68574-1

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NO. 68574-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILLER,

Appellant.

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT / Reply

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A. STATEMENT OF CASE IN REPLY

Although Mr. Rasar testified emotionally that he suffered "part of a bone pinching through the skin" on his face, Resp. Br. at 5, in fact, the doctor testified, and the photographs demonstrated, no bone pierced his skin. RP 213-14; Exs. 1, 4, 6, 7, 16, 33.

The trial court included the sentence "that the defendant was not acting in self-defense" in its to-convict instruction after significant discussion of instructions. That was not the language the defense originally proposed. Resp. Br. at 11 n.2. Compare: CP 32 and CP 62. The defense took exception to the court's instruction No. 6 specifically for failing to include defense of property. RP 413-14.

Counsel apologizes for inadvertently misquoting a portion of instruction No. 9 in the Brief of Appellant ("App. Br.") at 19. The quotation marks should begin after "recklessness" and before "is". The correct language is quoted in full at App. Br. at 16, and accurately at 24. CP 65.

B. ARGUMENT IN REPLY

1. THE ERRONEOUS "RECKLESS" INSTRUCTION REQUIRES REVERSAL OF THIS CONVICTION.

The State concedes:

> The defendant is correct that 'substantial bodily harm' is the wrongful act or result that the perpetrator must know of, and disregard, i.e., he acts recklessly as to this result.

Resp. Br. at 15. Yet it argues the court need not convey this specific legal requirement to the jury.

a. State v. Johnson controls this case.

The State argues this issue "has no merit" and is "fatally flawed." Resp. Br. at 15. But the Courts consistently have applied it when the issue is raised. State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011) (manslaughter 1°; reckless instruction must specify risk of death); State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011) (assault of a child 1°; reckless instruction must specify risk of great bodily harm); and most recently in State v. Johnson, ___ Wn. App. ___, ___ P.3d ___ (No. 66624-0-I, 12/3/2012) (assault 2°;

reckless instruction must specify risk of substantial bodily harm).[1]

The State seeks to distinguish Peters from Harris, Resp. Br. at 17-20, but as Johnson demonstrates, its distinction is without a difference.

In Johnson, this Court applied Peters and Harris specifically to a case of assault in the second degree, as here, intentionally assaulting another and recklessly inflicting substantial bodily harm. The recklessness instruction in Johnson was precisely the same language as in this case. CP 65; Johnson, Slip Op. at 16.

> ... RCW 9A.36.021 required the State to prove that Johnson "[i]ntentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm." This language was reflected in the "to convict" jury instruction for this charge. There was no error and none claimed for this instruction.
>
> However, the jury instruction that stated the definition of "reckless" included the same general "wrongful act" language as in Peters and Harris. The definition should have used the more specific statutory language of "substantial bodily harm," not "wrongful

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[1] These cases all stem from State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005) (manslaughter's definition of recklessness requires proof of knowing of and disregarding specific risk of death).

act." The trial court erred in giving this instruction.

Johnson, Slip Op. at 19.[2]

The State claims Instructions 5 and 6, the crime's definition and the "to-convict" instruction, accurately tell the jury what risk Mr. Miller had to be aware of and disregard. Resp. Br. at 16. But those instructions describe a result -- that substantial bodily harm was inflicted -- not the essential mental state, i.e., knowing a risk of substantial bodily harm exists and disregarding that specific risk.

For the same reasons as stated in Johnson, this Court should reverse this conviction.

b. Instructions for a specific case must be more specific than statutes or WPICs.

The statute defining recklessness, RCW 9A.08.010(1)(c), includes general language: "knows of and disregards a substantial risk that a

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[2] The Johnson court further held the error was invited error, because defense counsel proposed the same language; and it was not deficient performance of counsel because Johnson's trial occurred before Peters and Harris were decided. Id., Slip Op. at 19-21. Mr. Miller's trial was after the opinions in Peters and Harris; and defense counsel did not propose this language. CP 29-49.

wrongful act may occur." Resp. Br. at 16. But a statute defines a general principle applicable to many different crimes. "The standard for clarity in a jury instruction is higher than for a statute." State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996); State v. Bland, 128 Wn. App. 511, 515, 116 P.3d 428 (2005).

The Washington Pattern Instructions-Criminal ("WPIC") also are designed in general terms, not for every possibility of every specific case.

> **Use of pattern jury instructions--In general.** The committee writes pattern jury instructions to assist the trial judge and the attorneys in preparing clear, accurate, and balanced jury instructions for individual criminal cases. *Pattern instructions are examples that apply to a general category of cases, rather than an exact blueprint for use in every individual case. They provide a neutral starting point for the preparation of instructions that are individually tailored for a particular case. Trial judges and attorneys must consider whether modifications are needed to fit the individual case.*

11 Wash. Prac., WPIC 0.10 (3d Ed.) (emphases added).

WPIC 10.03 provides:

> 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.
>
> *[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 Note on Use indicates the court must apply legal analysis to using the bracketed material: "Use bracketed material as applicable." See also 11 Wash. Prac., WPIC 0.10.

The Committee's Comment explicitly cautions about the holding in Gamble, supra:

> Accordingly, for a manslaughter case, the instruction above should be drafted using the word "death" rather than "wrongful act." The [Gamble] court gave no indication as to whether more particularized standards would also apply to offenses other than manslaughter. **The first paragraph of the instruction above is drafted in a manner that allows practitioners to more fully consider how Gamble applies to other offenses.**

11 Wash. Prac., WPIC 10.03, Comment (3d Ed.) (emphasis added).

As Johnson, Peters, and Harris demonstrate, Gamble required fuller consideration of the specific elements of the charge in this instruction.

c. This Court Rejected the State's Argument in Johnson.

The State makes the same argument here as it did in Johnson, supra. Resp. Br. at 20-24.

> The State argues that this court should reject Division Two's analysis and use this court's approach in State v. Holzknecht.[3] We decline this invitation.
>
> As the State notes, the defendant in Holzknecht did not challenge the use of the term "wrongful act" in the definition of "reckless." Instead, the issue was whether "[t]he instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm." Since the issue was different in this case, the conclusion that the instructions were "clear" cannot be extended here.

Johnson, Slip Op. at 19-20.

This same issue distinguishes the other cases on which the State relies: the appellants did not challenge, and the courts did not consider, the term "wrongful act" in the definition of "reckless." State v. McKague, 159 Wn. App. 489, 246 P.3d 558, affirmed, 172 Wn.2d 802, 262 P.3d 1225 (2011); State v. Keend, 140 Wn. App. 858, 863-

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[3] 157 Wn. App. 754, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029 (2011).

68, 166 P.3d 1268 (2007); State v. Nordgren, 167 Wn. App. 653, 273 P.2d 1056 (2012).

This Court should follow Johnson, Peters, and Harris, and reverse this conviction.

2. CRIMINAL ASSAULT BY ACTUAL BATTERY NONETHELESS REQUIRES SPECIFIC INTENT TO CAUSE INJURY OR OFFENSE, OR TO CAUSE FEAR OF INJURY OR OFFENSE.

The State cites many Court of Appeals opinions saying that assault by means of "actual battery" does not require the specific intent for criminal assault required by State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995), and State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996). The State argues an assault by battery requires only "criminal intent," i.e., the intent to commit the act that becomes the contact, so long as the contact is perceived as harmful or offensive. Resp. Br. at 26-27.

One need begin only with the basic concept that a criminal act is more serious than a tort. A tort is a wrong that permits one individual to recover damages from another to make the injured person whole. Washington law does not permit punitive damages for torts. A crime, in contrast, is something so bad that it is considered an

offense against the community, requiring a public response to punish the person who committed it. It permits a loss of liberty in addition to compensation for damages caused.

This most basic of legal premises compels a conclusion that a criminal battery must require at least as much as a civil battery. Yet the State's theory defines criminal battery to require less than a tortious claim.

> An act cannot, however, be considered a battery unless the actor intended to cause a harmful or offensive contact with another person.

O'Donoghue v. Riggs, 73 Wn.2d 814, 820, 440 P.2d 823 (1968).

It took many years of assault prosecutions for the Supreme Court to squarely confront the issue of specific intent.

> It is not enough to instruct a jury that an assault requires an intentional unlawful act because, given the circumstances, Byrd's act of drawing a gun could be found to be an unlawful intentional act. **Even where an act is done unlawfully and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told.**

Byrd at 715-16 (emphasis added). See also Eastmond, supra.

Although the Court in each case addressed only the facts before it, and so not an assault by battery, yet in neither opinion did the Court hold this element would not apply in a case of battery.

This case presents a record distinct from those the State relies on:[4] Trial counsel proposed instructions requiring the specific intent, and took exception to the court's failure to instruct the jury on this element. Mr. Miller testified to what his intent was: that he did not intend to harm or offend or cause fear; he intended merely to get Mr. Rasar off his property so he could not assault him again. RP 364-65, 374-75.

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[4] See, e.g., State v. Davis, 119 Wn.2d 657, 835 P.2d 1039 (1992) (challenging sufficiency of charging document for the first time on appeal; lower standard of review); State v. Daniels, 87 Wn. App. 149, 151, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998) (defense did not request instruction at trial); State v. Esters, 84 Wn. App. 180, 927 P.2d 1140 (1996), review denied, 131 Wn.2d 1024 (1997) (court claimed to look to statute to determine mental elements of assault, but assault is not defined by statute, see Byrd, supra); State v. Baker, 136 Wn. App. 878, 151 P.3d 237 (2007), review denied, 162 Wn.2d 1010 (2008) (evidence more than sufficient to support court's inference of assault after bench trial).

Furthermore, this issue arises in a case of self-defense: There was no dispute the actual physical contact was intended, yet the defense theory was Mr. Miller did not intend to harm or offend, or to cause fear of harm or offense.

In this sense, this case presents a scenario akin to that in Byrd, supra. Mr. Byrd's defense was that he was guilty of unlawful display of a weapon, but not of assault, because he did not intent to harm or offend or frighten the other person into believing he was about to be harmed or offended. The defense theory and facts illuminated the specific issue, i.e., the specific intent required for a criminal assault vs. the broader intent required for unlawful display of a weapon.

The same illumination occurs here. The jury could have believed Mr. Miller acted with the sole intent to remove Mr. Rasar from his property, and that he was justified in doing so, yet believed it was required to find proof of "intentional assault" because he intentionally placed his hand on Mr. Rasar's shoulder, and Mr. Rasar ended up injured.

This record demonstrates how the rule is "incorrect and harmful," justifying a departure

from language in other cases. Resp. Br. at 27-28. It is incorrect because it negates the defense theory of the case and punishes as a crime something less than a tort. It is harmful because it results in a felony conviction of a man who unintentionally harmed another person in a manner that would not even support a tort of battery.

The State's reasoning and that of its cited authorities is circular. "Intent to commit an assault" does not define what "assault" means. Resp. Br. at 26. "An unlawful touching with criminal intent" does not define what that criminal intent is. Resp. Br. at 26. What makes the touching unlawful if not the intent to harm, offend, or frighten?

"[T]he defendant must intend an actual battery," Resp. Br. at 26, would be adequate if "battery" were properly defined. O'Donoghue v. Riggs, supra, 73 Wn.2d at 820; Garratt v. Dailey, 46 Wn.2d 197, 200-01, 279 P.2d 1091 (1955). See App. Br. at 30.

"[A]ssault by battery simply requires intent to do the physical act constituting assault," Resp. Br. at 27, again begs the question: What is the

"assault"? If it is merely the physical contact, then every social contact made without advanced permission is a crime: a hand on a shoulder, an impromptu embrace, moving close enough to touch in a crowded bus. Our laws were not designed to make us all criminals in daily human interactions. These acts are not criminal unless they are intended to harm, offend, or frighten.

As in Byrd, this Court should resort to the common law, the origins of the definition of "assault," and apply it as well to assault by battery. Byrd, 125 Wn.2d at 713, citing LaFave & Scott, *Criminal Law* 611 (1972):

> We agree and hold specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree.

Byrd, 125 Wn.2d at 713.

3. THE DEFENSE WAS ENTITLED TO AN INSTRUCTION ON DEFENSE OF PROPERTY.

The State argues Mr. Miller was not entitled to an instruction on defense of property because on cross-examination, he responded "no" to the specific question of whether he was "defending [his] property." Resp. Br. at 29-30.

When determining whether the evidence was sufficient to support giving an instruction, this Court views the evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

The prosecutor asked Mr. Miller if he was defending his property shortly after he testified that the flashlight had left a mark on his door. He honestly answered in this context that he did not push Mr. Rasar off his property to protect his door. RP 380-81; App. Br. at 13.

He later testified that he pushed Mr. Rasar down his driveway because he wanted him off his property. RP 394-95; Resp. Br. at 30. According to the defense theory, Mr. Rasar turned and struck Mr. Miller instead of continuing down the driveway and off the property. Thus he was not "leaving of his own accord." The malicious presence was Mr. Rasar's assault of Mr. Miller. Resp. Br. at 33.

Mr. Miller's desire to remove Mr. Rasar from his property is protected by the legal theory of "defense of property." State v. Bland, supra (displayed handgun to remove invitee from home

after she assaulted him); State v. Redwine, 72 Wn. App. 625, 865 P.2d 552 (1994) (displayed shotgun to urge process server to leave property after serving papers); State v. Murphy, 7 Wn. App. 505, 500 P.2d 1276, review denied, 81 Wn.2d 1008 (1972) (carried handgun to emphasize request that inspectors leave his property when they had not first requested permission to enter); State v. Mierz, 72 Wn. App. 783, 798, 866 P.2d 65 (1994), affirmed, 127 Wn.2d 460, 470, 901 P.2d 286 (1995) (all cited in App. Br. at 33-34). The State makes no effort to distinguish these cases.

Mr. Miller is not a lawyer. Asking a question that called for a legal conclusion does not negate his simple and adequate statement: "Because I wanted him off my property."

The court instructed the jury it had a "duty to return a verdict of guilty" if it found the listed elements proved beyond a reasonable doubt, without regard to defense of property. CP 62. This error requires reversal for denial of the constitutional right to present a defense. U.S. Const., amends. 6, 14; Const., art. I, § 22.

4. THE TRIAL COURT ERRED BY REJECTING THE DEFENSE PROPOSED LANGUAGE REGARDING THE JURY'S ABILITY TO RETURN A VERDICT OF GUILTY.

> Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court.

State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

Appellant maintains his position that the law never requires a jury to return a verdict of guilty, and so it is improper to tell the jury it has such a duty. App. Br. at 37-45.

No one in United States history has ever disputed "the principle of noncoercion of jurors," established in Bushell's Case in England in 1671. Vaughan 135, 124 Eng. Rep. 1006 (1671). Edward Bushell was a juror in the prosecution of William Penn for unlawful assembly and disturbing the peace. When the jury refused to convict, the court fined the jurors for disregarding the evidence and the court's instructions. Bushell was imprisoned for refusing to pay the fine. In issuing a writ of habeas corpus for his release, Chief Justice Vaughan declared that judges could neither punish nor threaten to punish jurors for their verdicts.

See generally Alschuler & Deiss, "A Brief History of the Criminal Jury in the United States," 61 U. CHI. L. REV. 867, 912-13 (1994).

> The right to a fair and impartial jury trial demands that a judge not bring to bear coercive pressure upon the deliberations of a criminal jury. The United States Supreme Court has said:
>
> > Put simply, the right to be tried by a jury of one's peers finally exacted from the king would be meaningless if the king's judges could call the turn. In the exercise of its functions not only must the jury be free from direct control in its verdict, but it must be free from judicial pressure, both contemporaneous and subsequent.
>
> United States v. Spock, 416 F.2d 165, 181 (1st Cir. 1969).[5]

State v. Boogaard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978).

In Bennett, the Court considered an instruction defining reasonable doubt. The language had been approved by the Pattern Jury

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[5] Citing: United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, 408, 67 S. Ct. 775, 91 L. Ed. 973 (1947); Sparf v. United States, 156 U.S. 51, 105-06, 15 S. Ct. 273, 39 L. Ed. 343 (1895); Compton v. United States, 377 F.2d 408, 411 (8th Cir. 1967); Edwards V. United States, 286 F.2d 681, 683 (5th Cir. 1960); United States v. Taylor, 11 F. 470, 474 (C.C.D. Kan. 1882).

Instruction Committee and all three divisions of this Court. Still the Supreme Court disagreed.

> However, this court has never placed its stamp of approval on the Castle[6] instruction. While the instruction may meet constitutional muster, it does not mean that it is a good or even desirable instruction. Although we conclude that the Castle instruction is constitutionally adequate, we do not endorse the instruction.

Bennett, 161 Wn.2d at 315. Four members of the Court would have held the instruction unconstitutional. Id., 161 Wn.2d at 318-22 (Sanders, J., dissenting).

The majority nonetheless exercised its inherent supervisory power and directed all Washington trial courts not to use the Castle instruction. It specifically directed all courts to use WPIC 4.01 "until a better instruction is approved." Id., 161 Wn.2d at 318.

This Court need not find the trial court violated the Constitution by instructing the jury it had a duty to return a verdict of guilty. In this case, unlike the cases on which the State relies, the defense proposed alternative language -

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[6] State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997).

- the same language used in WPIC 160.00, and language equivalent to that used in federal instructions. CP 32; App. Br. at 42-45. This Court could clearly state that when the alternative language is proposed, it shall be given. Bennett, supra.

This result would be consistent with State v. Wilson, 9 Wash. 16, 21, 36 P. 967 (1894). It is not completely clear what issue was presented in Wilson: the Court seemed to be posing its own hypothetical objection,[7] then responding to it. The Court never quoted the full instructions given in that case. Even so, while upholding the instruction without any legal analysis, it opined that "it would have been better that the word 'may'

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[7] "Defendant further complains that the court instructed the jury that, if they found the game was carried on for gain, they must find defendant guilty. If the clause to which exception is taken stood alone, it would no doubt be open to the criticism that it authorized the jury to convict without all of the elements necessary to warrant them in so doing having been found by them to have been established by the evidence; but when such clause is construed with what the court said in immediate connection therewith, it is not open to any objection unless it be in the use of the word "must" instead of the word "may" ... ." Wilson, 9 Wash. at 21.

should have been substituted [for the word 'must' find the defendant guilty]." Id.

In contrast, in Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885), the Supreme Court reversed a murder conviction. While the court did not address the specific issue raised here, it set out the instructions given in the case. The language of those instructions to the jury provide us a view of what the law was before the Constitution was adopted.

> If you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you **may** find him guilty of such a degree of crime as the facts so found show him to have committed; but if you do not find such facts so proven, then you **must** acquit.

Leonard, 2 Wash. Terr. at 399 (emphases added). Thus the courts acknowledged, and incorporated into the jury instructions, the threshold requirement that each element be proved beyond a reasonable doubt to **permit** a conviction; but that any reasonable doubt **required** an acquittal.

This Court could reverse because the trial court rejected this preferable language. It was prejudicial because it omitted the defense theory of defense of property, yet required the jury to

return a verdict of guilty without considering it. Or this Court could reverse on other grounds, and recommend trial courts use this language when trial counsel proposes it.

C. CONCLUSION

For the reasons stated above and in the Brief of Appellant, this Court should reverse this conviction.

DATED this 14th day of December, 2012.

Respectfully submitted,

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WSBA No. 11140
Attorney for Mr. Miller

DECLARATION OF SERVICE

ALEXANDRA FAST declares:

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

Mr. Dennis McCurdy
King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

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

12/14/2012- SEATTLE, WA — Alex Fast
Date and Place — ALEXANDRA FAST