SUPREME COURT NO. 89703-6
COURT OF APPEALS NO. 68574-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH FRANKLIN MILLER,

Respondent.

PETITION FOR REVIEW

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FILED
DEC 24 2013
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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A. IDENTITY OF PETITIONER

The State of Washington, respondent below, hereby seeks review of the decision of the Court of Appeals in State v. Miller, No. 68574-1-I, decided October 28, 2013. Appendix A.

B. ISSUE PRESENTED FOR REVIEW

Where a "to convict" jury instruction accurately defines the crime of Assault in the Second Degree, and the "reckless" definition instruction accurately defines that ***term***, as codified by statute, is it a constitutional due process violation if the "reckless" definition instruction does not include additional language not required by the constitution or statute?

C. THE FACTS AND COURT OF APPEALS DECISION

The substantive facts of the trial are adequately set forth in the Court of Appeals opinion. The facts necessary for consideration of the issue raised herein are as follows:

In pertinent part, and as the defendant was charged and convicted, the second-degree assault statute reads:

> A person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

RCW 9A.36.021(1)(a); CP 1.

Consistent with the statute, the jury was instructed that:

> A person commits the crime of assault in the second degree when he ***intentionally assaults another*** and thereby ***recklessly inflicts substantial bodily harm.***

CP 61 (emphasis added); RCW 9A.36.020(1)(a).[1]

In pertinent part, the "to convict" instruction provided as follows:

> 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 the 6th day of November, 2009, the defendant ***intentionally assaulted*** Randall Rasar;
>
> (2) That the defendant thereby ***recklessly inflicted substantial bodily harm*** on Randall Rasar;
>
> (3) That the defendant was not acting in self-defense; and
>
> (4) That the act occurred in the State of Washington.

CP 62.[2]

As is appropriate, the jury was also provided with the statutory definitions of the terms (not elements) "assault," "intent," "substantial bodily harm," "knowledge," "lawful force," and "recklessness." CP 63-68. Consistent with the statute, the term "recklessness" was defined as follows:

---

[1] This instruction is consistent with WPIC 35.10.

[2] This instruction is consistent with WPIC 35.13 with the exception that at the request of the defendant, element 3, pertaining to his self-defense claim, was added.

> A person is reckless or acts recklessly when he or she knows of and disregards ***a substantial risk that a wrongful act or result may occur*** and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 65 (emphasis added); RCW 9A.08.010(1)(c).

The Court of Appeals reversed the defendant's second-degree assault conviction, holding that instructing the jury in the manner as outlined above was a violation of due process in that the instructions relieved the State of the burden of proving every element of the crime. The Court held that in providing the definition of the term "recklessly," the court must go beyond the statutory definition of the term and add terminology that defines the entire element of the crime (recklessly inflicts substantial bodily harm), not just the term "recklessly." Specifically, the Court held that the term "substantial bodily harm," must be added to the definition of the term "recklessly," so that it reads, in pertinent part: "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that substantial bodily harm may occur…"

D. **REVIEW SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DECISION IS CONTRARY TO EXISTING LAW AND THE DECISION WILL RESULT IN NUMEROUS VALID CONVICTIONS BEING REVERSED**

Respondent respectfully submits that the holding of the Court of Appeals, that the instructions given here, that comport with the applicable statutes, violates due process. It should be noted that the State does not argue that modifying the "reckless" definition is wrong or that in some cases a modified definition may not add clarity to the instructions as a whole. However, per this Court's prior decisions, in order to find a violation of due process, the instructions as given must relieve the State of proving an element of the crime or prevent the parties from arguing their theory of the case – the instructions here do not violate this longstanding principle.

A petition for review will be accepted by this Court if the decision of the court of appeals conflicts with a decision of this Court or another decision of the court of appeals, or if the decision raises a significant question of law under the Constitution of the State of Washington or of the United States, or if the petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b). The issue here falls directly within this rule.

Jury instructions satisfy due process 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. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). This Court will "review the instructions in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); Mills, 154 Wn.2d at 7. Jury instructions are interpreted and read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809 P.2d 116 (1990).

This Court has long held that trial courts not just "may," but "should," use the statutory language when instructing a jury in regards to the law of the case. State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968); State v. Bixby, 27 Wn.2d 144, 177 P.2d 689 (1947). That is exactly what was done here. The Court of Appeals' error in finding that these instructions violated due process can be found in a misapplication of a correct holding from one of this Court's cases, State v. Gamble.[3] This misapplication exists in a few related cases.

Gamble was convicted of second-degree felony murder with the predicate felony being assault in the second degree. The court of appeals reversed Gamble's conviction with an order that the trial court was to enter a judgment on what the court assumed was a lesser included offense

[3] 154 Wn.2d 457, 114 P.3d 646 (2005).

of first-degree manslaughter. This Court was asked to determine whether manslaughter is a lesser included offense of felony murder and thus whether the court of appeals' remedy was correct when it vacated the greater offense. This Court held that manslaughter is not a lesser included offense of felony murder because for manslaughter, there must be a direct connection between the recklessness and the death, but for felony murder based on assault, the recklessness relates to causing substantial bodily harm . 154 Wn.2d at 460. In other words, as this Court explained, in a manslaughter case, a person acts recklessly when he knows of and disregards a substantial risk that "death" may occur – as opposed to disregarding a substantial risk that "substantial bodily harm" may occur in the context of second-degree assault – the predicate felony for felony murder. Id. at 467-68. This Court's decision in Gamble said nothing about jury instructions, the propriety of any particular "to convict" instruction, or the propriety of any particular jury instruction defining the term "recklessness" -- in a manslaughter case or any other case.

1. STATE V. PETERS,[4] THE FIRST CASE TO APPLY GAMBLE

Peters was convicted of first-degree manslaughter. On appeal, Peters claimed that erroneous jury instructions violated his due process

[4] 163 Wn. App. 836, 261 P.3d 199 (2011).

rights by lowering the State's burden of proving the crime charged. Peters, 163 Wn. App. at 847. As the court noted, it is a violation of due process to "instruct the jury in a manner that would relieve the State of the burden of proof." Id. (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

A person is guilty of manslaughter in the first degree when "[h]e or she recklessly causes the death of another person." RCW 9A.32.060(1)(a). In a "to convict" instruction that did not track the language of the manslaughter statute, the jury was instructed that to find the defendant guilty, it had to find:

> (1) That on or about the 16th day of November, 2008, the defendant ***engaged in reckless conduct***;
>
> (2) That [S.P.] died as a result of defendant's ***reckless acts***; and
>
> (3) That any of these acts occurred in the State of Washington.

Peters, at 845 (emphasis added).

Consistent with the statute, the term "reckless" was defined as follows:

> A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a ***wrongful act*** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Id. (emphasis in original).

The court of appeals reversed Peters' conviction, holding that the jury was not properly instructed on the law. Specifically, no instruction, the court said, informed the jury that it had to find Peters "recklessly caused the death" of S.P. Id.

While the court stated that it was the "reckless" definition instruction that relieved the State of the burden of proving Peters knew of and disregarded a substantial risk that "death" may occur, in point of fact, it was the jury instructions as a whole that relieved the State of that burden —if not solely the "to convict" instruction. See State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997) ("Jury instructions must be read as a whole, and each instruction must be read in the context of all other instructions given"); State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (The "'to convict' jury instruction must contain all the elements of the crime because it serves as a yardstick by which the jury measures the evidence to determine guilt or innocence"). In other words, had the "to convict" instruction been written differently, for example, tracking the language of the statute, the "to convict" instruction would have informed the jury that Peters needed to have recklessly caused the death of the victim, not just that he recklessly did some act and death resulted. Critical however, is the point that either way, if the "to convict" instruction had been modified, or the "reckless" definition instruction modified, the State

would not have been relieved of its burden of proving an element of the crime.

2. ALONG CAME STATE V. HARRIS,[5] A MISAPPLICATION OF PETERS

Harris was convicted of first-degree assault of a child, a crime that requires that the perpetrator "[i]ntentionally assaults the child" and "[r]ecklessly inflicts great bodily harm" on the child. RCW 9A.36.120(1)(b). The jury was instructed that to find Harris guilty, it had to find:

> (1) That on or about the 25th day of August 2007, the defendant ***intentionally assaulted [TH] and recklessly inflicted great bodily harm***;
>
> (2) That the defendant was eighteen years of age or older and [TH] was under the age of thirteen; and
>
> (3) That the acts occurred in the State of Washington.

Harris, 164 Wn. App. at 384-85 (emphasis added). Just as in Peters, the jury was provided with the standard instruction defining reckless as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a **wrongful act** may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Id. at 384 (emphasis added).

[5] 164 Wn. App. 377, 263 P.3d 1276 (2011).

Harris argued that the trial court should have substituted the term "great bodily harm" for the term "wrong act" in the instruction defining the term "reckless." Division Two agreed, stating "[w]e agree with Division One's analysis [in Peters] and hold that the jury instruction here relieved the State of its burden to prove that Harris acted with disregard that a substantial risk of great bodily harm would result when he shook TH." Harris, at 387. The problem with this conclusion is that the rationale of Peters did not apply to the situation that existed in Harris.

In Peters, the "to convict" instruction for manslaughter did not inform the jury that it had to find Peters recklessly caused the death of the victim. Rather, the "to convict" instruction simply used the terms "conduct" and "acts." Peters, at 845. Thus, with neither the "to convict" instruction, nor the "reckless" definition instruction informing the jury what wrongful act or result the defendant had to have disregarded, the instructions did not properly state the law.

In contrast, in Harris, the "to convict" instruction specifically informed the jury that it had to find that the defendant recklessly inflicted a specific defined level of harm. The jury was required to find that Harris "recklessly inflicted great bodily harm." Harris, at 384. This is what the statute requires. Thus, the basic premise underlying Peters was missing in Harris -- that there was a violation of due process because the State was

relieved of proving an element of the crime. Without this due process violation, while one could argue that the definition of reckless instruction would be clearer if it were modified, there is no basis to reverse the conviction and no requirement that the definitional instruction be revised.

The court in Harris never discussed whether or not the "to convict" instruction properly stated the law. Nor did the court address the distinction between the "to convict" instruction in Peters, and the "to convict" instruction in Harris. Because the "to convict" instruction in Harris specifically informed the jury of the wrongful act or result it was required to find, there was no due process violation and the application of Peters was misguided.

3. THE COURT IN STATE V. JOHNSON,[6] IMPROPERLY ADOPTED THE MISGUIDED CONCLUSION FROM HARRIS

Among other charges not relevant here, Johnson was charged with second-degree assault. Under the statute, a person commits second-degree assault when the person "intentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). The

[6] 172 Wn. App. 112, 297 P.3d 710 (2012), rev. granted, 178 Wn.2d 1001 (2013). Although this Court accepted review of this issue in the Johnson case, the Johnson case includes the nuance that Johnson proposed the allegedly offending instruction. Thus, Johnson raised an ineffective assistance of counsel claim, a claim that was rejected by the court of appeals. With this added nuance, this Court could decide the Johnson case without ever reaching the substance of this issue.

"to convict" instruction provided that to find Johnson guilty, the jury had to find the following:

> (1) That during the time intervening between May 4, 2009 and May 6, 2009, the defendant ***intentionally assaulted*** [J.J.];
>
> (2) That the defendant thereby ***recklessly inflicted substantial bodily harm*** on [J.J.]; and
>
> (3) That the acts occurred in the State of Washington.

Johnson, 289 P.3d at 670. Just as in Peters and Harris, the jury was given the standard instruction defining the term "reckless." Id.

The court of appeals adopted the Harris court's application of Peters, and found that the reckless definition instruction given was erroneous. Id. at 671. In doing so, the court dismissed out of hand the State's argument that the "to convict" instruction properly stated the law, stating only that the "court's holding in Peters was focused on the definition of recklessness, not the 'to convict' instruction itself." Id. at 672. However, as in Harris, focusing solely on the definition instruction, without looking at the "to convict" instruction, or the instructions as read as a whole, ignores the very premise of the claim, that there is a due process violation that relieved the State of proving an element of the crime. It also conflicts with this Court's rulings that it is the "to convict" instruction that must contain the essential elements of the crime, that jury instructions must be read as a whole, and that instructions

should mirror the statutory language.

The definition of the term "reckless" given to the jury is word-for-word the definition as supplied by the legislature. On its face, it cannot be said to be erroneous—it is the law. The only way the instruction could be considered erroneous would be in the context of the case it is given. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005) (Jury 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). But just as in Harris, the "to convict" instruction in Johnson correctly stated the law, informing the jury that Johnson had to have "recklessly inflicted substantial bodily harm." The "to convict" instruction did not relieve the State of the burden of proving an element of the crime, and thus the adoption of Harris' application of Peters was erroneous.

4. APPLICATION TO MILLER'S CASE AND THE COURT OF APPEALS' DECISION.

By statute "a person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). Here, the jury instruction defining the crime tracked the statutory language:

A person commits the crime of assault in the second degree

> when he ***intentionally assaults another and thereby recklessly inflicts substantial bodily harm.***

CP 61 (emphasis added). The "to convict" instruction also tracked the statutory language and required that the jury find the following statutory elements:

> (1) That on or about the 6th day of November, 2009, the defendant ***intentionally assaulted*** Randall Rasar;
>
> (2) That the defendant thereby ***recklessly inflicted substantial bodily harm*** on Randall Rasar;
>
> (3) That the defendant was not acting in self-defense; and
>
> (4) That the act occurred in the State of Washington.

CP 62 (emphasis added). Separate instructions defined the ***terms***[7] "assault," "substantial bodily harm," "reckless," "intent," "knowledge," and "lawful force." CP 63-68. The reckless definition was consistent with the statutory language (RCW 9A.08.010(1)(c)) and the instruction given in Peters, Harris, and Johnson. CP 65.

The court of appeals merely adopted the holding of Harris and Johnson. But like Harris and Johnson, the court never explained how it concluded that a due process violation existed where the "to convict" instruction, and the crime definition instruction (CP 61), accurately stated

---

[7] It may be that the court erred in mistakenly believing that the "reckless" definition instruction was defining the entire element, "recklessly inflicts substantial bodily harm." It was not. The instruction, like the other various definitional instructions, defined a single term.

the law, and in no uncertain terms, informed the jury that it was required to find that the defendant "recklessly inflicted substantial bodily harm" on Randall Rasar in order to find the defendant guilty.[8]

Two instructions properly informed the jury as to the "elements" of the crime, the two that are supposed to serve this purpose – the crime definition instruction and the "to convict" instruction. The reckless definition instruction accurately defined that "term." The failure to provide a modified reckless definition instruction did not relieve the State of proving the properly defined elements of the crime.

A myriad of various crimes include the *mens rea* of recklessness. The reckless definition instruction given in this case has been used for over thirty years. See State v. Smith, 31 Wn. App. 226, 229, 640 P.2d 25 (1982). The court of appeals' decision in this case conflicts with the various cases cited above regarding how jury instructions are read and interpreted and when a due process violation occurs. Further, the ruling of the court places innumerable criminal cases in jeopardy, cases in which the juries were properly instructed. This Court should accept review to correct the errors being perpetuated by a misapplication of this Court's ruling in Gamble.

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[8] The definition of the crime instruction also clearly informed the jury on the elements of the crime. CP 61.

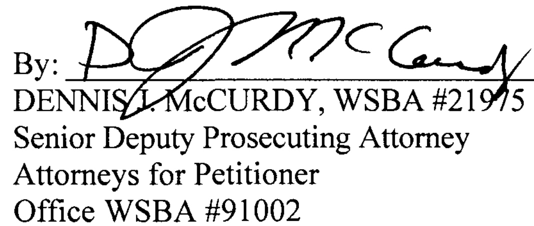
E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to grant review of the decision in Miller.

DATED this 6 day of November, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



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Appendix A

H
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NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.
STATE of Washington, Respondent,
v.
Kenneth Franklin **MILLER**, Appellant.

No. 68574–1–I.
Oct. 28, 2013.

Appeal from King County Superior Court; Honorable Mariane Spearman.
Prosecuting Atty King County, King Co Pros/App Unit Supervisor, Dennis John **McCurdy**, King County Prosecutor's Office, Seattle, WA, for Respondent.

Lenell Rae Nussbaum, Attorney at Law, Seattle, WA, for for Appellant.

UNPUBLISHED OPINION
SCHINDLER, J.

*1 Kenneth Franklin **Miller** appeals his conviction of assault in the second degree. **Miller** asserts the instructions misstate the law and relieve the State of its burden of proof by incorrectly stating the jury need only find that he disregarded a "wrongful act" rather than "substantial bodily harm." We reverse and remand for a new trial.

FACTS

United Parcel Service (UPS) driver Randall Rasar delivered packages to Kenneth Franklin **Miller's** house in Bellevue approximately once every other month for 10 to 15 years.

On November 6, 2009, UPS notified **Miller** that he needed to sign for the delivery scheduled for that evening. Rasar parked the UPS truck at the end of the sloping driveway leading to **Miller's** house at approximately 6:00 p.m. and walked up the driveway to the front porch. Rasar rang the doorbell "several times" and then "pound[ed]" on the door with his flashlight.

Miller opened the door and asked Rasar why he was "pounding" on the door. Rasar told **Miller** he was wearing earplugs and he thought the doorbell was disconnected. **Miller** signed for the package. After Rasar walked down the stairs of the front porch, he turned around and told **Miller**, "[E]njoy your package jerk."

Miller walked down the steps after Rasar calling, "[H]ey," and caught up with Rasar "in the middle of the driveway." **Miller** said that Rasar "shouted get away from me. Leave me alone," and then struck **Miller** in the face with his flashlight. **Miller** said that after Rasar hit him, he put his hand on Rasar's "shoulder and started pushing [him] forward" toward the UPS truck so Rasar "couldn't turn" and hit him again. While going down the driveway, **Miller** said that they picked up speed. When they reached the bottom of the driveway, **Miller** pushed Rasar "off to my side and lifted my arm because I ran into the side of the truck." **Miller** fell to the ground, got up, and walked back to the house.

According to Rasar, he rang the doorbell only once and "tapped" on **Miller's** door with his flashlight. Rasar admitted that as he was leaving, he muttered, "What a jerk, under [his] breath." Rasar said that he was only a few feet from the truck when **Miller** grabbed him from behind, shoved him into the side of the truck, and began punching him in the back of the head and body. Rasar suffered a broken nose and had abrasions on his face, arms, knees, and hip.

The State charged **Miller** with assault in the second degree of Rasar. The State alleged that

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Miller intentionally assaulted and recklessly inflicted substantial bodily harm. **Miller** asserted he used lawful force to defend himself, and the accidental injuries to Rasar were caused when he slammed into the truck.

The State called a number of witnesses, including Rasar, to testify at trial. **Miller's** spouse Tania **Miller** testified that while she was in the back bedroom finishing a school project, she heard "a lot of loud knocking and ringing at the door.... Probably about 4 or 5 times." Tania said it then "became quiet and I heard voices so I assumed [**Miller**] had answered the door." Tania saw **Miller** about 10 minutes later when she took a break. Tania said his face was red and he was sitting on a footstool in the kitchen "looking, just shocked, bewildered, just dazed."

***2** Tania asked **Miller** what happened "[b]ecause of all the noise." **Miller** told Tania that

> it was the UPS man which made no sense to me and so I started saying why would the UPS man make all that noise. You know, what's wrong, you know? I could just, I knew something was wrong. He just was being so quiet and just not himself. And so I kept pressing him and finally he told me that the UPS guy had taken a swing at him with a flashlight and not to worry, he was fine. Everything was fine. Of course I was completely worried. I asked if he was okay. He said I'm fine. I managed to get the guy away from me and out in the driveway. Everything's fine. You need to finish your project. We can talk about this later. I said we need to call someone or do we need to do something. He said we will, just please, you must finish. You're almost finished. We can't mess up your graduation. Just finish. It's half an hour I'll be finished. I said I'll be finished in half an hour and he said that's great. And we'll take care of this then.

Miller denied hitting Rasar. **Miller** testified that he pushed Rasar down the driveway after Rasar hit him to prevent Rasar from hitting him again. Dr. Gary Kato testified that **Miller** had a number of contusions and bruises on his "right cheek, left forearm, [and] right elbow."

The court instructed the jury on self defense but rejected a number of the other instructions proposed by the defense, including an instruction defining the element of "reckless" to mean acting "with the intent to cause substantial bodily harm." [FN1]

> FN1. The defense instruction defining "reckless" states:
>
> A person is reckless or acts recklessly when he knows of and disregards a substantial risk that substantial bodily injury may occur and disregarding this risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> A person also recklessly causes substantial bodily harm if he acted with the intent to cause substantial bodily harm.

The jury convicted **Miller** of assault in the second degree. **Miller** appeals.

ANALYSIS

Miller asserts the jury instructions misstate the law by incorrectly defining "reckless," relieving the State of its burden of proving an essential element of assault in the second degree and depriving him the opportunity to argue his theory of the case.

We review challenged jury instructions de novo. *State v. Levy,* 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). As a general rule, "jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *State v. Teal,* 152 Wn.2d 333, 339, 96 P.3d 974 (2004). When a court is instructing a jury, it "should use the statute's language 'where the law governing the case is expressed in the statute.' " *State v. Harris,* 164 Wn.App. 377, 387, 263 P.3d 1276 (2011)

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(quoting *State v. Hardwick,* 74 Wn.2d 828, 830, 447 P.2d 80 (1968)).

Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. *State v. Peters,* 163 Wn.App. 836, 847, 261 P.3d 199 (2011); *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Schulze,* 116 Wn.2d 154, 167–68, 804 P.2d 566 (1991). It is reversible error "to instruct the jury in a manner" that would relieve the State of this burden. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

***3** RCW 9A.36.021 defines the crime of assault in the second degree, in pertinent

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm.[FN2]

FN2. RCW 9A.08.010(1)(c) defines "reckless" as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Here, the to-convict jury instruction correctly states the State must prove beyond a reasonable doubt that **Miller** recklessly inflicted substantial bodily harm on Rasar. The to-convict jury instruction states:

> 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 the 6 th day of November, 2009, the defendant intentionally assaulted Randall Rasar;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Randall Rasar;
>
> (3) That the defendant was not acting in self-defense; and
>
> (4) That the acts occurred in the State 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.

But the jury instruction defining "reckless" states:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.[FN3]

FN3. **Miller** objected to the court's instructions "to the extent these instructions are not the same as what I offered."

Miller contends the jury instruction defining "reckless" is misleading and conflicts with the statutory language. The instruction defines "reckless" to mean **Miller** acted with disregard of a substantial risk that a "wrongful act or result" may occur,

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rather than the specific statutory language that requires the State to prove he disregarded a substantial risk that "substantial bodily harm" may occur. RCW 9A.36.021(1)(a).

In *Gamble,* the supreme court addressed whether manslaughter in the first degree is a lesser included offense of felony murder based on assault as the predicate offense. *State v. Gamble,* 154 Wn.2d 457, 459, 114 P.3d 646 (2005). The court held that while the wrongful act to prove manslaughter required showing that the defendant knew and disregarded a substantial risk of homicide, where the predicate offense was assault, the State need only prove disregard that a substantial risk of substantial bodily harm may occur. *Gamble,* 154 Wn.2d at 467–68.

> [T]o achieve a felony murder conviction here, the State was required to prove only that Gamble acted intentionally and "disregard[ed] a substantial risk that [*substantial bodily harm*] may occur." Significantly, the risk contemplated per the assault statute is of "substantial bodily harm," not a homicide as required by the manslaughter statute. As such, first degree manslaughter requires proof of an element that does not exist in the second degree felony murder charge the State brought against Gamble.

***4** *Gamble,* 154 Wn.2d at 467–68.[FN4]

FN4. (Citation omitted) (emphasis in original) (alteration in original).

After the decision in *Gamble,* the Washington Supreme Court Committee on Jury Instructions revised the definition of "recklessness." The amended pattern jury instruction includes brackets around the term "wrongful act" and directs the court to state a more particular act, if applicable. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.03, at Supp. 31 (3d ed. Supp.2011) (WPIC). WPIC 10.03 provides, in pertinent part:

> RECKLESSNESS–DEFINITION [Replaced]
> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a [wrongful act] [*fill in more particular description of act, if applicable*] may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> [When recklessness [as to a particular [result] [fact]]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

The WPIC 10.03 Note on Use states, in pertinent part: "Use bracketed material as applicable. For a discussion of the first paragraph's bracketed alternatives relating to a wrongful act, see the Comment below." The Committee explained, in pertinent part:

> The [*Gamble*] court gave no indication as to whether more particularized standards would also apply to offenses other than manslaughter. The ... instruction above is drafted in a manner that allows practitioners to more fully consider how *Gamble* applies to other offenses. If the instruction's blank line is used, care must be taken to avoid commenting on the evidence.

WPIC 10.03 Comment.

In *Harris,* Division Two of this court applied the reasoning in *Gamble* in reversing the conviction in an assault case because the jury instruction defining "reckless" misstated the law. *Harris,* 164 Wn.App. at 385–88.

The to-convict instruction in *Harris* correctly stated the jury must find the State proved beyond a reasonable doubt that the defendant "intentionally assaulted [the victim] and recklessly inflicted great bodily harm" to convict him of first degree assault of a child. *Harris,* 164 Wn.App. at 383–84. [FN5] But the instruction defining "reckless" referred to

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"a wrongful act" rather than "great bodily harm." *Harris,* 164 Wn.App. at 384.[FN6]

FN5. (Internal quotation marks omitted.)

FN6. (Internal quotation marks omitted.)

The court held the jury instructions relieved the State of its burden to prove that Harris "knew and recklessly disregarded that great bodily harm could result." *Harris,* 164 Wn.App. at 388. The court concluded the court erroneously instructed the jury that a person acts recklessly when they know of and disregard a substantial risk that a wrongful act may occur. *Harris,* 164 Wn.App. at 385.

> In instructing a jury, a trial court should use the statute's language "where the law governing the case is expressed in the statute."... *Hardwick,* 74 Wn.2d [at] 830.... Here, the law governing Harris's child assault charge is expressed in RCW 9A.36.120(1)(b)(i), the statute defining first degree child assault. And a jury instruction defining RCW 9A.36.120(1)(b)(i)'s recklessness requirement must account for the specific risk contemplated under that statute, here great bodily harm, and not some undefined wrongful act. *See Gamble,* 154 Wn.2d at 468 ("the risk contemplated per the assault statute is of 'substantial bodily harm' ").

***5** *Harris,* 164 Wn.App. at 387–88.

In *State v. Johnson,* 172 Wn.App. 112, 297 P.3d 710(2012), we agreed with the decision in *Harris* and the principle that in defining "reckless," the trial court should have used the specific statutory language for assault in the second degree of "substantial bodily harm" rather than "wrongful act." *Johnson,* 172 Wn.App. at 131–32.[FN7]

FN7. The to-convict instruction and instruction defining "reckless" in *Johnson* are nearly identical to those here. The only notable difference is that in *Johnson,* the instruction defining "reckless" (1) referred in the first paragraph only to a "wrongful act" instead of a "wrongful act or result;" and (2) began the second paragraph by stating, "When recklessness *as to a particular fact or result* is required to establish an element of a crime," instead of, "When recklessness is required to establish an element of a crime." *Johnson,* 172 Wn.App. at 129–30 (emphasis added) (internal quotation marks omitted).

Here, the State points to the to-convict instruction that correctly states the statutory harm to argue that *Harris* and *Johnson* are wrongly decided. We considered and rejected the same argument in *Harris.*

> [T]he definitional instruction that told the jury it need only find that Harris disregarded the risk of a "wrongful act," even read with the "to convict" instruction, did not properly state the law and these instructions relieved the State of its burden to show that Harris knew and recklessly disregarded that great bodily harm could result from his picking [the victim] up and shaking him.

Harris, 164 Wn.App. at 388; *see also Johnson,* 172 Wn.App. at 131–32.

We adhere to the decisions in *Harris* and *Johnson,* and conclude the jury instructions in this case misstate the law by defining "reckless" to mean **Miller** knew of and disregarded "a substantial risk that a wrongful act or result may occur," rather than "a substantial risk that substantial bodily harm may occur," lowering the burden of proof and depriving the defense from arguing its theory of the case.

An erroneous jury instruction that misstates the law is subject to a harmless error analysis. *State v. Thomas,* 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The State bears the burden of showing that the error is harmless beyond a reasonable doubt. *Delaware v. Van Arsdall,* 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); *State v. Guloy,* 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

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Inconsistent jury instructions resulting in a misstatement of the law are prejudicial. *State v. Wanrow,* 88 Wn.2d 221, 239, 559 P.2d 548 (1977). Buta misstatement of the law in a jury instruction is harmless if the element is supported by uncontroverted evidence. *State v. Brown,* 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing *Neder v. United States,* 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). "[W]e must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.' " *Brown,* 147 Wn.2d at 341 (quoting *Neder,* 527 U.S. at 19).

Miller contends the misstatement of law in the jury instructions is not harmless. The State does not address harmless error or engage in a harmless error analysis, relying solely on the argument that *Harris* and *Johnson* were wrongly decided. Nonetheless, we conclude the uncontroverted evidence does not establish that **Miller** knew of and disregarded a substantial risk that substantial bodily harm may occur. **Miller** testified that after Rasar hit him with the flashlight, **Miller** put his hand on Rasar's shoulder "so he couldn't turn again and started moving him down the driveway." Further, the State relied on and emphasized the importance of the erroneous jury instruction defining "reckless" during closing argument. The prosecutor argued, in pertinent part:

> ***6** A person acts reckless or recklessly when he knows of and disregards a substantial risk that a wrongful act or result may occur and disregards, and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. And that recklessness, when reckless is required to establish an element of a crime, the element is also established if a person acts intentionally, meaning that they intentionally pushed this person into the truck to cause his injury. Or knowingly as to that fact or result.
>
> Let's talk about this, because herein is a very important part of this case. [**Miller**] knew the slope of his driveway. He had been living hereHe was asked on his direct, he said he knows every space of his house. His wife said that he's remodeling his house. He knows the slope of his driveway. He walks up it every day. He has to park his cars. He has to, you know, probably set the emergency brake to make sure the cars, you know, probably try to figure out so the cars don't slide out of the driveway so they don't run into the neighbor's house. Right? He knows the slope of his driveway. It is a daily fact in his life.
>
> And he knows at some point that he's quote picking up speed as he's going down his driveway. And he knows that that truck is there. And he should know that running into the truck would cause injury. He actually ran into the truck. He bounced off that truck and fell onto the ground himself. And he's actually behind the person that struck first. He disregarded a substantial risk that a wrongful act or result would occur. This was a reckless act. For a person who's literally got a flashlight in their hands, in the dark on a crowded driveway, at night as he's going down with his back to him. This is an attack from the back in which [Rasar] is just literally trying to cautiously walk down the stairs and he's ran into his own truck.

Because we reverse and remand for trial, we briefly address the argument that the court erred in refusing to give the defense instruction on battery. Our courts do not require a "specific intent" instruction for a charge of assault based on battery. *State v. Hall,* 104 Wn.App. 56, 62, 14 P.3d 884 (2000). "Assault by battery does not require specific intent to inflict harm or cause apprehension; rather, battery requires intent to do the physical act constituting assault." *Hall,* 104 Wn.App. at 62. The court did not err in refusing to give the defense instruction on battery.[FN8]

FN8. We do not address **Miller's** argument regarding the court's refusal to give an instruction on defense of property. Whether **Miller** is entitled to a defense of property instruction will depend on the evidence presented at the trial. *See State v. Walden,*

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131 Wn.2d 469, 473–74, 932 P.2d 1237 (1997).

Miller also claims that because juries have the power to acquit even where a verdict is contrary to the evidence or the law, the court erred in instructing the jury that if it finds each element of assault in the second degree, "then it will be your duty to return a verdict of guilty." We disagree. In *State v. Meggyesy,* 90 Wn.App. 693, 958 P.2d 319 (1998), we squarely addressed and rejected this argument. *See Meggyesy,* 90 Wn.App. at 699–701 (a court does not err by instructing a jury that it has a duty to convict if it finds all of the elements of the crime proven beyond a reasonable doubt), *abrogated on other grounds by State v. Recuenco,* 154 Wn.2d 156, 110 P.3d 188 (2005).

*7 Reversed and remanded.

WE CONCUR: APPELWICK and BECKER, JJ.

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Ave, Suite 330, Seattle, WA 98121, containing a copy of the Petition for Review, in STATE V. MILLER, Cause No. 68574-1-I, in the Court of Appeals, Division I, for the State of Washington,

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

11-07-13

Name
Done in Seattle, Washington

Date