NO. 91464-8
COA No. 68574-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Kenneth Miller, defendant and appellant below, petitions this Court for review of the Court of Appeals opinion cited below.

B. COURT OF APPEALS OPINION

Mr. Miller seeks review of *State v. Miller*, Slip Opinion No. 68574-1-I, issued February 9, 2015. A copy is attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does a criminal assault involving physical contact require the same element as a tortious battery and a non-contact criminal assault, i.e., the specific intent either to harm or offend another or to cause the other to fear he is about to be harmed or offended?

2. Is a property owner who is physically removing a man from his property after the man struck him in the face entitled to an instruction on defense of property?

3. May the court instruct the jury it has a "duty to return a verdict of guilty" if it finds each element in the "to convict" instruction without requiring the State to disprove the defense theory of defense of property?

D. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS[1]

Ken Miller expected UPS to deliver a package needing his signature. His wife, working on a final school project in the back of the house, needed extreme quiet. He watched for the UPS truck so he could get to the door before the carrier disturbed her with the doorbell or knocking. Despite Mr. Miller's best efforts, UPS carrier Randall Rasar both rang the doorbell and banged on the front door with his flashlight several times. RP 331-32, 358-61.

Mr. Miller and Mr. Rasar exchanged words regarding the noise. Mr. Miller signed for the package. As Mr. Rasar walked away, he called Mr. Miller a "jerk." Mr. Miller walked toward him on the driveway to ask what he'd said. Mr. Rasar turned and struck Mr. Miller in the face and elbow

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[1] The issues in this appeal turn on jury instructions. 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). For this reason, petitioner presents the facts based on the defense theory of the case while noting the State's theory.

with his flashlight.[2] Mr. Miller then put his hand on Mr. Rasar's shoulder and firmly pushed him down the driveway to get him off his property. The two men picked up speed as they descended toward the street. Mr. Rasar's truck was parked across the bottom of the driveway. Mr. Miller pushed Mr. Rasar to the side to avoid the truck. Both men struck the truck and fell to the ground.[3] RP 361-63.

Mr. Miller had bruises to his cheek and elbow from the flashlight, and a bruise on his arm from striking the truck. Mr. Rasar had a broken nose and a cut cheek. RP 290-95, 335-37, 369-71.

2. PROCEDURAL FACTS

The State charged Mr. Miller with assault in the second degree, in violation of RCW 9A.36.021(1)(a). CP 1.

On cross-examination, Mr. Miller responded that Mr. Rasar's flashlight left a mark on his

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[2] Mr. Rasar denied striking Mr. Miller. RP 53-55, 96.

[3] Mr. Rasar claimed Mr. Miller slammed his face into the truck, then threw him to the ground, got on top of him and forced his face into the pavement. RP 53-55, 96. Mr. Miller denied any contact other than his hand on his shoulder to get him off his property. RP 364-65, 374-75.

door. The prosecutor then asked whether he was defending himself or his property; Mr. Miller said himself, not his property. RP 380-81. On redirect, he clarified that he did not push Mr. Rasar off his property to protect his door. "I wanted him off my property." Mr. Miller thought he should be safe on his own property. RP 394-95.

The defense proposed instructions defining assault to include the specific intent to inflict bodily injury or to create an apprehension or fear of bodily injury; and requiring the State to prove the act was not in self-defense or defense of property. CP 30-33.[4] The court refused to instruct on the element of specific intent. It defined lawful force to include self-defense and defense of property. CP 68. But the to-convict instruction required only the absence of self-defense, not defense of property. CP 61-63, 66, 68.[5]

Mr. Miller was convicted. He was sentenced to and served six months in jail.

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[4] The relevant proposed instructions are attached as Appendix B.

[5] The court's instructions are attached as Appendix C.

On appeal, the Court of Appeals initially reversed his conviction for faulty instructions on recklessness, consistent with its decision in *State v. Johnson*, 172 Wn. App. 112, 297 P.3d 710 (2012). This Court reversed *Johnson*, then granted the State's petition for review in this case and remanded it for reconsideration in light of *Johnson*, 180 Wn.2d 195, 307-08, 325 P.3d 135 (2014).

On reconsideration, the Court of Appeals reversed itself and now affirmed Mr. Miller's conviction. *State v. Miller, supra*.

The Court of Appeals summarily rejected that criminal assault requires specific intent.

> "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." *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000).

Slip Op. at 5. It failed to cite or distinguish any of this Court's authorities appellant cited.

The Court of Appeals concluded Mr. Miller had no right to an instruction on defense of property -- although the trial court included that defense in the "lawful force" instruction. CP 68; Slip Op. at 5-8.

E. GROUNDS FOR REVIEW AND ARGUMENT

1. THE COURT OF APPEALS OPINION CONFLICTS WITH THIS COURT'S OPINIONS IN *STATE v. BYRD*, *STATE v. EASTMOND*, *O'DONOGHUE v. RIGGS* AND *GARRATT v. DAILEY*, PRESENTS A SIGNIFICANT ISSUE OF CONSTITUTIONAL LAW AND A SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE THAT THIS COURT SHOULD DECIDE. RAP 13.4(b)(1), (3), (4).

a. Criminal assault requires specific intent.

"Assault" is not statutorily defined, so Washington courts apply the common law definition.[6]

> Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.

Stevens, 158 Wn.2d at 311. These definitions however are incomplete: the law requires a specific intent to either cause injury or offense, or to cause fear of injury or offense. *Byrd*, *supra*; *Eastmond*, *supra*. This specific intent is the "criminal intent" required with an unlawful touching.

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[6] *State v. Stevens*, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006); *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995); *State v. Eastmond*, 129 Wn.2d 497, 919 P.2d 577 (1996).

In *Byrd*, the State accused Mr. Byrd of drawing a gun and pointing it at the complaining witness, who was frightened. The defendant testified he merely displayed the gun, but did not aim it. This Court held that assault required the specific intent to harm, or to cause fear of harm, as an essential element of criminal assault.

> 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).

In *Eastmond*, the State accused Mr. Eastmond of pointing his gun at a cashier; he said he was trying to check his weapon by handing her the butt of the gun. 129 Wn.2d at 499. This Court reaffirmed *Byrd*'s holding that failing to instruct on specific intent to cause bodily injury or fear was constitutional error requiring reversal.

> By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude. ... We reject the State's

> characterization of the disputed error as located in the definition of assault and thereby falling short of the manifest error standard. ... As we settled in *Byrd*, specific intent represents an "essential element" and its omission results in manifest error.[7] ...
>
> Nor do the instructions viewed as a whole cure the deficiency. ... Contrary to the State's assertions, Instruction 6, requiring a finding "the defendant intentionally assault," and Instruction 8, defining "intent," afford no further indication of the essential specific intent element. ...
>
> ... By relieving the State of its burden of proving every essential element beyond a reasonable doubt, the omission of an element of the crime produces such a fatal error.

Eastmond, 129 Wn.2d at 502-03. In both cases, this Court held omitting this essential element from the jury instructions violated due process.[8]

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[7] In *State v. Daniels*, 87 Wn. App. 149, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031 (1998), the court rejected a similar issue raised for the first time on appeal, concluding that the specific intent was merely a "definition" and not an "essential element" of assault by battery. 87 Wn. App. at 155-56. This conclusion was directly rejected by *Eastmond*.

[8] *Byrd*, 125 Wn.2d at 713-14, *citing In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *Eastmond*, 129 Wn.2d at 502; U.S. Const., amends. 5, 14; Const., art. I, §§ 3, 22.

b. Criminal assault based on battery requires at least as much as the tort of battery.

In this case, unlike *Byrd* and *Eastmond*, the State claimed assault based on actual battery, not merely an attempt. The same specific intent, however, must be found, or innocent actions are made a crime.

Court decisions incorporate the civil battery definition into the criminal definition of assault.[9] This Court has clearly held in those civil cases that battery requires the intent to harm or offend.

> 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). Causing an injury without this specific intent creates a cause of action in negligence, not battery. Negligence cannot be an intentional assault.

> The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:
> "An act which, directly or indirectly, is the legal cause of a

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[9] *Seattle v. Taylor*, 50 Wn. App. 384, 388, 748 P.2d 693 (1988).

> harmful contact with another's person makes the actor liable to the other, if
>
> "(a) **the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof** to the other or a third person, **and**
>
> "(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
>
> "(c) the contact is not otherwise privileged."

Garratt v. Dailey, 46 Wn.2d 197, 200-01, 279 P.2d 1091 (1955) (emphases added).

If intent to cause offense or harm is an essential element of civil battery, it is also required to prove a crime based on the same act. There is no legitimate reason not to require this element; indeed, it would make all three of our criminal definitions of assault consistent with one another and with the civil definitions.

Whether specific intent is an essential element of criminal assault is a significant issue of constitutional law. Failure to include it in the instructions violates due process. U.S. Const., amends. 5, 14; Const., art. I, § 3, 22. RAP 13.4(b)(1), (3).

c. This Case Squarely Presents the Issue to Distinguish Innocent from Criminal Behavior.

Here the Court of Appeals relied on dictum from *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). In *Hall*, the defendant was charged with three counts of assault 3° for attempting to bite, attempting to head-butt, and attempting to spit on three police officers. An expert testified the defendant's intoxication diminished his capacity to intend. There was no issue of self-defense, defense of property, or innocent intentional contact.

The issue raised in *Hall* was the need to include the element of "intent" in the to-convict instruction; he did not raise the question of specific intent. The Court of Appeals applied an abuse of discretion standard of review to hold the instructions in their entirety properly informed the jury that intent was an essential element. *Id.* at 61-63.

This case presents a record distinct from Court of Appeals opinions discussing specific intent in dicta, from which this Court has denied

review.[10] Here trial counsel proposed instructions requiring the specific intent and took exception to the court's failure to instruct the jury on this element. CP 30-33, RP 402-04, 413. Mr. Miller testified to what his intent was: 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.

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, by intentionally placing his hand on Mr. Rasar's shoulder to remove him from the property.

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[10] *See, e.g., State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992) (challenging for first time on appeal sufficiency of charging document, not instructions; lower standard of review); *State v. Daniels, supra* (defense did not request instructions or object at trial to not defining "battery" in instructions); *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).

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 intend 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 the State proved "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 dicta in other cases. It is incorrect because it negates the defense theory of the case and punishes as criminal battery behavior less than the tort of battery. 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.

d. Criminalizing Innocent but Intentional Contact is a Substantial Issue of Public Importance this Court Should Decide.

The gravamen of *Byrd* and *Eastmond* is that whether an assault is a crime turns not merely on the perception of the complaining witness, but on the specific intent of the accused. This requirement is consistent with the way people interact in our society. There are countless ways we intentionally and innocently touch one another without first asking permission: an impulsive embrace, a touch to get one's attention, brushing or pushing to get past in a crowd. A person can intentionally touch another, perhaps not knowing the other person has an injury in that particular spot, and so unintentionally cause pain, harm or offense. But if the contact was intended for innocent purposes, it cannot be considered a crime merely because it was harmful or received as an offense.

Thus in this case, Mr. Miller intended to touch Mr. Rasar to remove him from his property; but he did not intend to harm or offend him or to

scare him. Under the law, this was a permissible touching to defend himself and his property.

Failing to require the specific intent to harm or offend makes criminal many innocent physical contacts we all make every day -- depending solely on the perception of the person receiving the contact. This Court should decide this issue of substantial public importance. RAP 13.4(b)(4).

2. THE COURT OF APPEALS OPINION CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE COURT OF APPEALS AND PRESENTS A SIGNIFICANT CONSTITUTIONAL ISSUE. RAP 13.4(b)(1), (2), (3).

a. The Constitution Entitled Mr. Miller to an Instruction on Defense of Property.

A defendant is entitled to an instruction on lawful use of force if he presents "some evidence" to support the theory.[11] Mr. Miller testified he intended to remove Mr. Rasar from his property. This is "some evidence" that his use of force was lawful. His desire to remove Mr. Rasar from his property is protected by the legal theory of

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[11] *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993).

"defense of property."[12] The Court of Appeals opinion holding otherwise conflicts with these well established opinions of this Court and the Court of Appeals, and violates his constitutional right to due process and to present a defense.[13] RAP 13.4(b)(1), (2), (3).

b. When the To-Convict Instruction Imposes a "Duty to Return a Verdict of Guilty" on the Jury, It Must Include Every Element of the Crime, Including the Absence of Self-Defense and Defense of Property if There is Some Evidence to Support Them.

The trial court here found there was some evidence of defense of property, and included that concept in its definition of "lawful force." CP 68. Nonetheless, although it incorporated the State's burden to prove the absence of self-defense in the to-convict instruction, it failed to include

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[12] RCW 9A.16.020; *State v. Bland*, 128 Wn. App. 511, 116 P.3d 428 (2005) (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 no permission to enter).

[13] U.S. Const., amends. 5, 14; Const., art. I, §§ 3, 22.

the absence of defense of property in the same instruction. Thus it required the jury to "return a verdict of guilty" without considering the State's failure to prove defense of property. CP 62.

By removing this defense from the elements instruction, No. 6, the court violated Mr. Miller's right to present a defense and to have the jury instructed on his defense.

> [A] "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. ... We are not to look to other jury instructions to supply a missing element from a "to convict" jury instruction.

State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010), *quoting State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), and *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22. This holding is essential because the court instructed the jury it had a "duty to return a verdict of guilty" if it found all of the elements listed in that single instruction, without regard to defense of property. CP 62.

The Court of Appeals opinion thus conflicts with this Court's opinions in *Janes*, *Sibert*, *Smith*, and *Emmanuel*; the Court of Appeals opinions in *Bland*, *Murphy*, and *Redwine*; and presents a significant issue of constitutional law. RAP 13.4(b)(1), (2), (3).

F. CONCLUSION

Whether the crime of assault by actual battery requires the same specific intent as the other two definitions of assault is a significant issue of constitutional law, and a substantial issue of public importance this Court should decide. The Court of Appeals opinion summarily rejecting it conflicts with this Court's opinions. This Court therefore should grant review of this issue. RAP 13.4(b)(1), (3), (4).

The court's failure to include the lack of defense of property in the to-convict instruction, when there was evidence to support the defense and the court instructed on that theory of the defense, conflicts with this Court's opinions and is a

significant constitutional issue this Court should review. RAP 13.4(b)(1), (3).

DATED this 10th day of March, 2015.

Respectfully submitted,

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the 18th and 19th pages of the Petition for Review, postage prepaid, to the following individual, postage prepaid, addressed as indicated, as well as emailed to the follows:

Mr. Dennis McCurdy
Senior Deputy Prosecuting Attorney
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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.

3·13·2015·SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST

APPENDIX A
State v. Miller,
Court of Appeals Slip Op. No. 68574-1-I
(Feb. 9, 2015)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KENNETH FRANKLIN MILLER, Appellant.	)	No. 68574-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 9, 2015

SCHINDLER, J. — Kenneth Franklin Miller appeals his conviction of assault in the second degree. Miller asserts the jury instructions misstate the law and relieve the State of its burden of proof by stating the jury need only find that he disregarded a "wrongful act" rather than "substantial bodily harm." Adhering to our decision in State v. Johnson, 172 Wn. App. 112, 297 P.3d 710 (2012), we reversed. State v. Miller, 177 Wn. App. 1019, 2013 WL 5800748. In State v. Johnson, 180 Wn.2d 295, 307-08, 325 P.3d 135 (2014), the Washington Supreme Court held that the instruction defining "reckless" need not include the specific statutory language where the to-convict instruction properly set forth the elements of the crime. The court granted the petition for review in this case and remanded for reconsideration in light of Johnson. Consistent with the Supreme Court decision in Johnson, we affirm the conviction.

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 that evening. At approximately 6:00 p.m., Rasar parked the UPS truck at the end of the sloping driveway leading to Miller's house and walked up the driveway to the front porch.

Miller said that Rasar rang the doorbell "several times" and "pound[ed]" on the door with his flashlight. Miller said that after Rasar walked down the stairs of the front porch, he turned around and told Miller, "[E]njoy your package jerk." 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 testified 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 his head and body. Rasar suffered a broken nose and abrasions on his face, arms, knees, and hip.

The State charged Miller with assault in the second degree of Rasar. The State alleged that Miller intentionally assaulted Rasar and recklessly inflicted substantial bodily harm. Miller asserted he used lawful force to defend himself.

The State called a number of witnesses to testify at trial. Miller testified and denied hitting Rasar. Miller said that he pushed Rasar down the driveway after Rasar hit him. A doctor 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. The court refused to give an instruction proposed by the defense that defines "reckless" to mean acting "with the intent to cause substantial bodily harm"[1] and an instruction on battery. The jury convicted Miller of assault in the second degree.

On appeal, Miller argued the jury instructions misstated the law by incorrectly defining "reckless" as "a wrongful act," thereby relieving the State of its burden of proving an essential element of assault in the second degree.[2] We adhered to our decision in Johnson and reversed.

In Johnson, 172 Wn. App. at 112, we addressed whether a jury instruction defining "reckless" as "a wrongful act" lowered the State's burden of proof. In Johnson, the State charged the defendant with three counts of assault in the second degree. Johnson, 172 Wn. App. at 118. The to-convict instruction properly required the State to prove that the defendant " 'recklessly inflicted substantial bodily harm.' " Johnson, 172 Wn. App. at 129-30.[3] But the instruction defining "reckless" required the State to

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[1] 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.

[2] RCW 9A.36.021 defines the crime of assault in the second degree, in pertinent part:

> (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.

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.

[3] Emphasis omitted.

prove the defendant disregarded the risk of " 'a wrongful act.' " Johnson, 172 Wn. App. at 130.[4] We reversed and held the jury instruction defining "reckless" 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 132-33.

The Washington State Supreme Court reversed. State v. Johnson, 180 Wn.2d 295, 307-08, 325 P.3d 135 (2014). The court held that where the to-convict instruction properly set forth the elements of the crime, the instruction defining "reckless" need not include the specific statutory language. Johnson, 180 Wn.2d at 306. The court also held the instruction defining "reckless" did not relieve the State of its burden of proof because the to-convict instruction properly laid out the essential elements of the crime of assault in the second degree. Johnson, 180 Wn.2d at 306. Because the " 'to convict' instruction[,] the primary 'yardstick' the jury uses to measure culpability," was accurate, "[t]aken in their entirety," the instructions were sufficient. Johnson, 180 Wn.2d at 306.

> It is not error to instruct the jury on the generic definition of "reckless" as long as the jury is also given a "to convict" instruction that lists every element of the crime the State needs to prove in order to convict the defendant, including the charge-specific language for "reckless."

Johnson, 180 Wn.2d at 298.

Here, as in Johnson, although the definition of "reckless" defines "a substantial risk" as "a wrongful act," the to-convict jury instruction correctly states that the State must prove beyond a reasonable doubt that Miller recklessly inflicted substantial bodily

[4] Emphasis in original.

harm.[5] 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 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 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.

Miller also argues the court erred by refusing to give the instruction the defense proposed on battery. We disagree. "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." State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000). The court did not err in refusing to give the defense instruction on battery.

Miller contends the court violated his right to present a defense by refusing to give his proposed jury instruction on "defense of property."

A defendant is entitled to have the court instruct the jury on its theory of the case if evidence supports the instruction. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986); see also State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997) ("To

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[5] 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.

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

be entitled to a jury instruction on self-defense, the defendant must produce some evidence demonstrating self-defense."). A defendant is not entitled to an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The court reviews the denial of a proposed instruction based on the evidence at trial for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). To determine if the evidence supports giving the proposed jury instruction, the court views the evidence in the light most favorable to the defendant. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

It is a defense to the charge of assault that the force used was lawful. See State v. McCullum, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983) (self-defense negates the intent element of a crime).

Use of force is lawful when used by a party "in preventing or attempting to prevent . . . a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession," so long as the force "is not more than is necessary." RCW 9A.16.020(3). RCW 9A.16.020 states, in pertinent part:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> . . . .
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.[6]

Viewed in the light most favorable to Miller, sufficient evidence did not support giving a jury instruction on defense of property. The defense theory at trial was that Miller was acting in self-defense, not defense of his property. During cross-

[6] Emphasis added.

examination, Miller specifically denied he was acting in defense of his property.

> Q: When this incident happened, when Mr. Rasar ended up on the side of that truck, you were not defending your property.
> A: I was defending my person.
> Q: Okay. I asked you, were you defending your property?
> A: No.

On redirect, Miller testified he was acting in self-defense.

> Q: So when you said you were not defending your property when you pushed him down the driveway, did you mean because you were not responding to the damage to your door. Is that correct?
> A: He had struck me and I was, yeah, trying not to get, excuse me, hit again and so--
> . . . .
> Q: So why did you push him all the way down the driveway?
> A: Because I wanted him off my property.
> Q: In that sense you were defending your property?
> A: I was struck in the face and I was trying not to get struck again, so I figured I should be safe on my own property.

The court instructed the jury on self-defense but, based on Miller's testimony that he was "not acting in defense of his property," refused to give the proposed instruction on defense of property. The court did not err in refusing to instruct the jury on defense of property.

State v. Bland, 128 Wn. App. 511, 116 P.3d 428 (2005), is distinguishable. In Bland, the elderly defendant chased a guest around his house and into a bedroom with a gun after the guest threatened him and refused to leave. Bland, 128 Wn. App. at 516-17. The court instructed the jury on the defense of property, and the jury convicted the defendant of assault in the second degree. Bland, 128 Wn. App. at 513. This court reversed, holding that the instruction given was erroneous because it "could be understood to require a finding that a defendant reasonably believed that he was about to be injured in preventing a malicious trespass." Bland, 128 Wn. App. at 514. Because

such belief is not a requirement of defense of property, the court held that the instruction confused the distinction between self-defense and defense of property. Bland, 128 Wn. App. at 515-16.

Miller also contends 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." In State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319 (1998), we squarely addressed and rejected the same 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).

We affirm the jury conviction of assault in the second degree.

WE CONCUR:

APPENDIX B
Defendant's Proposed Jury Instructions
CP 30-33

No. 1

An assault is an intentional touching or striking of another person, done with unlawful force, and done

(1) with the intent to inflict bodily injury upon the other person, or

(2) with the intent to create in the other person an apprehension or fear of bodily injury,

regardless of whether any physical injury is done to the person.

CP 30.

No. 2

A person commits the crime of assault in the second degree when he intentionally touches or strikes another, with unlawful force, intending to inflict bodily injury or intending to make the other person afraid he is about to inflict bodily injury, and thereby recklessly inflicts substantial bodily harm.

CP 31.

No. 3

To convict the defendant, Kenneth Miller, of assault in the second degree as charged, you must find the State has proved each of the following elements beyond a reasonable doubt:

1. That on or about November 6, 2009, Kenneth Miller intentionally assaulted Randall Rasar;

2. That Mr. Miller intended to injure Mr. Rasar or intended to make Mr. Rasar afraid he was about to injure him;

3. That Mr. Miller was not acting in self defense or defense of his property;

4. That by this assault Mr. Miller recklessly caused substantial bodily harm to Mr. Rasar; and

5. That these acts occurred in King County, Washington.

In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all 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.

CP 32.

No. 4

A person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances as he reasonably perceives them, to remove an unwanted person from that property. Such use of force is not an assault.

A person is not required to experience or fear injury to himself in order to defend his property.

CP 33.

APPENDIX C
Court's Instructions to the Jury

No. 5

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.

No. 6

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 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.

CP 62.

No. 7

As assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

CP 63.

No. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

CP 66.

No. 12

It is a defense to a charge of Assault 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 use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, 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.

CP 68.

APPENDIX D
Constitutional and Statutory Provisions

UNITED STATES CONSTITUTIONAL PROVISIONS

"No person shall be ... deprived of life, liberty, or property, without due process of law; ... ."

United States Constitution, Amendment 5.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment 6.

"... [N]or shall any state deprive any person of life, liberty, or property, without due process of law; ..."

United States Constitution, Amendment 14, § 1.

WASHINGTON CONSTITUTIONAL PROVISIONS

> **Personal Rights.** No person shall be deprived of life, liberty, or property, without due process of law.

Constitution, art. I, § 3.

> **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases ... ; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

Constitution, art. I, § 22.

The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:

...

(3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary;

....

RCW 9A.16.020.

Assault in the second degree

(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; ... .

RCW 9A.36.021.

CERTIFICATE OF SERVICE

I certify that on this date I mailed a copy of the Petition for Review, postage prepaid, to the following individual, postage prepaid, addressed as indicated, as well as emailed to the follows:

Mr. Dennis McCurdy
Senior Deputy Prosecuting Attorney
King County Prosecutor's Office
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

paoappellateunitmail@kingcounty.gov

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.

3·10·2015-SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST