Supreme Court No. 97242-7
COA No. 77322-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY EUGENE MANS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Rodney Eugene Mans requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Mans, No. 77322-4-I, filed on April 29, 2019. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. An element of the crime of felony violation of a no contact order is that the defendant knew of and disregarded a substantial risk that death or serious physical injury to another person could occur. Here, the jury was instructed only to find Mans knew of and disregarded a substantial risk that a "wrongful act" could occur, not that death or serious physical injury could occur. Did the instructions relieve the State of proving an element of the crime?

2. A court may not suggest to the jury that they must reach a unanimous verdict. Here, the jury did not answer two questions on a special verdict form for count II, suggesting they could not reach a unanimous verdict. The court told the jury they had not answered all of the questions and instructed them to return to the jury room and follow their instructions. Did the court improperly suggest to the jury they must reach a unanimous verdict?

C. STATEMENT OF THE CASE

Rodney Mans and Theresa Lopez were in a romantic relationship for about two years and had a child together. RP 356-58. In March 2016, an incident occurred and a no-contact order was issued prohibiting Mans from contacting Lopez. RP 359-60.

Lopez claimed that in the early morning of October 21, 2016, Mans knocked on her door. RP 367. She said that when she opened the door, Mans pushed his way in and the two of them engaged in a physical struggle. RP 368-70. She said at one point, Mans put his hands around her throat. RP 371. She said he also hit her in the head and the face with his hands and a plastic toy pistol that he was carrying. RP 372, 495, 528. She ran out of the house to a neighbor's house. RP 374-76. Lopez had no serious injuries but said she experienced some pain for about a month. RP 391.

On December 16, 2016, Mans again came over to Lopez's house and she invited him in. RP 401.

For the incident on October 16, Mans was charged with second degree assault by strangulation (count I); first degree burglary (count II); and felony violation of a court order based on intentional assault or reckless conduct that created a substantial risk of death or serious

physical injury to Lopez (count III). For the incident on December 16, Mans was charged with felony violation of a court order based on two prior convictions for violation of a court order (count IV). CP 69-70.

The State alleged that all of the charges were "domestic violence" offenses committed "against a family or household member." RP 64-65. The State also alleged the offenses in counts I, II and III were "part of an ongoing pattern of psychological, physical or sexual abuse of the same victim or multiple victims manifested by multiple incidents over a prolonged period of time." CP 64-65.

The jury was provided with a two-page special verdict form to record their verdicts as to the domestic violence and aggravating factor allegations. CP 111-12. The jury was instructed on how to fill out the special verdict form:

> You will also be given a single special verdict form for the crimes charged in Count 1-4.
>
> If you find the defendant not guilty of any of these crimes, do not use the special verdict form corresponding to that crime or those crimes.
>
> If you find the defendant guilty of any of these crimes, you will then use the special verdict form and fill in the blanks with the answer 'yes' or 'no' according to the decision you reach for that crime or those crimes.
>
> In order to answer the special verdict form 'yes,' you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer.
>
> If you unanimously agree that the answer to the question is 'no,' you must answer 'no.'

> If after full and fair consideration of the evidence you are not able to reach a unanimous decision as to the answer, do not fill in the blank on that special verdict form.

CP 105.

The jurors began deliberating late on the afternoon of May 23. CP 213. The jury deliberated all the next day. CP 214-15. Shortly after 1 p.m. on the third day, the jury sent a note to the court indicating they had reached a verdict for counts II, III and IV, but could not reach a verdict for count I. Id.

The court summoned the jury. RP 763. The foreperson confirmed the jury had reached a verdict as to counts II, III and IV but could not reach a verdict as to count I. RP 764, 768. The court polled the jurors who all agreed. RP 765-66. The court read the verdict forms silently then told the jury to return to the jury room. RP 768.

The court informed the parties that the jury had answered "yes" to the two questions on the special verdict form for count I—the count on which the jury could not agree—but had provided no answers to the questions as to count II. RP 768, 780-81. The court summoned the foreperson back to the courtroom and said, "I noted that there are not answers as to Count II . . . . Can you tell me – and, again, I don't want to know the details, but was that simply an accidental omission?" RP

769. The foreperson responded, "Yes, sir." RP 769. The court told the foreperson to return to the jury room. RP 769.

Defense counsel urged the court to accept the verdicts. RP 770. Instead, the court summoned the jury again and instructed them to reconsider their answers on the verdict forms. RP 771. The court said, "As I explained to the foreperson in your absence, some of these forms are not filled out . . . so I'm going to send you back with these forms and simply ask that you follow your instructions and notify us when and if you're ready." RP 771. The jury exited again. RP 771.

The jury returned to the courtroom about five minutes later. CP 215. The foreperson handed the verdicts to the clerk who read them aloud. RP 774-75; CP 106-12. This time, the answers on the special verdict form for count I were scratched out and the jury had answered "yes" to the two questions for count II. RP 775-76, 780; CP 111-12. The court again polled the jurors who all agreed these were their verdicts. RP 776-78.

Defense counsel filed a motion to set aside the special verdicts for count II and a hearing was held. RP 785. Counsel argued the court should have accepted the jury's original answers on the special verdict form because they were consistent with the jury instructions. RP 787-

88. Counsel argued, "[t]he jury instructions specifically stated if you can't come to an agreement as to the Special Verdict, then leave it blank." RP 788. By instructing the jury to reconsider its answers, the court had taken the blank option away from them. RP 788.

The court denied the motion. CP 129-38. The court concluded it had authority under CrR 6.16(b)[1] to instruct the jury to reconsider its verdicts because the special verdicts were inconsistent with the general verdicts. RP 789-90, 808-09; CP 133.

At sentencing, the State did not request and the court did not impose an exceptional sentence. RP 819, 828. But the court entered a finding that all of the convictions were "domestic violence" offenses, based on the jury's answers on the special verdict form. CP 168.

The Court of Appeals affirmed.

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[1] CrR 6.15(b) provides:

> **(b) Special Findings.** The court may submit to the jury forms for such special findings which may be required or authorized by law. The court shall give such instruction as may be necessary to enable the jury both to make these special findings or verdicts and to render a general verdict. When a special finding is inconsistent with another special finding or with the general verdict, the court may order the jury to retire for further consideration.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The erroneous instruction defining "recklessness" for count III relieved the State of its burden to prove all of the elements of the crime.**

a. The jury instructions misstated an element of the crime.

In a criminal case, due process requires the State to prove the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. It is reversible error to instruct the jury in a manner that would relieve the State of its burden of proof. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

In count III, Mans was charged with felony violation of a no contact order under RCW 26.50.110(1), (4). CP 68-70. The statute required the State to prove (1) Mans knew of the no contact order; (2) he violated one of the provisions of the order; and (3) the violation was an assault that did not amount to assault in the first or second degree, or was "any conduct . . . that [wa]s reckless and create[d] a substantial risk of death or serious physical injury to another person." RCW 26.50.110(1), (4).

Two jury instructions are at issue. First, the to convict instruction for count III instructed the jury:

> To convict the defendant of the crime of violation of a court order as charged in Count 3, each of the following five elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 21, 2016, there existed a no-contact order applicable to the defendant;
>
> (2) That the defendant knew of the existence of this order;
>
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
>
> (4) That
>
> (a) the defendant's conduct was an assault that did not amount to assault in the first or second degree; or
>
> (b) ***the defendant's conduct was reckless and created a substantial risk of death or serious physical injury to another person***; and
>
> (5) That the defendant's acts occurred in the State of Washington. . . .

CP 98 (emphasis added). The jury was instructed they "need not be unanimous as to which of alternatives (4)(a), or (4)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt." CP 98-99.

Second, the jury was provided an instruction defining "recklessness":

> 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 fact or result 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 89 (emphasis added).

Together, these jury instructions relieved the State of its burden to prove the element of "recklessness." The instructions told the jury they need find only that Mans was aware of and disregarded a substantial risk that a "wrongful act" could occur, rather than informing the jury it must find he was aware of and disregarded a substantial risk that "death or serious physical injury to another person" could occur. State v. Harris, 164 Wn. App. 377, 387-88, 263 P.3d 1276 (2011); Peters, 163 Wn. App. at 849-50.

This case is like State v. Peters. There, Peters was convicted of first degree manslaughter, which required the State to prove he "***recklessly cause[d] the death*** of another person." Peters, 163 Wn. App. at 847. The jury instructions relieved the State of its burden to prove the element of "recklessness." Id. at 849-50. The criminal code defines "recklessness" as

> 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.

RCW 9A.08.010(1)(c).

Peters held the recklessness element required the State to prove "that Peters knew of and disregarded a substantial risk that ***death*** may occur." Peters, 163 Wn. App. at 849-50 (emphasis added). But the definitional instruction stated the State need prove only that Peters "knew of and disregarded 'a substantial risk that a ***wrongful act*** may occur,' rather than 'a substantial risk that ***death*** may occur.'" Id. at 849-50 (emphases added). The jury instructions relieved the State of its burden of proof because they allowed the jury to convict Peters only upon a finding that he knew of and disregarded a substantial risk that a "wrongful act" may occur. Id.

Peters relied upon this Court's decision in State v. Gamble, 154 Wn.2d 457, 114 P.3d 646 (2005). Peters, 163 Wn. App. at 848-49. Gamble addressed the recklessness element of manslaughter in the first degree in the context of analyzing whether the crime is a lesser-included offense of felony murder in the second degree based on the predicate offense of second degree assault. Gamble, 154 Wn.2d at 462. The Court held that manslaughter is not a lesser-included offense of felony murder. Id. at 468. The Court explained:

> [T]o prove manslaughter the State must show Gamble "[knew] of and disregard[ed] a substantial risk that a [*homicide*] may occur." On the contrary, to 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. It is thus unamenable to a lesser included offense instruction on the offense of manslaughter.

Id. at 467-68 (citations and footnotes omitted). In distinguishing the elements of the two crimes and the State's burden of proof, the Court held that the "wrongful act" for purposes of manslaughter in the first degree requires proof beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that death may occur. Id.

This case is also like State v. Harris. There, Division Two agreed with Division One's analysis in Peters and extended it to the charge of first degree assault of a child, which required the State to prove the defendant "[r]ecklessly inflict[ed] great bodily harm." Harris, 164 Wn. App. at 383; RCW 9A.36.120(1)(b)(i). The definition for "recklessness" in the jury instruction was the same as in Peters.[2] Harris,

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[2] The instruction defining "recklessness" in Harris stated "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." Harris, 164 Wn. App. at 384.

164 Wn. App. at 384. The instruction misstated the law because it enabled the jury to find only that Harris knew of and disregarded a substantial risk that a "wrongful act" could occur rather than "great bodily harm." Id. at 387-88.

Here, as in Peters and Harris, the jury instructions misstated the law because they allowed the jury to find only that Mans knew of and disregarded a substantial risk that a "wrongful act" could occur rather than "death or serious physical injury to another person." RCW 26.50.110(1), (4). The instructions therefore relieved the State of its burden to prove an element of the crime. Peters, 163 Wn. App. at 849-50; Harris, 164 Wn. App. at 387-88.

This Court's decision in State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014) is distinguishable from this case. There, Johnson was charged under RCW 9A.36.021(1)(a), which provides that a person is guilty of second degree assault if he or she "[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." Id. at 304. The jury was provided with the same definitional instruction of "recklessness" as in this case. Id. at 305. The Court held the instructions, taken in their entirety, were sufficient because the "to convict" instruction properly laid out the elements of the crime. Id. at

306. The to convict instruction required the jury to find Johnson "intentionally assaulted" his wife and "thereby recklessly inflicted substantial bodily harm on" her. Id. at 304-05. The to convict instruction correctly "identified the wrongful act contemplated by Johnson as 'substantial bodily harm.'" Id. at 306.

Johnson does not apply here because the to convict instruction did not identify the wrongful act contemplated by Mans. The to convict instruction stated the jury need find only that Mans' "conduct was reckless and created a substantial risk of death or serious physical injury to another person." CP 98. It did not specify that Mans must have known of and disregarded a substantial risk that *death or serious physical injury* could occur.

Because the jury instructions did not inform the jury they must find Mans knew of and disregarded a substantial risk that death or serious physical injury could occur, they misstated an essential element of the crime. Harris, 164 Wn. App. at 387-88; Peters, 163 Wn. App. at 849-50. The Court of Appeals' conclusion to the contrary conflicts with the controlling case law, warranting review. RAP 13.4(b)(1), (2).

b. The conviction for count III must be reversed.

A jury instruction that misstates an element of the crime is harmless only if the element is supported by uncontroverted evidence. Peters, 163 Wn. App. at 850; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The State bears the burden to show the error is harmless beyond a reasonable doubt. Peters, 163 Wn. App. at 850. The question is whether the Court can conclude beyond a reasonable doubt that the jury verdict would have been the same without the error. Peters, 163 Wn. App. at 850; Brown, 147 Wn.2d at 341.

The question in this case is whether there was uncontroverted evidence that Mans knew of and disregarded a substantial risk that death or serious physical injury to Lopez could occur. See Peters, 163 Wn. App. at 850.

The evidence to establish this essential fact was controverted. Lopez testified she and Mans engaged in a physical struggle after he entered her house. RP 367-72. Lopez alleged that Mans placed his hands around her throat, but the jury did not find him guilty of second degree assault by strangulation. CP 106; RP 371.

Indeed, the evidence that Lopez suffered any "serious physical injury" was equivocal at best. Neither of her neighbors noticed any

physical injuries on her when she came to their house immediately after the incident. RP 261, 278. Lopez suffered no lasting injury but said she had some pain for about a month. RP 391.

In sum, the evidence was not uncontroverted that Mans knew of and disregarded a substantial risk that death or serious physical injury could occur. Therefore, the jury instructions relieved the State of its burden to prove the element of recklessness and were not harmless. The conviction must be reversed. Harris, 164 Wn. App. at 387-88; Peters, 163 Wn. App. at 850-51.

2. The court coerced the jury into entering a verdict for the special findings as to count II.

The court improperly suggested to the jury that they must enter findings on the special verdict form for count II. Initially, the jury did not answer the two questions on the special verdict form for count II. RP 768, 780-81. The court asked the foreperson whether this was "an accidental omission." RP 760. When the foreperson said it was, the court summoned the jury back to the courtroom and told them, "some of these forms are not filled out." RP 771. The court sent the jury back to the jury room with the verdict forms and told them to "follow your instructions and notify us when and if you're ready." RP 771.

The court's actions were improperly coercive in violation of CrR 6.15(f)(2) and Mans' constitutional right to an impartial jury.

The accused has a state and federal constitutional right to a trial by "an impartial jury." Const. art. I, § 22; U.S. Const. amend. VI; State v. Yates, 161 Wn.2d 714, 742, 168 P.3d 359 (2007); Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961).

"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." State v. Boogard, 90 Wn.2d 733, 736-37, 585 P.2d 789 (1978). The accused is entitled to a "verdict free from outside influence." Id. at 740.

Criminal Court Rule 6.15(f)(2) is intended "to prevent judicial interference in the deliberative process." Id. at 736. The rule provides that "[a]fter jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate." CrR 6.15(f)(2).

The question is whether there is "a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." State v. Ford, 171 Wn.2d 185, 188-89, 250 P.3d

97 (2011). The Court considers the totality of the circumstances regarding the trial court's intervention into the jury's deliberations. Id.

When jury instructions contain an "unable to agree instruction," and the jury leaves a verdict form blank, the presumption is that the jury was in fact unable to agree.

> The jury was specifically instructed that if it unanimously agreed on a verdict, it was required to fill in the blank on the verdict form. However, if it could not agree on a verdict, it was instructed to leave the form blank. Given those instructions, the jurors leaving the verdict form blank necessarily meant that they were genuinely deadlocked on the charge.

State v. Glasmann, 183 Wn.2d 117, 126, 349 P.3d 829 (2015).

In this case, the trial court improperly suggested that the jury must fill out the special verdict questions as to count II when the court specifically asked the foreperson whether leaving that section blank was a "an accidental omission." RP 760. Rather than accepting the jury's verdict, the court sent the jurors back to fill out a section of the form that did not necessarily *need* to be filled out. In fact, the jury instructions specifically stated the jury should not fill in the blank on the special verdict form if it was unable to reach a unanimous decision. CP 105. The court essentially questioned the jury's verdict.

This Court has emphasized the importance of not second-guessing a jury, even if verdicts arguably conflict. In light of "the important role of 'jury lenity,' and problems inherent in second-guessing the jury's reasoning," the Court has upheld the "power of a jury to return a verdict of not guilty for impermissible reasons." State v. Goins, 151 Wn.2d 728, 734, 92 P.3d 181 (2004) (internal quotation marks and citation omitted).

Moreover, even if the jury's decision to leave those two questions blank somehow suggested that the jury had failed to follow the court's instructions, such a failure did not allow the court to comment in a way that interfered with the jury's deliberations. In Goins the court reiterated that "[i]t is important to note that while truly inconsistent verdicts reveal the jury somehow erred in applying the jury instructions, that error does not necessarily render the guilty verdict void." Goins, 151 Wn.2d at 733.

Even when a jury may have made a mistake, the trial court must not inquire into the jury's deliberations or its verdict. "[J]uries return inconsistent verdicts for various reasons, including mistake, compromise, and lenity." Goins, 151 Wn.2d at 733. And "[d]espite the inherent discomfort surrounding inconsistent verdicts," a verdict

will not be vacated merely because it is inconsistent with another verdict. Id.

"Because the general verdict and the special verdict are separate and distinct, it is not our place to second-guess the jury's decision to render the two apparently inconsistent verdicts." Id. at 738. A "mistake" does not justify the court's intervention. State v. Harrington, 181 Wn. App. 805, 820, 333 P.3d 410 (2014).

Under these authorities, the trial court's conduct in second-guessing the jury's verdict, based on its own assumption that the jury must have made a mistake, was coercive. The court should have accepted the jury's verdict, even if it believed it to be inconsistent with the jury's general verdicts and special verdicts on the other counts.

In denying the defense motion to reinstate the original verdicts, the trial court relied upon State v. Ford, 171 Wn.2d 185. RP 797. In that case, the Court held that a successful claim of judicial coercion requires "a threshold showing that the jury was still within its deliberative process" at the time the court intervened. Id. at 193. In Ford, the defendant did not make that showing because the jury had already reached a unanimous verdict at the time the court instructed them to fill in a blank verdict form. Id. at 189. Nothing in the record

suggested the jury "was deadlocked or experiencing any difficulty in reaching a decision." Id.

Here, by contrast, the jury had *not* reached a unanimous decision as to count I. RP 764, 768. The jury was deadlocked and unable to reach a decision on that count. Therefore, the jury was still within its deliberative process at the time the court instructed them to reconsider how they had filled out the verdict forms.

The court improperly coerced the jury and the original verdicts must be reinstated. The Court of Appeals' opinion affirming conflicts with the controlling case law, warranting review. RAP 13.4(b)(1), (2).

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 22nd day of May, 2019.

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APPENDIX

FILED
4/29/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RODNEY EUGENE MANS, Appellant.	)	No. 77322-4-I DIVISION ONE UNPUBLISHED OPINION FILED: April 29, 2019

ANDRUS, J. — Rodney Mans appeals his conviction and sentence for second-degree burglary and felony violation of a court order. He argues that the instruction defining recklessness relieved the State of its burden of proof and that the trial court coerced the jury into entering findings on two alleged aggravating factors by instructing the jury to correct errors on the verdict forms. But the jury instructions were not erroneous under State v. Johnson, 180 Wn.2d 295, 325 P.3d 135 (2014). And Mans fails to demonstrate judicial coercion. We therefore affirm.

FACTS

Rodney Mans and Theresa Lopez had a two-year relationship and had a daughter together. In March 2016, after the birth of their child, Mans assaulted Lopez at a shopping mall, resulting in the entry of a no-contact order. Lopez nevertheless remained in touch with Mans thereafter because she loved him and wanted to make the relationship work. The two continued to communicate via text

message. The relationship, however, remained difficult with Mans accusing Lopez of sleeping around. About a month after entry of the no-contact order, Mans came to the house Lopez shared with her father, ringing the door bell and pounding on the door until he broke the screen door. Lopez called the police because she was scared. This scenario repeated itself three or four times.

There were times, however, that Lopez allowed Mans to enter the home, and the two would end up having sex. She sometimes allowed him to sleep in the car in the garage when he had nowhere else to sleep. Her father refused to permit Mans to sleep in the house.

On the morning of October 21, 2016, after Lopez's father had left for work, Mans showed up at Lopez's home. Thinking her father had returned, Lopez got up out of bed to open the door. Mans pushed his way into the house and the two began to fight. During the struggle, Lopez testified that Mans choked her to the point where she thought she "was going to die." She testified that at some point, he was on top of her while she lay prone on the floor, hitting her in the back of her head. She stated Mans told her he had a gun and she felt it in his hand. He let her up after several minutes and, while pointing the gun at her, ordered her into the bedroom.

When they saw headlights of an arriving car through the bedroom window, Lopez told Mans her father had returned. This comment distracted Mans, allowing Lopez to escape the house in her underwear. She called 9-1-1 from a neighbor's home after the newspaper deliveryman refused to open his car door to let her in. When Federal Way Police officers arrived, they were unable to locate Mans. They

found Mans' belongings, including his coat, backpack, and an airsoft pistol used to threaten Lopez, in the trunk of a vehicle parked in the garage.

On December 12, 2016, the State charged Mans with second degree assault (Count I), first degree burglary (Count II), and felony violation of a court order (Count III). The State alleged a domestic violence aggravating factor for each count.

On December 16, 2016, Lopez invited Mans to her home. The two engaged in consensual sexual intercourse but were interrupted by Lopez's brother, who, knowing about the no-contact order, called the police. Mans had again left the premises by the time officers arrived.

In May 2017, the State amended the information to charge Mans with another count of felony violation of a court order (Count IV) for the December 2016 incident, again alleging a domestic violence aggravating factor. The State also alleged the aggravating factor that the crimes charged were part of an ongoing pattern of psychological, physical, or sexual abuse.

Mans' jury trial began on May 16, 2017. The jury began deliberations on May 23, 2017. The trial court provided the jury with verdict forms for each of the four counts, and a Special Verdict Form. The Special Verdict Form asked two questions as to each charge: whether Mans and Lopez were members of the same family or household before or at the time the crime was committed and whether the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim. The court instructed the jury that if it did not find Mans guilty of any of the four charged crimes, it should not answer the corresponding Special Verdict Form questions. But if the jury found Mans guilty of any of the crimes, it

should answer each question "yes" or "no" according to the decision it reached for the relevant crime. Instruction No. 25 indicated that in order to answer the Special Verdict Form "yes," it must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. And it instructed them that "[i]f after full and fair consideration of the evidence you are not able to reach a unanimous decision as to the answer, do not fill in the blank on that special verdict form."

On May 26, 2017, the jury sent a note to the trial court indicating it had reached verdicts on the burglary, and two violation of court order charges (Counts II-IV), but it could not agree on a verdict on the assault charge (Count I). The trial court asked the jury foreperson to confirm on the record that the jury was deadlocked on Count I.

Without the jury present, the trial court and the parties agreed the court would poll the jury and if the jurors agreed they were deadlocked, the court should declare a mistrial as to Count I. They also agreed the court would then take the jury's verdict for Counts II through IV.

When the trial court brought the jury out, it proceeded as the parties had agreed by polling the jury. Each juror confirmed the jury was unable to reach a verdict as to Count I. The court asked the jury to return to the jury room, at which time it declared a mistrial as to Count I and discharged the jury as to that count only.

The trial court then brought the jury back to render its verdicts on Counts II through IV. The trial court reviewed the verdicts and the Special Verdict Form, and before the clerk could read the verdict, the trial court again dismissed the jury to speak with counsel. The trial court informed the parties that the jury had answered

two questions on the Special Verdict Form relating to Count I, the charge for which the trial court had just declared a mistrial, the jury had not answered the two questions relating to Count II, and the foreperson had not signed the Special Verdict Form. The trial court indicated its intent to bring the foreperson into the courtroom a second time to "inquire as to what happened. It could be that . . . this was simply as omission but I want to clarify." Neither party objected to proceeding in this fashion.

The trial court called the jury foreperson out for a second time, and the following exchange occurred:

> COURT: On the Special Verdict . . . Form, I note that there are no answers as to Count II, and your signature and date is not contained on the Special Verdict Form. Can you tell me – and, again, I don't want to know the details, but was that simply an accidental omission?
>
> FOREPERSON: Yes, sir.
>
> COURT: Okay. I am going to . . . send you back out.

After the foreperson left the courtroom, the trial court suggested to counsel that it bring the jury out and instruct it to complete the forms according to the jury instructions. Neither counsel for the State nor counsel for Mans objected to this course of action. Defense counsel stated "I guess, Your Honor, they have verdicts. I don't know how much we are to inquire as to the rest of the process when they say they have a verdict." The trial court explicitly acknowledged that it did not want to "coerce the jury into doing anything." It stated it did not deem it to be coercive to tell the foreperson that the verdict was unsigned. Defense counsel seemed to agree that it was permissible to just inform the jury to fill out the form according to the jury's instructions.

When the trial court brought the jury into the courtroom, it said: "As I explained to the foreperson . . . some of these forms are not filled out and, I'm . . . going to send you back with these forms and simply ask that you follow your instructions and notify us when and if you're ready."

The jury returned approximately six minutes later, and found Mans guilty on the remaining three counts. On the Special Verdict Form, the jury had scratched out the answers to questions relating to Count I, and had answered "yes," to the two questions relating to Count II. The trial court then polled the jury to confirm unanimity and subsequently discharged the jury.

On June 20, 2017, Mans moved to dismiss the jury's findings as to Count II, asserting that the trial court had improperly suggested that the jury needed to fill in an answer in the Special Verdict Form as to Count II. He argued the jury could have left the questions blank if they had not reached a unanimous decision as to either question, and the trial court, by suggesting the blanks were a "mistake," implied that the jurors needed to reach agreement in violation of CrR 6.15(f)(2). The trial court denied the motion, citing to CrR 6.16(b) for its conclusion that it was allowed to order the jury to retire for further consideration, and to State v. Ford, 171 Wn.2d 185, 250 P.3d 97 (2011), for its conclusion that Mans failed to show that the jury was still deliberating and undecided when the court made its comments.

On July 28, 2017, the court imposed a mid-range standard sentence of 101 months on count II, 60 months on count III, and 60 months on count IV, all to run concurrently.[1]

ANALYSIS

Mans first asserts that the "to-convict" instruction for violation of a court order, when read with the definition of recklessness, relieved the State of its burden of proving that Mans disregarded a substantial risk that death or physical injury could occur.

We review jury instructions de novo. State v. Johnson, 180 Wn.2d at 300. "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." Id. at 306 (quoting State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). 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." Id. (quoting State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010)). Other jury instructions cannot supplement a defective to-convict instruction. Id.

Instruction 21, the to-convict instruction for Count III, provided in pertinent part that:

> To convict the defendant of the crime of violation of a court order as charged in Count 3, each of the following five elements of the crime must be proved beyond a reasonable doubt:

[1] It also imposed a concurrent 12 month sentence on a subsequent unrelated charge (King County Superior Court no. 17-1-00489-4). That charge was not used in the calculation of the offender score for this case. This court recently reversed that conviction and sentence in an unpublished opinion. See State v. Mans, No. 77321-6-I (Wash. Ct. App. Mar. 11, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/773216.pdf.

> (1) That on or about October 21, 2016, there existed a no-contact order applicable to the defendant;
> (2) That the defendant knew of the existence of this order;
> (3) That on or about said date, the defendant knowingly violated a provision of this order;
> (4) That
> (a) the defendant's conduct was an assault that did not amount to assault in the first or second degree; or
> (b) the defendant's conduct was reckless and created a substantial risk of death or serious physical injury to another person; and
> (5) That the defendant's act occurred in the State of Washington.

Instruction 12 provided a definition of "recklessness:"

> 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 fact or result 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.

Instruction 12 is a verbatim restatement of Washington Pattern Jury Instruction (WPIC) 10.03, which is taken from RCW 9A.08.010(1)(c).

Mans argues that by defining recklessness as disregarding a substantial risk that "a wrongful act may occur," Instruction 12 lowered the State's burden of proving that Mans created a substantial risk that death or serious physical injury would occur. This argument, however, was explicitly rejected in State v. Johnson. In that case, a jury convicted Johnson of multiple domestic violence crimes against his wife, including second-degree assault. Johnson argued he received ineffective assistance of counsel when his attorney offered the generic definition of recklessness in his proposed instructions. 180 Wn.2d at 305. Johnson argued, as Mans does here, that the to-convict instruction, when read in conjunction with

the recklessness instruction, lowered the State's burden of proof because the phrase "a wrongful act" was used instead of the more charge-specific language "substantial bodily harm." Id.

The Supreme Court disagreed. It held the to-convict instruction correctly articulated the elements of second-degree assault, including the element of recklessly inflicting substantial bodily harm. Id. at 306. The generic instruction defining "reckless" was sufficient without any charge-specific language because the to-convict instruction included the proper language. Id. at 305.

Mans does not contend Instruction 21 failed to set out all the elements of the charged crime. As in Johnson, Instruction 21, the to-convict instruction, accurately set forth the elements of RCW 26.50.110(4).[2] Instruction 12 contained the general WPIC definition of reckless. Because the two instructions were proper under Johnson, we reject this argument.

Mans next argues that the trial court improperly intervened with the jury's deliberations because it coerced the jury into rendering a verdict as to the aggravators for Count II. To prevail on a claim of improper judicial interference, a defendant "must establish a reasonably substantial possibility that the verdict was improperly influenced by the trial court's intervention." State v. Ford, 171 Wn.2d 185, 188-89, 250 P.3d 97 (2011) (quoting State v. Watkins, 99 Wn.2d 166, 178,

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[2] Under RCW 26.50.110(4):

> Any assault that is a violation of an order issued under this chapter, chapter 7.92, 7.90, 9A.40, 9A.46, 9A.88, 9.94A, 10.99, 26.09, 26.10, *26.26, or 74.34 RCW, or of a valid foreign protection order as defined in RCW 26.52.020, and that does not amount to assault in the first or second degree under RCW 9A.36.011 or 9A.36.021 is a class C felony, and any conduct in violation of such an order that is reckless and creates a substantial risk of death or serious physical injury to another person is a class C felony.

660 P.2d 1117 (1983)). This requires an affirmative showing; it cannot be based on mere speculation. Id. But, before doing so, the defendant must make a threshold showing that the jury was still in the deliberative process. Id.

Mans' argument is foreclosed by State v. Ford. In that case, Ford was charged with two counts of child rape. Id. at 186. When the presiding juror alerted the trial court that the jury had reached a unanimous verdict, the court announced the verdict for the second count but not for the first. Id. at 186-87. After a brief sidebar with counsel, the court alerted the jury that it had failed to complete the verdict form for the first count. Id. at 187. Before sending the jury back to the jury room, the court instructed the jury that the form "must be filled in." Id. Ford did not object. Id. at 188. The jury returned four minutes later with a guilty verdict for the first count. Id. at 187-88. The trial court then polled the jury and confirmed its verdict was unanimous on both counts. Id. at 189.

Ford argued the trial court erred by directing the jury to complete the verdict form for the first count. Id. at 188. Ford alleged a violation of CrR 6.15(f)(2), which prohibits a court from instructing the jury in a way that suggests the need for agreement. Id. at 190. The Supreme Court rejected this argument because the record showed that the jury had informed the court it had reached a verdict and, after being instructed by the court to complete the verdict forms, it returned after only four minutes, demonstrating the jury's deliberations were complete. Because the jury was not still within the deliberative process, CrR 6.15(f)(2) was inapplicable. Id. at 191.

This case is analogous to Ford. Here, the jury alerted the trial court that it had reached decisions for Counts II, III, and IV but that it could not agree on Count

I. As a result, the court declared a mistrial as to Count I. The court then reviewed the verdicts and the Special Verdict Form and noticed the jury had answered the questions on the Special Verdict Form as to Count I but not as to Count II. The foreperson had also failed to sign the Special Verdict Form.

Both counsel for Mans and counsel for the State agreed with the court's suggestion to question the foreperson about the forms. When the foreperson confirmed that it was an "accidental omission," there was no objection to the court's suggestion that it return the verdict forms to the jury to be completed according to the jury instructions. In fact, counsel for Mans conceded that the jury had completed its deliberations by that point. The jury returned the completed and signed verdict forms six minutes later. When polled, each juror stated that the verdicts were unanimous.

The record here, like in Ford, demonstrates the jury had completed its deliberations by the time the trial court alerted it that the Special Verdict Form was incomplete. Mans has thus failed to make a threshold showing that the jury was in the deliberative process when the trial court made its comments to the jury. Thus, as in Ford, we find no violation of CrR 6.15(f)(2).

Affirmed.

Andrus, J.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77322-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: May 22, 2019
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