* Mr. Soriano put his hand on Mr. Doyle's shoulder and told, "Man, you're not even worth it," and turned around to

walk away. Id. As he did so, Mr. Soriano heard his son shout, “Watch your back.” Id. He turned back around to see the Mr. Doyle “reaching behind his back, kind of like lunging towards [him],” so Mr. Soriano hit him once with his right hand. RP 256, 258. An uninvolved witness, Andrew Boots, confirmed Mr. Doyle had a reputation for carrying a knife, and on the day of the incident, saw Mr. Doyle reaching for something and heard Perry Spillers, Jr. warn his father. RP 300, 302.

Mr. Soriano did not intend to injure Mr. Doyle, striking him only once with his right hand when he is actually left-handed. RP 269. He believed Mr. Doyle had been reaching for a weapon. RP 258. He checked to see if Mr. Doyle was okay, and believing the injuries were not serious, he went home. RP 269. He later returned calls to the responding officers and provided an oral statement. RP 275.

Mr. Doyle claimed he remained calm throughout the incident and did not carry a knife. RP 211, 213. He did, however, admit he has a collection of knives large enough that he could not remember how many he owned. RP 215.

At trial, Mr. Soriano requested a “to-convict” instruction

for assault in the second degree which included the element that the State must prove Mr. Soriano's use of force was unlawful. CP 52. The court declined to give the requested instruction, stating it was not "inclined to add an additional element which the State must prove." RP 316. The jury convicted Mr. Soriano of assault in the second degree. CP 26.

E. ARGUMENT

The trial court's refusal to include the element of unlawful force in the "to convict" instruction presents a significant constitutional question.

"Elements' are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime." *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008). "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." *State v. McCullum*, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983). With respect to a "to convict" instruction, "it is the duty of the court to instruct the jury as to each and every essential element of the offense charged." *State v. Emmanuel*, 42 Wn.2d 799,

820-21, 259 P.2d 845 (1953); *accord*, *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Because it “serves as a ‘yardstick’ by which the jury measure the evidence” each of the elements must be included in the “to convict” instruction. *Smith*, 131 Wn.2d at 263.

Mr. Soriano requested the court include in the “to convict” instruction that the state must prove beyond a “That the force used was not lawful, and that the assault was not in defense of the defendant.” CP 52. The court refused, reasoning that “the Court is not inclined to add an additional element which the State must prove.” RP 316.

The proposed language is an accurate statement of the elements of the offense. In fact, in order “to convict” Mr. Soriano of the jury was required to find beyond a reasonable doubt that Mr. Soriano’s use of force was unlawful. *McCullum*, 98 Wn.2d at 493–94.

The “to convict” instruction purports to set forth all the elements which the State must prove, yet it does not. The jury has the right to consider the “to convict” instruction as a complete statement of the law. *Smith*, 131 Wn.2d at 258. By omitting the element of unlawful force, the “to convict” was not a

complete statement of the law. Instead, the instruction permitted the jury to convict Mr. Soriano without explicitly finding the force was unlawful.

The opinion of the Court of Appeals is contrary to numerous opinions of this Court including *Smith, Emmanuel*, and *McCullum*. This Court should grant review under RAP 13.4.

F. CONCLUSION

For the foregoing reasons, and those cited Appellant's opening brief, reasons, reversal is required.

Dated this 12th day of July 2019.



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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 PERRY LEE SORIANO)
 a/k/a PERRY LEE SPILLERS,)
)
 Appellant.)
 _____)

No. 77725-4-1

UNPUBLISHED OPINION

FILED: June 17, 2019

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VERELLEN, J. — Perry Soriano challenges the judgment and sentence imposed following his jury conviction for second degree assault. He contends that he was denied his right to a fair trial when the trial court refused to give a to-convict instruction that required the State to prove the absence of self-defense. We affirm.

FACTS

On August 21, 2016, Todd Doyle and his wife, Jacqueline Robinson, were in the process of moving out of their house in White Center. They had a 20-foot moving truck, behind which they were towing a Dodge Caravan. Doyle and Robinson decided to visit a neighbor, Russ Van Holtren, before driving the truck to their new property. Because there was no room to park the truck in front of Van

Holtren's house, Doyle parked the truck two blocks away, next door to Thelma Spillers' house.

Approximately 30 minutes later, Doyle heard someone yelling, "Move your truck."¹ Doyle came out of Van Holtren's house and saw Perry Soriano in Van Holtren's driveway. Soriano put his hand on Doyle's shoulder and continued to yell at Doyle to move his truck. Doyle told Soriano to remove his hand and that he would move the truck. Doyle turned to walk towards the truck, and Soriano punched Doyle in the face, fracturing his cheek, nose, and eye socket. Doyle's injuries required multiple surgeries.

Soriano testified that Doyle parked his truck directly in front of Spillers' house, blocking her driveway. Soriano, who is Spillers' ex-husband, went to Van Holtren's house with his son to ask Doyle to move the truck. According to Soriano, Doyle responded, "Fuck you, you don't even live there."² Doyle then bumped Soriano with his chest. Soriano turned to walk away and heard his son shout "Watch your back."³ Soriano saw Doyle reach behind his back for something. Believing that Doyle was armed, Soriano "smacked him."⁴

The State charged Soriano with second degree assault, and the case proceeded to trial. The trial court instructed the jury on the lesser included offense

¹ Report of Proceedings (RP) (Oct. 17, 2017) at 198.

² Id. at 256.

³ Id. at 267.

⁴ Id. at 256.

of fourth degree assault. At Soriano's request, the trial court instructed the jury on self-defense as follows:

It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used 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 is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.^[5]

The State proposed a to-convict instruction for second degree assault based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 35.13 (4th ed.):

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 21, 2016, the defendant intentionally assaulted Todd Doyle;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Todd Doyle; and

⁵ Clerk's Papers (CP) at 41.

(3) That this act occurred in the [s]tate of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.^[6]

Soriano sought to add an element to the to-convict instruction requiring the State to prove the absence of self-defense, that “the force used was not lawful, and that the assault was not in defense of the defendant.”⁷ The trial court chose to give the pattern instruction offered by the State:

I’m going to use the instruction proffered by the State. I’m going to reject the one proffered by the defense. I’m satisfied that, absent a directive to do so, the court is not inclined to add an additional element which the State must prove. More importantly, they simply have to consider the defense of self-defense in this case.^[8]

A jury convicted Soriano as charged. Soriano appeals.

DISCUSSION

Soriano argues that, because the absence of self-defense is an essential element that the State must prove beyond a reasonable doubt, it must be included in the to-convict instruction. He contends that the instructions relieved the State of its burden of proof and allowed the jury to convict him without finding that the State proved unlawful force beyond a reasonable doubt. But the Washington Supreme

⁶ Id. at 36.

⁷ Id. at 52.

⁸ RP (Oct. 19, 2017) at 316.

Court has rejected this argument in State v. Hoffman, holding that a to-convict instruction need not contain the absence of self-defense so long as a separate instruction informs the jury of the State's burden of proof.⁹

Here, as in Hoffman, the separate instruction on self-defense informed the jury of the State's burden to prove the absence of self-defense beyond a reasonable doubt. The jury was instructed to consider the instructions as a whole. The trial court did not err in refusing to give Soriano's proposed instruction.

Soriano argues that the instructions as a whole were unclear as to the State's burden because the definition of assault used for the second degree assault charge provided that the assault must be done with "unlawful force,"¹⁰ but the definition of assault used for the lesser-included offense of fourth degree assault did not.¹¹ Soriano contends that this confused the jury as to whether they had to determine if Soriano's use of force was unlawful for the lesser included offense. But both the prosecutor and Soriano's attorney explained to the jury that self-defense applied to both second degree and fourth degree assault, and that

⁹ 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

¹⁰ "An assault is an intentional striking of another person, with unlawful force, that is harmful or offensive." CP at 37 (based on WPIC 35.50).

¹¹ "An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person." CP at 46 (based on WPIC 35.50).

the State had the burden to disprove self-defense in both cases.¹² The jury instructions, read as a whole, did not relieve the State of its burden.

Affirmed.

WE CONCUR:

Andrus, J.

[Signature]

[Signature]

¹² The trial court also instructed the jury, in response to a jury question, that “[t]he jury instructions involving self-defense also apply to Assault in the Fourth Degree.” RP (Oct. 19, 2017) at 358.

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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 of the document to which this declaration is affixed/attached, was filed in the **Washington State Supreme Court** under **Case No. 97432-2**, 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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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 9, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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