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NO. 65029-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAY DEE MILLER,

Appellant.

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

The Honorable Larry McKeeman, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

(1) The trial court committed reversible error by instructing the jury, in Instruction Nos. 8 and 9, that Mr. Miller could be found guilty of committing an assault, element No. 1 of the to-convict instruction, even if it found that Mr. Miller did not actually intend to inflict bodily injury. Instructions 8 and 9, considered together, permitted the jury to find that Mr. Miller committed an assault without the requisite element of intent.

(2) Under the circumstances of this case, the trial court should have instructed the jury that proof that Mr. Miller inflicted great bodily harm was required to support a conviction. Court's Instructions 8 and 9 were erroneous for this reason.

(3) Since this incident took place in Mr. Miller's home, the trial court should have instructed the jury in accordance with the standard set forth in the justifiable homicide statute, RCW 9A.16.050(2).

(4) The trial court erred by not including the absence of self-defense as an element in the to-convict instruction itself.

B. STATEMENT OF THE CASE

1. Summary of Proceedings Below

Jay Dee Miller, a professional gardener residing in Everett, was charged by information with the offense of assault in the first degree under RCW 9A.36.011. CP 71-72. Trial of the case resulted in a guilty verdict, CP 29, and a special verdict that Mr. Miller was armed with a firearm. CP 56.

Mr. Miller was sentenced to fifteen years in prison. CP 7-17. This appeal followed. CP 1-6.

2. Summary of Testimony

Defendant Jay Miller met the complaining witness, James Engle, approximately one month prior to the incident. RP 244.¹ Mr. Miller gave Engle and his friend Spring Kopp a place to stay. RP 245. Mr. Miller was living in a home in Everett owned by his father.

On a day prior to the incident, Mr. Miller observed Engle in a fight which took place behind the Walmart store in Everett. RP 248. Engle tackled an individual who had allegedly beaten up a friend of Engle's. Engle hit the victim with his fists and kicked him with his shoe. The victim tried to get away, but Engle tackled him again. RP 248-249. Engle swung at the victim with a flashlight. RP 250-251. After the incident, Engle was elated that he had beaten this individual up. *Ibid.*

Prior to the incident, Engle told Mr. Miller stories from his prison fights. RP 252. Engle told Mr. Miller that he had to fight to survive in prison. RP 252. He showed Mr. Miller how he punched people. RP 253.

On a day prior to the incident, Engle was arrested, apparently on a warrant, and was taken to jail to serve time. He subsequently returned to Everett, and to Mr. Miller's home, four days before the shooting. RP 255-256.

¹ The verbatim report of proceedings consists of two volumes, I and II. The pages are numbered consecutively.

Upon Engle's return, Mr. Miller asked Engle when he would find his own place to live. RP 257. Mr. Miller did not want Engle on the property any longer. RP 258. He was afraid of Engle. *Ibid.*

Mr. Miller heard a verbal argument between Engle and his girlfriend Spring. RP 260-261. Engle called Spring a name. When Mr. Miller asked Engle not to do that, Engle replied, "I'll jerk your head off". RP 265.

On the night before the incident, Engle stayed in a travel trailer which was behind Mr. Miller's home. Engle rang the doorbell to Mr. Miller's home the next morning, telling Mr. Miller to "open the goddamn door". RP 273, 275. Mr. Miller asked Engle to take his stuff and get off the property. RP 273, 275. Mr. Miller put a handgun in his pocket because he was afraid that Engle was going to assault him. RP 275.

After Mr. Miller told Engle to leave, Engle shoved him in the chest. RP 277-278. Mr. Miller shoved Engle back. Engle knocked Mr. Miller down on his rear-end. RP 278. Engle pushed Mr. Miller under a kitchen counter; Mr. Miller moved a bar stool between them. Mr. Miller took out his gun. Engle asked Mr. Miller: "What are you going to do, shoot me?". RP 278. Miller replied that he was not going to shoot Engle, but that he wanted him to leave and not come back. RP 279.

Engle stormed out of the house, slammed the slider door closed, and began kicking items around in the yard. RP 279-281. Engle picked up a rock and started to come towards the door of Mr. Miller's home. RP 281. He threw the rock on a step. Engle came into the house again; Mr. Miller backed up. RP 282-283.

Mr. Miller was afraid that Engle was going to do him bodily harm. RP 284. This was due to Engle's actions, what Mr. Miller had seen Engle do in the past, and the "I'll break your head" comment. RP 283-284.

Mr. Miller closed his eyes and fired. RP 283. After the shot was fired, Engle swore at Mr. Miller and started to step forward; Mr. Miller fired a second shot because Engle was coming towards him. RP 286.

James Engle, the complaining witness, testified to a different version of events. See RP 81 ff.

On cross, Engle admitted that he had taken medication for schizophrenia. RP 103-104. He had taken Risperdal because he was hearing voices. RP 105. Engle indicated that he served time in prison in California and had convictions for theft in California, Utah, and Washington. RP 107-109.

Dr. Paul Kim, an emergency medicine physician at Providence, testified to his examination of Engle after the incident. He observed a superficial wound to Engle's shoulder. RP 223-224. Engle had two wounds in the back of his head. RP 226. The two wounds in the back of Engle's head were most likely an in-and-out sort of injury. RP 227. The wounds were closed with staples, two for one wound and one for the other one. RP 228.

The skull was intact; there were no fractures. RP 226. Engle had stable vital signs, was alert and oriented, and did not have any other complaints, no headaches or any neurologic deficits. RP 222.

Dr. Kim could not say what direction Engle's torso was facing at the time the bullet hit his head. RP 233. At the time of the shooting, the head could be anywhere it could swivel to, with the body being in a different position. RP 233.

Detective Allen of the Everett police department located a .22 pistol on Mr. Miller's kitchen counter; two rounds appeared to have been fired. RP 143-144. An unloaded shotgun was located in the home. RP 145.

Other officers testified to their post-incident contacts and interviews of Mr. Miller. Detective Parker of the Everett police department described Mr. Miller as flustered and "kind of out of it" during their contact. RP 162.

C. *Argument as to Assignment of Error No. 1: the Trial Court Committed Reversible Error by Instructing the Jury, in Instruction Nos. 8 and 9, That Mr. Miller Could Be Found Guilty of Committing an Assault, Element No. 1 of the To-convict Instruction, Even If it Found That Mr. Miller Did Not Actually Intend to Inflict Bodily Injury. Instructions 8 and 9, Considered Together, Permitted the Jury to Find That Mr. Miller Committed an Assault Without the Requisite Element of Intent.*

Court's Instruction No. 8, the to-convict instruction, advised the jury that to obtain a first degree assault conviction, the prosecution must prove four elements beyond a reasonable doubt. The first element was that "the defendant assaulted James Engle;...". CP 41. Instruction No. 9 defined the term "assault". CP 42.²

Three definitions of assault were given in Instruction 9. The third paragraph advised the jury that an assault "is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, ... *even though the actor did not actually intend to inflict bodily injury.* Instruction No. 9, CP 42 (emphasis added). Based upon this instruction, the jury could find that Mr. Miller had committed an assault without intending to inflict bodily injury.

² For the Court's convenience, copies of Instructions 8 and 9 appear in the Appendix herein, pages A-1 and A-2.

The third element in the “to-convict” instruction stated: “That the defendant *acted* with intent to inflict bodily harm; ...”. (Emphasis added.) This instruction did not require the jury to find that the *assault itself*, Element No. (1), was committed with intent to inflict great bodily harm. Accordingly, the instruction constituted reversible error because the jury was not required to find that Mr. Miller committed the assault itself with requisite intent.

The prosecution must prove every essential element of a crime beyond a reasonable doubt for a conviction to be upheld. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). Accordingly, “it is reversible error to instruct the jury in a manner that would relieve the state of this burden”. *State v. Byrd*, 125 Wn.2d 707, 714, 887 P.2d 396 (1995). The instructions, taken in their entirety, must inform the jury that the state bears the burden of proving the requisite intent. *State v. Byrd, supra*.

As a result of the phrasing of Instructions 8 and 9, even if the jurors found that Mr. Miller assaulted James Engle *without* intent to inflict great bodily harm, the trial court’s instructions permitted it to return a verdict of guilty of first degree assault, as long as the jury found that *some act* depicted in the testimony was done with such intent. As such, the trial court’s instructional error impermissibly removed the element of intent from the jury. *See State v. Byrd, supra*, 125 Wn.2d at 716, 887 P.2d at 401.

To paraphrase the analysis of the Court of Appeals in *Byrd*,³ it is not enough to instruct a jury that the state must prove that Mr. Miller did *some act*

³ See *State v. Byrd*, 72 Wn.2d 774, 780, quoted in *State v. Byrd, supra*, 125 Wn.2d at 715-716, 887 P.2d at 400-401.

with intent to inflict great bodily harm because, given the circumstances, even his act of drawing the gun, as well as some other act, could be found to be an act done with the requisite intent. Even where an act is done unlawfully and the result is reasonable apprehension in another, it is not sufficient to convict because *the assault itself* must be accompanied by the requisite intent, not some unspecified “act”.

Mr. Miller was charged in the information with assault in the first degree under RCW 9A.36.011(1)(a). That statute requires proof that the defendant assaulted another “with intent to inflict great bodily harm”. The instructions did not require the jury to find that Mr. Miller *assaulted* Engle with intent to inflict great bodily harm, only that, at some point during the incident, he *did some act* with that intent. This is insufficient. Reversal is required.

D. *Argument as Assignment of Error No. 2: under the Circumstances of this Case, the Trial Court Should Have Instructed the Jury That Proof That Mr. Miller Inflicted Great Bodily Harm Was Required to Support a Conviction. Court’s Instructions 8 and 9 Were Erroneous for this Reason.*

As noted, Mr. Miller was charged in the information with assault in the first degree under RCW 9A.36.011(1)(a), which requires proof of an assault with a firearm or deadly weapon committed with the intent to inflict great bodily harm. Another section of the statute, RCW 9A.36.011(1)(c), provides that a person is guilty of assault in the first degree if he assaults another with intent to inflict great bodily harm and in fact inflicts such harm.

Under the circumstances of this case, infliction of great bodily harm was an element that had to be proven to the jury beyond a reasonable doubt. This result is required because Mr. Miller’s action of pointing his gun and/or

firing it, or both, would constitute second degree assault under Washington law: "RCW 9A.36.021(1)(c) clearly specifies that one commits second degree assault whenever one assaults another with a deadly weapon." *State v. Smith*, 124 Wn. App. 417, 432, 102 P.3d 158 (2004). The assault proscribed by the second degree assault statute includes the act of firing a bullet at someone. *Ibid.*

In this case, the element of infliction of great bodily harm distinguishes assault in the first degree from assault in the second degree. The instructions herein blurred the distinction between the two statutes, because the first degree assault instructions did not require the jury to find that Mr. Miller committed the assault itself with the requisite intent. See Section C, above.

The blurring of the elements of the two statutes in the instructions, under the circumstances of this case, requires reversal and a new trial for Mr. Miller.

E. *Argument as to Assignment of Error No. 3: since this Incident Took Place in Mr. Miller's Home, the Trial Court Should Have Instructed the Jury in Accordance with the Standard Set Forth in the Justifiable Homicide Statute, RCW 9A.16.050(2).*

Under the circumstances of this case, the trial court should have instructed the jury regarding Mr. Miller's specific right to defend himself in his home; a new trial should be granted.

The justifiable homicide statute provides broader protections to individuals utilizing force inside their own homes. RCW 9A.16.050(2) provides in pertinent part that homicide is justifiable when committed "... in the actual resistance of an attempt to commit a felony upon the slayer, in his presence,

or upon or in a dwelling, or other place of abode, in which he is". Under this statute, a citizen can use force against a burglar, for example, without the showing of necessity which has been interpreted to be required in the general self-defense statute, RCW 9A.16.020(3).

Mr. Miller had a broader right of self-defense because he was in his own home. The jury instructions did not apprise the jury of this principle; reversal is required. "A jury instruction stating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial". *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997), quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996).

It is true that RCW 9A.16.050(2) is a justifiable homicide statute, rather than a general self-defense statute. The scope of the right of self-defense should not turn on whether or not a death occurred. The controlling factor should be whether or not force was used by the citizen in his own home. The jury should be instructed regarding the home self-defense statute, RCW 9A.16.050(2).

F. *Argument as to Assignment of Error No. 4: the Trial Court Erred by Not Including the Absence of Self-Defense as an Element in the To-convict Instruction Itself.*

The absence of self-defense is an element which the prosecution was required to disprove in this case, beyond a reasonable doubt. The element of absence of self-defense did not appear in Instruction 8, the to-convict instruction. Instead, it appeared in Instruction 17. CP 50. Instruction No. 8 should have included the element of absence of self-defense.

We contend that the trial court's failure to include all the elements the prosecution was required to prove in the "to-convict" instruction violated Mr. Miller's constitutional rights to due process of law and to a fair jury trial, secured to him by Article I, §§ 3, 21 and 22 of the Washington Constitution, and the Sixth and Fourteenth Amendments to the United States Constitution. Citing *Sullivan v. Louisiana*⁴ and other federal decisions, the Washington Supreme Court has held that a "to-convict" instruction that fails to identify all the elements of the crime may not be cured by referring to the other instructions given by the trial court; the jury is entitled to rely on the "to-convict" instruction as a complete statement of the elements the prosecution must prove. *State v. Smith*, 131 Wn.2d 258, 262-263, 930 P.2d 917 (1997). A "to-convict" instruction that fails to identify all of the elements of the crime is error of constitutional magnitude and is never harmless. *Smith, supra*, at 263-266; *State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) (failure to instruct jury on intent element was not harmless error; jury not required to search other instructions to see if another element should have been included).

Undersigned counsel recognizes that prior decisions have concluded that the element of absence of self-defense need not be included in the to-convict instruction. Nonetheless, this argument is presented here in order to preserve the issue for Mr. Miller.

⁴ 508 U.S. 275, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

G. CONCLUSION

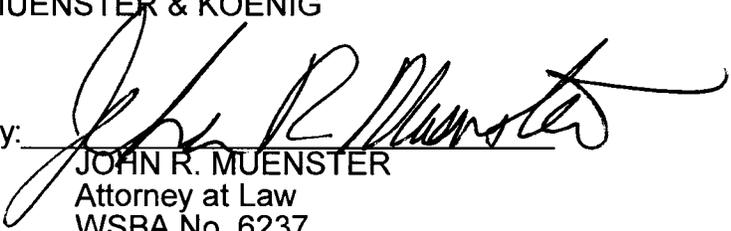
The record in this case demonstrates instructional error at Mr. Miller's trial. However, no exception was taken by the defense to the trial court's instructions. We urge the Court to review the issues set forth herein on appeal because there is manifest error effecting Mr. Miller's constitutional rights, under the Sixth and Fourteenth Amendments to the United States Constitution, to a fair trial before a properly instructed jury. See RAP 2.5(a)(3).

For the reasons stated, we urge the Court to reverse the judgment, and remand this cause to the Snohomish County Superior Court for a new trial.

DATED this the 24 day of August, 2010.

Respectfully submitted,

MUENSTER & KOENIG

By: 

JOHN R. MUENSTER
Attorney at Law
WSBA No. 6237

Of Attorneys for Appellant Jay Dee Miller

CERTIFICATE OF SERVICE

I certify that on the date noted below I filed the above entitled document with the Clerk of the Court. On the same date, I served opposing counsel in this case via first class mail.

DATED this the 2nd day of August, 2010.

MUENSTER & KOENIG

By: S/Andi Anderson
Andi Anderson
Legal Assistant

INSTRUCTION NO. 8

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

(1) That on or about the 2nd day of September, 2009, the defendant assaulted James Engle;

(2) That the assault was committed with a firearm or by force or means likely to produce great bodily harm or death;

(3) That the defendant acted with intent to inflict great bodily harm; and

(4) That this act 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 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.

INSTRUCTION NO. 9

An assault is an intentional touching or shooting 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 shooting is offensive if the touching or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.