

70234-3

70234-3

No. 70234-3

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

STATE OF WASHINGTON,

Respondent,

v.

KHAIR A. SIDDIQ,

Appellant.

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

APPELLANT'S OPENING BRIEF

FILED
11/11/10



MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT..... 8

**The trial court erred in refusing to provide the defense-
proposed to-convict jury instruction**..... 8

1. The State bore the burden to prove, as an element of the crime,
that Mr. Siddiq did not act in self defense 8

2. The court erred in refusing to provide the defense-proposed to-
convict instruction that included the absence of self defense as
an element of the crime, because the instruction was an accurate
statement of the law and was supported by the evidence 11

3. The conviction must be reversed 14

E. CONCLUSION..... 15

TABLE OF AUTHORITIES

Constitutional Provisions

Const. art. I, § 3	9, 11
Const. art. I, §21	11
U.S. Const. amend. VI.....	11
U.S. Const. amend. XIV	9, 11

Cases

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	8, 9
<u>Chambers v. Mississippi</u> , 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	11
<u>Duncan v. Louisiana</u> , 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968).....	11
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	9
<u>State v. Acosta</u> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	9
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996)	8
<u>State v. Emmanuel</u> , 42 Wn.2d 799, 259 P.2d 845 (1953)	12
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009)	14
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991).....	13
<u>State v. Mills</u> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	12, 13
<u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199 (1984)	15

State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010)..... 13

State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997)..... 12, 13

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 11

State v. Wanrow, 88 Wn.2d 221, 559 P.2d 548 (1977)..... 12, 14

State v. Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010)..... 11

Statutes

RCW 9A.16.020(3) 9

A. ASSIGNMENT OF ERROR

The trial court erred, and violated Khair Siddiq's constitutional rights to present a defense and to a jury trial, by refusing to provide the defense-proposed to-convict jury instruction, which included the lawful use of force as an element of the crime that the State must prove beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant in a criminal trial is entitled to have the jury fully instructed on the defense theory of the case. When the defense proposes a jury instruction that supports the defense theory, the trial court must provide it, as long as the instruction is an accurate statement of the law and is supported by the evidence. Here, the defense proposed a to-convict instruction that included the lawful use of force as an "element" the State must prove beyond a reasonable doubt. The instruction was an accurate statement of the law, was supported by the evidence, and supported Mr. Siddiq's theory that he acted in self defense. Did the court err in refusing to provide the instruction?

C. STATEMENT OF THE CASE

On the evening of December 17, 2011, Khair Siddiq went to Pink, a nightclub in downtown Seattle, to celebrate his girlfriend's

birthday with a group of his friends and family. RP 377. Pink is located on the fourth floor of Pacific Place Shopping Center. RP 51-52.

That same evening, Michael Freeman and his girlfriend Maria Klink, went to Pink to celebrate Ms. Klink's birthday. RP 51. Mr. Freeman and Ms. Klink went to the nightclub together with their friends Lanai Jenkins, Ansley Tworek, and Lisa Cooke. RP 53. They met several other friends there. RP 53.

At around 1:30 a.m., Mr. Siddiq left the nightclub with his friends Yevgeniy Kushner and "Jamal."¹ RP 380-81. The three men descended to the concourse level of the shopping center to pay for parking, and then entered an elevator heading down to the parking garage. RP 380-81.

Mr. Freeman, Ms. Klink, Ms. Tworek, Ms. Jenkins and Ms. Cooke left the nightclub at around the same time as Mr. Siddiq. RP 54. They also descended to the concourse level and rode with Mr. Siddiq and the other two men—in the same elevator—to the parking garage. RP 55, 381.

¹ "Jamal's" last name is not in the record.

Mr. Siddiq, Mr. Kushner, and Jamal entered the elevator first and Mr. Freeman and his group entered the elevator behind them. RP 381. An altercation then occurred inside the elevator between the two groups. RP 383-84. When the elevator doors opened again, several people fell out of the elevator and onto the ground and a fight took place in the elevator lobby. RP 383-84. Security officers observed the fight on a video screen and called the police, who soon responded. RP 312, 326. Two responding police officers saw Mr. Freeman, who appeared to be unconscious, lying on the ground with a swollen and bloody face. RP 314, 337. Ms. Klink told police she and Mr. Freeman were struck during the fight. RP 338. She pointed toward Mr. Siddiq and Mr. Kushner, who were walking toward their car. RP 316-17, 337-38. Police took the two men into custody. RP 338.

Mr. Freeman was taken to Harborview by ambulance. RP 143. He suffered a concussion and had a swollen ear, bruising on his face, a lacerated lip, and knots on his head. RP 57. At a follow-up visit several days later, Mr. Freeman reported few lingering symptoms. RP 97-100.

Mr. Siddiq and Mr. Kushner were jointly charged with one count of second degree assault of Mr. Freeman. CP 1. The State

alleged they intentionally assaulted Mr. Freeman and thereby inflicted substantial bodily harm. CP 1; see RCW 9A.36.021(1)(a).

At the jury trial, Mr. Siddiq testified he had not been paying attention to Mr. Freeman and his group when they entered the elevator behind him. RP 381-82. At some point during the descent and before the elevator doors opened, Mr. Freeman became agitated and aggressive and shouted something like, “don’t talk to girls like that.” RP 382. Mr. Siddiq did not know what he was talking about; he had not heard anyone in his group say anything to anyone in Mr. Freeman’s group. RP 382. Mr. Siddiq had not said or done anything to provoke Mr. Freeman. RP 404. Nonetheless, Mr. Freeman came toward him and swung wildly, striking him with his fist. RP 383, 404. Mr. Siddiq was shocked and hit him back once or twice in self-defense; he was trying to keep Mr. Freeman from attacking him. RP 383, 404. The two men wrestled in the elevator and, when the doors opened, fell out and onto the ground. RP 383, 405. Mr. Siddiq got up, left the elevator lobby and walked toward his car. RP 384-85, 405. He did not kick Mr. Freeman and did not know who did. RP 406.

Mr. Freeman testified he had several drinks that evening and was intoxicated when he left Pink. RP 54. He recalled leaving the

nightclub but could not recall getting into the elevator. RP 71. He remembered regaining consciousness briefly and feeling his head “bouncing” on the ground. RP 55. The next thing he remembered was waking up in the hospital. RP 55. He did not remember being involved in any kind of argument or fight. RP 67.

Ms. Jenkins testified that, after everyone entered the elevator, Mr. Kushner reached out and tried to touch Ms. Cooke and get her attention. RP 260. Ms. Cooke said “don’t touch me.” RP 261. Mr. Freeman then put his arm out between Ms. Cooke and Mr. Kushner as if to create a shield between them, saying “leave these girls alone.” RP 261, 269. Mr. Freeman was then pushed backwards and his arm swung wildly as he tried to steady himself. RP 262. Ms. Jenkins assumed the men interpreted Mr. Freeman’s action as a swing or a punch because the next thing she knew a brawl had ensued. RP 263. Mr. Siddiq, Mr. Kushner and Jamal jumped on top of Mr. Freeman and the others in his group and when the elevator doors opened, the group fell to the ground. RP 263.

According to Ms. Jenkins, after Mr. Freeman fell to the ground, a man in a white shirt stomped on his head. RP 264, 284. Ms. Klink testified that two men stomped on Mr. Freeman’s head: a black man in

black boots, jeans, and a white shirt, and a white man. RP 133. On the other hand, Ms. Tworek testified the men who kicked or punched Mr. Freeman in the head were both black; one was wearing boots and a sweater vest, and the other was wearing a white shirt and white shoes. RP 231-35, 240. Mr. Siddiq was wearing a white shirt that night but was not wearing white shoes. RP 389, 391.

The altercation happened so quickly, it was difficult for the witnesses to see what was happening. RP 161, 234.

At the close of the evidence, defense counsel proposed several jury instructions on self defense. CP 17-19, 23. Counsel argued the absence of self defense should be included in the to-convict instruction because it was an element the State must prove beyond a reasonable doubt. RP 456. Counsel proposed a to-convict instruction that stated the State bore the burden to prove, as an “element” of the crime, “[t]hat the force used was not lawful, and that the assault was not in defense of the defendant.”² CP 23. Counsel argued that the absence of self

² Counsel offered the following to-convict instruction:

To convict the defendant of the crime of assault in the 2nd degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 18th day of December, 2011, the defendant intentionally assaulted Michael Freeman;

defense should be included in the to-convict instruction so that the State's burden to disprove the defense beyond a reasonable doubt would be in the forefront of the jury's mind as they reviewed the elements of the crime that the State must prove. RP 456.

The State objected, arguing that if the absence of self defense were included in the to-convict instruction, then the court would also have to include the definitional elements of the defense, including that the force used was necessary and reasonable, and that the defendant was not the first aggressor. RP 457. The court agreed with the State and refused to give the defense-proposed instruction. RP 458. The court reasoned, "it is a more correct statement of the law to leave it as it

-
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Michael Freeman;
 - (3) That the force used was not lawful, and that the assault was not in defense of the defendant; 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 the these elements, then it will be your duty to return a verdict of not guilty.

CP 23.

was proposed without the added reference – without the modifications basically.” RP 458.

The jury received several instructions on the defense of self defense. RP 473-75.³ But the to-convict instruction did not state that the State bore the burden to prove that the force used was not lawful. RP 469.

The jury found Mr. Siddiq guilty of second degree assault as charged. CP 29, 31.

D. ARGUMENT

The trial court erred in refusing to provide the defense-proposed to-convict jury instruction

1. The State bore the burden to prove, as an element of the crime, that Mr. Siddiq did not act in self defense.

An accused in a criminal case is presumed innocent of the charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L.

³ The jury instructions were recorded when the court read them aloud to the jury verbatim, but no written instructions were ever filed in

Ed. 2d 435 (2000); 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.

When the defendant raises the issue of self defense in a criminal case, the absence of the defense becomes another “element” that the State must prove beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984).

To properly raise the issue of self defense, the defendant must produce some evidence demonstrating self defense. State v. Walden, 131 Wn.2d 469, 472-74, 932 P.2d 1237 (1997). A person uses force in self defense if he reasonably believes he is about to be injured and the degree of force he uses to prevent or attempt to prevent the injury is not more than a reasonably prudent person would find necessary under the conditions as they appeared to the defendant. Id.; RCW 9A.16.020(3). Once the defendant produces some evidence of self defense, the burden shifts to the prosecution to prove the absence of the defense beyond a reasonable doubt. Walden, 131 Wn.2d at 473-74.

When the defense of self defense is properly raised, the jury must be fully instructed, in an unambiguous way, that the State bears the burden to prove the absence of the defense beyond a reasonable

the court file. The entire set of instructions is part of the record at RP 463-77.

doubt. Acosta, 101 Wn.2d at 621. Jury instructions on self defense “must more than adequately convey the law.” Walden, 131 Wn.2d at 473.

Here, the defense of self defense was properly raised. Mr. Siddiq testified he hit Mr. Freeman after Mr. Freeman came toward him in the elevator, swung his arm wildly at him, and struck him with his fist. RP 383, 404. Mr. Siddiq hit Mr. Freeman once or twice in self defense, in an effort to keep Mr. Freeman from further attacking him. RP 383, 404. Mr. Siddiq had not done or said anything to provoke Mr. Freeman. RP 404.

The trial court agreed that the defense of self defense was properly raised. The court provided the jury with instructions on the defense. RP 473-75. But the court refused to provide the defense-proposed to-convict instruction, which stated that the absence of self defense was one of the “elements” of the crime that the State bore the burden to prove beyond a reasonable doubt. RP 458. By refusing to provide the defense-proposed to-convict instruction, the court violated Mr. Siddiq’s right to have the jury fully instructed on his defense.

2. The court erred in refusing to provide the defense-proposed to-convict instruction that included the absence of self defense as an element of the crime, because the instruction was an accurate statement of the law and was supported by the evidence.

It is a fundamental principle of criminal procedure that a defendant in a criminal case has a constitutional right to fully defend against the charges. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3.

In addition, the right to a jury trial is a fundamental right guaranteed by both the state and federal constitutions. Duncan v. Louisiana, 391 U.S. 145, 155-56, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); State v. Williams-Walker, 167 Wn.2d 889, 895-96, 225 P.3d 913 (2010); U.S. Const. amend. VI; Const. art. I, §21.

As a corollary to the constitutional rights to present a defense and to a jury trial is the defendant’s right “to have the jury fully instructed on the defense theory of the case.” State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The trial court is required to provide an instruction that supports the defense theory, as long as the

instruction is an accurate statement of the law and is supported by the evidence. State v. Warrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977); Staley, 123 Wn.2d at 803.

Here, the trial court erred in refusing to provide Mr. Siddiq's proposed to-convict instruction because the instruction supported the defense theory, was an accurate statement of the law, and was supported by the evidence. This Court reviews the adequacy of the jury instructions de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

Mr. Siddiq's proposed to-convict instruction was an accurate statement of the law. It is well-established that the to-convict jury instruction must contain all elements essential to the conviction. Mills, 154 Wn.2d at 7-8; State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Although, "as a general legal principle all the pertinent law need not be incorporated in one instruction," the Supreme Court has consistently held that "an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged." Mills, 154 Wn.2d at 7-8 (quoting Emmanuel, 42 Wn.2d at 819). 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. State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010); Smith, 131 Wn.2d at 263; Emmanuel, 42 Wn.2d at 819. The Court may not look to other jury instructions to supply a missing element from a to-convict jury instruction. Sibert, 168 Wn.2d at 262-63.

As stated, the absence of self defense was an “element” of the crime that the State was required to prove beyond a reasonable doubt. Acosta, 101 Wn.2d at 615-16. The proposed to-convict instruction informed the jury of the State’s burden to prove the absence of self defense as an “element” of the crime. CP 23. The instruction supported the defense theory of the case and was supported by the evidence. Therefore, the trial court erred in refusing to provide the instruction to the jury.⁴ Sibert, 168 Wn.2d at 311; Mills, 154 Wn.2d at 7-8; Smith, 131 Wn.2d at 263; Staley, 123 Wn.2d 794, 803.

The State argued the absence of self defense should not be included in the to-convict instruction because if it were, the court

⁴ In State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the Supreme Court held that the to-convict instruction need not contain the absence of self defense as an element of the crime as long as a separate instruction informs the jury of the State’s burden of proof on self defense. But Hoffman predates Mills, Smith, Sibert, and subsequent cases that

would also have to include the definitional elements of the defense, including that the force used in self defense was necessary and reasonable, and that Mr. Siddiq was not the first aggressor. RP 457. The State's argument is unpersuasive because a to-convict instruction need not contain all pertinent information such as definitions of terms. State v. Fisher, 165 Wn.2d 727, 754-55, 202 P.3d 937 (2009). Whether or not Mr. Siddiq was the first aggressor or used more force than was necessary were merely components of the *definition* of self defense and were not themselves elements of the crime. The to-convict instruction that Mr. Siddiq proposed contained only the following element: "That the force used was not lawful, and that the assault was not in defense of the defendant." CP 23. This was sufficient to inform the jury that the absence of self defense was one of the "elements" that the State bore the burden to prove beyond a reasonable doubt.

3. The conviction must be reversed.

An error in refusing to provide a defense-proposed jury instruction that is a correct statement of the law and is supported by the evidence is presumed prejudicial and requires reversal of the conviction unless it affirmatively appears to be harmless. Wanrow, 88 Wn.2d at

address the adequacy of a to-convict instruction. It is inconsistent with the principles set forth in those cases and should not be followed.

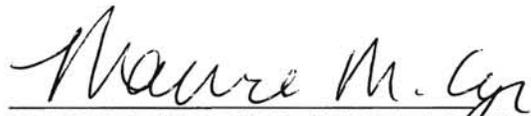
237; State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The error is harmless only if it had no effect on the final outcome of the case. Rice, 102 Wn.2d at 123.

Here, had the jury been instructed in the to-convict instruction that the absence of self defense was an “element” the State bore the burden to prove beyond a reasonable doubt, it might have returned a different verdict. Therefore, the error is not harmless and reversal is required.

E. CONCLUSION

The trial court erred in refusing to provide the defense-proposed to-convict instruction. Therefore, the conviction must be reversed.

Respectfully submitted this 8th day of October, 2013.


MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 70234-3-I
)	
KHAIR SIDDIQ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF OCTOBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] KHAIR SIDDIQ 365554 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

FILED
2013 OCT 10 11:10 AM
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF OCTOBER, 2013.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710