

67349-1

67349-1

NO. 67349-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

FRANKLIN L. HUTTON,

Appellant.

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Whether the trial court's decision to instruct the jury on the definition of assault without the term "unlawful force" was an abuse of discretion?

2. Whether the trial court correctly instructed the jury on the essential elements of second degree assault?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

Osmin Chavez is twenty-two years old. He is mentally slow and has schizoaffective disorder. In 2010, Chavez began hanging out in the Everett area around Evergreen Way and Madison Avenue; he also began associating with the defendant Franklin Hutton, Jessica Valdes, James Burmaster, Arturo Hinojosa, Vincent Ram and Bonnie Wilson. The defendant and Valdes have an on-again-off-again relationship and a four year old daughter in common. RP 13-19, 46-51, 63-66, 69-72, 208.

Valdez told the defendant that one night when Chavez was over watching a movie she fell asleep and woke up with Chavez on top of her with her breast uncovered. Valdez flipped out and Chavez got off of her. Valdez told the defendant that she had handled the situation and did not want him to do anything about it.

The defendant told Valdez that he would not do anything and that he had no intention of looking for Chavez or confronting him about the incident. RP 20, 208-209.

On December 17, 2010, Chavez was at Valdez's apartment listening to some music with Burmaster and two other women. The defendant arrived at the apartment and an argument ensued. Valdez told everyone to leave. The defendant and Burmaster followed Chavez. The defendant confronted Chavez regarding the prior incident with Valdez and Chavez admitted having had a sexual encounter with her. The defendant suggested that they settle the matter in a garage across the street from Valdez's apartment. RP 21-26, 209-211.

Chavez asked the defendant for a "pass"—street lingo for forgiveness—for the act. The defendant replied, "Hell no," and punched Chavez in the jaw. The defendant continued punching Chavez with Burmaster joining in. Chavez did not fight back. When Chavez fell to the ground the defendant and Burmaster began kicking him. The defendant kicked Chavez in the jaw. Chavez got up and Burmaster head-butted him in the mouth. The defendant finally said, "Okay, man, stop it." Chavez's jaw was broken during the assault. RP 27-30, 35-36, 213-214.

## **B. OBJECTION TO INSTRUCTIONS.**

The defendant was charged with second degree assault and the case proceeded to trial. At the conclusion of the State's case, the trial judge asked about proposed instructions. Defense counsel replied that she thought the parties had reached an agreement on WPIC 35.50, the "definition of assault, which includes the sentence on consent." Defense counsel also stated, "We are not asserting self-defense. I will be clear on that." CP 114-115; RP 149-150.

At the conclusion of the defense case the court provided counsel with copies of the jury instructions and asked for objections and exceptions. The State objected to the words "with unlawful force" in the proposed WPIC 35.50<sup>1</sup> on the basis that it was not applicable since the defendant was not arguing self-defense. The court agreed and gave the following instruction: "An assault is an intentional touching or striking of another person that is harmful or offensive. An act is not an assault if it is done with the consent of the person alleged to be assaulted." The defendant took exception. The only other objection or exception made by the defendant to the

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<sup>1</sup> The record of proceedings indicates that both sides proposed variations of WPIC 35.50. RP 245. However, a defense version is not contained in the clerk's record.

court's jury instructions was an objection to the court giving the accomplice instruction. CP 69, 70, 74, Sub# 35 at 12; RP 244-248.

The jury found the defendant guilty of second degree assault. CP 63.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT'S DECISION TO INSTRUCT THE JURY ON THE DEFINITION OF ASSAULT WITHOUT THE TERM "UNLAWFUL FORCE" WAS NOT AN ABUSE OF DISCRETION.**

The defendant argues that because his defense was that Chavez consented to fight the trial court erred in denying his request to include the optional language "with unlawful force" in its jury instruction defining assault. Appellant's Brief 6.

##### **1. Absent An Abuse Of Discretion The Trial Court's Decision To Give An Instruction Correctly Stating The Law Should Not Be Disturbed.**

Appellate courts review jury instructions for errors of law de novo, considering the challenged instruction in the context of all of the jury instructions as a whole. State v. Hayward, 152 Wn. App. 632, 641-642, 217 P.3d 354 (2009). Jury instructions are proper if they inform the jury of the applicable law without misleading the jury and allow the parties to argue their theories of the case. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). However, a jury instruction on a theory unsupported by the evidence presented

is improper. State v. Jarvis, 160 Wn. App. 111, 120, 246 P.3d 1280 (2011). “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.” Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); State v. Riley, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). A trial court’s refusal to give a jury instruction is reviewed for abuse of discretion. State v. Buzzell, 148 Wn. App. 592, 602, 200 P.3d 287 (2009). Even if an instruction may be misleading, it will not be reversed unless prejudice is shown by the complaining party. Keller, 146 Wn.2d at 249. If, on the other hand, a jury instruction correctly states the law, the trial court’s decision to give the instruction will not be disturbed absent an abuse of discretion. State v. Aguirre, 168 Wn.2d 350, 363-364, 229 P.3d 669 (2010).

## **2. Lawful Use Of Force.**

The use of force is lawful if it is (1) necessarily used by a public officer performing a legal duty; (2) necessarily used by a person arresting someone who committed a felony and delivering that person into custody; (3) used in defense of self, others, or property; (4) used to detain someone who unlawfully enters or

remains in a building and reasonably necessary for investigation; (5) used by a passenger carrier to remove a passenger who refuses to obey lawful, reasonable regulations; or (6) used to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing a dangerous act to any person. RCW 9A.16.020. Moreover, in its definition of assault, the Washington Supreme Court Committee on Jury Instructions explains that the “with unlawful force” language should be included if the defendant argued either self defense or lawful use of force. Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50, note on use at 548 (3d ed. 2008) (WPIC). “If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term ‘lawful.’ If there is no such evidence, the jury should not be left to speculate on what might constitute ‘lawful’ conduct.” WPIC 35.50 at 550; State v. Arthur, 42 Wn. App. 120, 122, 708 P.2d 1230 (1985) (aggressor instruction use of term “unlawful act” found unconstitutional vague). The defendant did not propose an instruction defining the term “lawful.” CP 81-94.

### **3. Consent Is Not Defined As A Lawful Use Of Force.**

In the present case, the defendant admitted hitting Chavez, but claimed that Chavez started the conflict by pushing him. The

defendant's theory was that Chavez consented to the assault. The court instructed the jury: "An act is not an assault if it is done with the consent of the person alleged to be assaulted." CP 70. The defendant's only reference to a lawful use of force defense was in his argument to include "with unlawful force" language in the jury instruction defining assault. RP at 245-247. Defendant's argument that his use of force was lawful is incorrect. Consent is not included in the statutory definition of lawful use of force. RCW 9A.16.020.

The defendant was not precluded from arguing that the assault was justified by self-defense; he chose not to raise self-defense. RP 150, 212-213. Instead the defendant argued that Chavez consented to the assault. But justification by self-defense and vitiation by consent are not the same inquiry. State v. Shelley, 85 Wn. App. at 33. "As our Supreme Court stated in State v. Simmons, 'where there is consent, there is no assault.'" State v. Shelley, 85 Wn. App. 24, 29, 929 P.2d 489 (1997) (quoting State v. Simmons, 59 Wn.2d 381, 388, 368 P.2d 378 (1962). However, "the great weight of authority disfavors the defense of consent in assault cases." State v. Baxter, 134 Wn. App. 587, 599, 141 P.3d 92 (2006).

It is not a defense to any form of criminal assault that the victim thought his punishment well deserved and consented to it. To make a good defense the accused must prove that the law gave him the right to chastise and that he exercised it reasonably. There are certain standards of behavior or moral principles which society requires to be observed; and the breach of them is an offense not merely against the person who is injured, but against society as a whole.

State v. Brown, 143 N.J.Super. 571, 579, 364 A.2d 27 (1976).

Courts are hesitant to permit a defense of consent for assault because "society has an interest in punishing assaults as breaches of the public peace and order, so that an individual cannot consent to a wrong that is committed against the public peace." State v. Weber, 137 Wn. App. 852, 859, 155 P.3d 947 (2007) (quoting State v. Shelley, 85 Wn. App. at 29. In determining whether consent is a defense to a criminal charge, the court considers the nature of the act that forms the basis of the charge, the surrounding circumstances, and public policy regarding the activity involved. Baxter, 134 Wn. App. at 598. Consent is not a defense to a crime if the activity that was consented to is against public policy. State v. Hiott, 97 Wn. App. 825, 828, 987 P.2d 135 (1999).

Because consent is not a lawful use of force by statute, and because the jury instructions allowed the defendant to argue that Chavez consented to fight, the instructions allowed the defendant

to present his theory of the case. The trial court instruction correctly stated the law and, therefore, the decision to not include the term “unlawful force” was not an abuse of discretion. The defendant's argument fails; the conviction should be affirmed.

**B. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE ESSENTIAL ELEMENTS OF SECOND DEGREE ASSAULT.**

The defendant argues the jury instructions violated his rights to due process because the to-convict instruction did not include language that the State had the burden to prove the absence of lawful force beyond a reasonable doubt.<sup>2</sup> He contends this relieved the State of its burden of proving an essential element of the crime. Appellant's Brief 5.

**1. The Court Properly Instructed The Jury On The Elements Of Second Degree Assault.**

The State must prove every essential element of a crime beyond a reasonable doubt in order for the court to uphold a conviction. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). It is reversible error to instruct the jury in a manner

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<sup>2</sup> The Supreme Court has rejected the similar argument that absence of self-defense must be included in the “to-convict” instruction. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

that relieves the State of this burden. State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995).

A person is guilty of assault in the second degree if he “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a). In accordance with RCW 9A.36.021(1)(a), the “to-convict” instruction given to the jury in this case 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 17th day of December, 2010, the defendant, or an accomplice, intentionally assaulted Osmin Alexander Chavez;

(2) That the defendant, or an accomplice, thereby recklessly inflicted substantial bodily harm on Osmin Alexander Chavez; and

(3) 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.

CP 69. This instruction follows the pattern instruction set forth in WPIC 35.13 (as modified pursuant to State v. Teal, 152 Wn.2d 333, 96 P.3d 974 (2004) to include accomplice language).

To be constitutional, the jury instructions need only instruct the jury about each element of the offense charged. State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988). Instructions need not define the elements individually. Id. In other words, the particular terms used in the instructions do not need to be specifically defined. Scott, 110 Wn.2d at 691. In this case, the jury was properly instructed regarding each element of second degree assault and of the State's burden to prove each element beyond a reasonable doubt.

## **2. Definitional Instructions.**

Nonetheless, in the present case, the court also instructed the jury on the definitions of assault, intent, reckless, and substantial bodily harm:

Instruction 4.

An assault is an intentional touching or striking of another person that is harmful or offensive. An act is not an assault if it is done with the consent of the person alleged to be assaulted.

CP 70.

Instruction 5.

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

CP 71.

Instruction 6.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that an assault may result in the infliction of substantial bodily injury and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 72.

Instruction 7.

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

CP 73.

“[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case.” State v. Teal, 152 Wn.2d at 339; State v. Benn, 120 Wn.2d 631, 654-655, 845 P.2d 289 (1993). The appellate court reviews de novo whether a jury instruction correctly states the applicable law. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Viewing the instructions in the present case as a whole and in the context of the testimony and arguments,

the instructions on second degree assault were accurate, not misleading and permitted each party to argue its theory of the case.

The to-convict instruction told the jury twice that each element had to be proved beyond a reasonable doubt. Nothing in this instruction, or any other instruction, informed the jury of any circumstance in which it could return a verdict of guilty on the charge of assault in the second degree without finding all three elements. The to-convict instruction clearly required the jury to find beyond a reasonable doubt that the defendant intentionally assaulted Chavez and thereby recklessly inflicted substantial bodily harm on him. There was no instructional error or due process violation. The defendant's conviction should be affirmed.

### **3. Invited Error And Failure To Object.**

Additionally, the defendant invited the error about which he now complains on appeal: Except for the accomplice language,<sup>3</sup> the defendant proposed an identical to-convict instruction to the court. CP 94. Thus, the defendant cannot now claim that the trial court erred in giving his proposed instruction. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) ("a party may not

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<sup>3</sup> While defendant objected to the accomplice instruction at trial, RP 247-248, he does not raise the issue on appeal.

request an instruction and later complain on appeal that the requested instruction was given”) (citations omitted).

The defendant further compounded his waiver of this alleged error when he failed to object to the language of the to-convict jury instructions at trial. The defendant’s claim that he objected to the court not including “unlawful force” in the to-convict instruction (Appellant’s Brief 3) is not supported by the record. RP 244-248. Accordingly, he cannot challenge this instruction for the first time on appeal. See State v. Scott, 110 Wn.2d 682, 685-686, 757 P.2d 492 (1988). A party must object to an erroneous instruction in order to afford the trial court an opportunity to correct the error. CrR 6.15(c); Scott, 110 Wn.2d at 685-686. Absent manifest injustice, an appellate court will not review an assignment of error based on deficiencies in the jury instructions when the defendant made no objection at trial. State v. Stubsoen, 48 Wn. App. 139, 148, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). If the defendant can show that the alleged error relieved the State of its burden of proof, then the error is of constitutional magnitude, which will not preclude review despite his failure to object. See State v. Davis, 154 Wn.2d 291, 306, 111 P.3d 844 (2005), aff’d in part, rev’d in part and rem’d on other grounds, 547 U.S. 813, 126 S.Ct. 2266 (2006);

State v. Goble, 131 Wn. App. 194, 203, 126 P.3d 821 (2005) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). However, as shown above, the defendant has not shown that the instructions relieved the State of its burden of proof.

In this case, the jury was properly instructed regarding each element of second degree assault and of the State's burden to prove each element beyond a reasonable doubt. The instructions were sufficient to allow the defendant to argue his theory of the case. The conviction should be affirmed.

#### **IV. CONCLUSION**

For the foregoing reasons, the defendant's appeal should be denied.

Respectfully submitted on February 1, 2012.

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