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STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY L. CRENSHAW, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 05-1-02245-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly reject defendant's proposed instructions on the defense of accident when together they were confusing and inaccurate and when the given pattern instructions allowed defendant to argue his theory of the case?
2. Even if the trial court erred when it failed to give defendant's proposed instructions on the defense of accident, is the error harmless where the State proved beyond a reasonable doubt that defendant intentionally assaulted his victim?

B. STATEMENT OF THE CASE.

1. Procedure

On May 9, 2005, the State charged JEFFREY LAWRENCE CRENSHAW, hereinafter "defendant", by information with one count of assault in the first degree and one count of unlawful possession of a firearm in the first degree. CP 1-4. The assault charge also carried a firearm sentencing enhancement. CP 1-4.

On October 25, 2005, the State amended the firearm charge to second degree possession of a firearm. CP 5-6. That same day, pre-trial motions and trial commenced before the Honorable D. Gary Steiner. RP1.

Defendant proposed three instructions regarding the defense of accident. CP 64, 67-68, RP 598-613. The trial court refused to give these instructions. RP 620. The trial court instructed the jury on the charged offenses and the lesser included second and third degree assault offenses for count I. CP 107-136. On November 5, 2005, the jury convicted the defendant of second degree assault and second degree unlawful possession of a firearm. CP 85, 87. By special verdict, the jury found defendant was armed with a firearm at the time he committed the assault. CP 88.

On December 9, 2005, the court imposed a sentence of 17.5 months incarceration on the second degree assault conviction plus 36 additional months for the firearm sentencing enhancement. and 16 months on the firearm conviction. CP 89-100. The court ran the term of the underlying offenses concurrently. CP 89-100. This timely appealed followed.

2. Facts

On May 8, 2005, Judy Stumpf was working as a clerk at the Rothem Inn in Tacoma. RP 132-35. At about 4:30, a man yelled at Stumpf to call 911. RP 136. Prior to that event, Stumpf heard a "pop" sound. RP 136. She told the 911 operator that she was not sure the sound was a gunshot. RP 136. After she called 911, she observed the defendant run from room number 208 across the second floor of the hotel and down

the stairs into the parking lot. RP 137-38. The defendant carried something under his arm, inside his coat or shirt. RP 138. Before reaching the street, defendant turned around and went back to room 208. RP 139. Stump observed defendant jumping up and down on his hands and knees near a woman on the bed. RP 139. Defendant said, "She shot herself." Defendant was a "little frazzled" but was not crying. RP 145. Defendant then ran back to the parking lot but turned around and returned to the room when a police patrol car pulled into the parking lot. RP 140-41, 371-72 .

Sue Tinitali was dating defendant in May 2005. RP 152. They had lived together for about five years until Tinitali moved in with her daughter in August 2004. RP 152. Tinitali became homeless in May 2005. RP 153. Tinitali described her relationship with defendant as "mostly good, then bad." RP 154. Tinitali said they argued about money and infidelity but never fought. RP 154. They used methamphetamine together. RP 156.

On Mother's Day, May 8, 2005, Tinitali was staying at the Rothem Inn when defendant came over to visit with her. RP 160. When defendant returned he was depressed and upset. RP 161, 185. During his visit he

argued with Tinitali about infidelity. RP 200.¹ Defendant brought Tinitali a ring as a gift. RP 187. Defendant threatened to kill himself and pointed a gun at his head and chin. RP 188, 193-94. Tinitali heard the defendant gagging in the bathroom. RP 164, 193. Tinitali went to see what was happening and saw defendant putting a gun in his throat. RP 164, 192. Defendant began to calm down after Tinitali told defendant to think about his son. RP 165. Defendant was pacing back and forth while Tinitali answered the phone. RP 166. Defendant was holding the gun. RP 167. About a minute into the phone conversation, Tinitali looked up, saw defendant holding the gun, heard a sound, saw the blast, and felt something on her chest. RP 169-70.

According to Tinitali, defendant began to panic and screamed out the door, "Someone call 911." RP 171. The defendant and Tinitali agreed that she would tell the police she shot herself. RP 171-72. When the police and paramedics arrived, she told them that "it was me, that I did it and it went off." RP 173. Tinitali explained that during defendant's attempts to get a phone, a phone "went up and hit [her] in the head" causing a black eye. RP 174. The bullet pierced her liver and colon. RP

¹ This testimony was inconsistent with her testimony on direct examination where she testified there was not discussion about infidelity. RP 164.

175. The bullet remains at the base of her pancreas. RP 175. It took about three months for Tinitali to heal from her wounds. RP 176.

Tinitali denied defendant pointed the gun at her or threatened her in any way. RP 198. Tinitali denied the defendant punched her in the eye. RP 199. Tinitali testified that she lied about telling the story that she shot herself accidentally, but was truthful about her testimony that defendant shot herself accidentally. RP 201. She lied because she did not want to get defendant in trouble. RP 201.

Defendant lost his index finger on his right hand. RP 197, 206. Defendant's email address is J-L-C crack. RP 205. Defendant hunts deer and uses his right hand to shoot his rifle. RP 206. Defendant shot and killed a deer in 2004. RP 205. She was unaware of whether defendant killed a deer with one shot. RP 206. Tinitali testified that defendant's arm was not raised when the gun went off. RP 209.

Lieutenant Kaiser, a fireman with a paramedic unit of the Tacoma Fire Department, treated Tinitali at the Rothem Inn. RP 284-302. For safety reasons, Kaiser moved the gun that was lying on the bed next to Tinitali to the floor. 291-293, 303. He observed a penetrating wound on Tinitali's mid-sternum area or center of her chest. RP 291, 297. Kaiser did not question Tinitali about the event that lead to her injuries. RP 302.

Tinitali advised a paramedic that she was looking at the gun when it went off. RP 303, 305. Tinitali had bruising to one of her eyes. RP 305.

Tacoma police officer Tracy Harrington was first to respond to the shooting. 369-75. Defendant told Harrington that he got into an argument with his girlfriend, went into the bathroom, and heard a gunshot. RP 373. Tinitali told Harrington that she was not arguing with defendant and shot herself while looking at the gun. RP 374.

Tacoma police officer Watters arrived at the scene and provided security before accompanying the victim to the hospital. RP 381. During the trip, Tinitali told Watters that she had been looking at a gun and it went off. RP 382. She said her boyfriend was in the room, but that he was by the door when the shooting occurred. RP 383. Watters observed that Tinitali had a swollen black and blue eye. RP 383. Tinitali would not tell Watters details about how she got the eye injury. RP 384.

At the scene of the shooting, Tacoma police officers Steven Piotrowski and Josh Boyd spoke with defendant after advising him of his Miranda rights. RP 468, 483-84. Defendant said he had a very emotional argument with his girlfriend that involved crying and yelling at each other. RP 470. Defendant said that while he was in the bathroom, he heard a gunshot and found his girlfriend shot on the bed with a gun between her arm and chest. RP 470, 485. Defendant did not know where the gun came

from or why Tinatali would shoot herself. RP 485-86. Defendant appeared nervous and was sweating while speaking with the officers. RP 468, 487-88.

At Tacoma General Hospital, trauma physician's assistant Daniel Brocksmith treated Tinatali for multiple gunshot wounds. RP 223, 228. Tinatali had injuries to her chest and abdomen with damage to her liver, intestine, and blood and air in the area around her lungs. RP 228, 230. Brocksmith testified that he believed the injuries were sustained from multiple "discharges" verses multiple wounds from one gunshot. RP 228. Her injuries were life threatening. RP 229.

Renae Campbell, a forensic specialist, processed room 208 and defendant's car for items of evidentiary value. RP 240-52, 258-282. Campbell observed a cell phone on the bed and another cell phone under the bed in the hotel room. RP 245-46. Campbell found a hand written note in a garbage can and a handgun on the floor of the room. RP 246, 262. In the passenger compartment of defendant's car, Campbell found a gun holster and two knives. RP 251, 259-60. There were no finger prints on any of these items. RP 266, 276, 281.

Tacoma Police detectives William Webb and Dan Davis interviewed² defendant after advising him of his Miranda rights. RP 312-314, 331, 339. Defendant first told the detectives that he was in the bathroom when he heard a shot and came out to find his girlfriend had inadvertently shot herself. RP 315. Defendant mentioned that there was an argument before she shot herself. RP 339. Later defendant told the detectives that he was in possession of the gun because he wanted to commit suicide, but the shooting was an accident. RP 316, 343. Defendant stated that he held the gun up to his chin, was going to shoot himself but lowered the gun before it discharged striking Tinitali.³ RP 353. Defendant told the detectives that he made up the story about Tinitali shooting herself because he was a convicted felon and knew it was a crime to possess a gun. RP 317. Defendant stated that Tinitali had written something in her day planner about defendant only wanting Tinitali for sex, which upset him. RP 356-57.

Detective Davis determined that Tinitali was on the hotel phone at the time of the shooting, not one of the cell phones. RP 359. At the hospital, Tinitali told Detective Davis that defendant shot her but that he

² Defendant provided a taped statement, which Detective Davis published to the jury. RP 348-50.

³ Detective Davis demonstrated for the jury how defendant showed the detectives how he lowered the gun. RP 349-50.

had a surprised and scared look on his face when the gun went off. RP 352, 361. Tinitali also told Detective Davis that defendant barged into her hotel room without knocking. RP 363. Tinitali described defendant as being agitated and worked up and that defendant's agitation continued to escalate. RP 364. Tinitali said defendant was angry about smelling massage oils in the room which led him to believe she was seeing someone else. RP 364. Tinitali observed the defendant with the gun prior to the defendant standing at the foot of the bed with the gun to his chin. RP 365.

Matt Noedel, a firearms examiner with the Washington State Patrol, examined the handgun and ammunition in this case. RP 402. The handgun was a Ruger .22 caliber single-six revolver. RP 402. This revolver is a single action gun which means that pulling the trigger will only drop the hammer, not cock it. RP 404. The trigger pressure pull was approximately three and three quarter pounds. RP 408. Noedel described the firing mechanism, including safety features of the gun to the jury. RP417-424. Noedel testified that this handgun is designed so that if dropped, the hammer would fall harmlessly onto the frame, not the firing pin. RP 419, 440. Once the revolver is cocked, the tension on the hammer has to be released and the trigger pulled to decock the weapon. RP 423, 427, 439. Generally, the sound of the gun being fired is heard

before the bullet leaves the barrel. RP 442. According to Noedel, the revolver did not have a flaw that would permit it to accidentally discharge. RP 425. Noedel indicated the term “crack shot” refers to someone who is an accurate shooter. RP 425.

William McCulloch, defendant’s former employer and friend, testified that about a month before the shooting, defendant told McCulloch that Tinitali was frustrating him and that he could of killed her. 445, 448-55. Defendant was “flushed, red, and very frustrated” when he made this statement. RP 454. McCulloch testified that defendant did not get along with Tinitali, that they fought all the time, and that they would “just holler and scream and carry on.” RP 447, 455.

McCulloch owned the Ruger revolver defendant used to shoot Tinitali. RP 456-58. The revolver was hidden in a dresser drawer in McCulloch’s house. RP 458-60. McCulloch hid the gun there after defendant took the gun without McCulloch’s permission during hunting season. RP 459. McCulloch knew defendant was a convicted felon and never let defendant borrow the revolver. RP 458, 460. McCulloch did not realize the gun was missing until the police called McCulloch. RP 458. The gun never malfunctioned or accidentally fired while in McCulloch’s possession. RP 460. According to McCulloch, Ruger had a reputation for manufacturing safe guns. RP 460. Defendant bragged about killing a

deer with one shot and McCulloch knew defendant was known as “crack shot.” RP 459.

Defendant testified in his defense. RP 507. He told the jury that he was called “crack shot” because of a comical shirt he wore at work. RP 508. The moniker had nothing to do with being a marksman. RP 508. The previous hunting season, defendant required three shots before killing a deer. RP 509. Defendant admitted shooting a deer with one shot when he was 17 years old. RP 509. Defendant explained McCulloch must have mixed up the hunting stories. RP 510. Defendant lost his index finger in a job related incident. RP 511. Defendant testified that he never shot the revolver after losing his finger before this shooting incident. RP 513.

On May 8, 2005, defendant was depressed and suicidal when he visited Tinitali. RP 517-22. Prior to the visit, he had been up for six days without sleep after consuming methamphetamine. RP 520. Defendant testified that he knocked on Tinitali’s door and she let him in. RP 521. Defendant has bought a ring for Tinitali which he brought with him. RP 522. While inside the room, the defendant noticed some message oil on the counter. RP 523. Believing Tinitali was seeing another man, he got angry. RP 523-24. Defendant had a heated argument with Tinitali and may have threatened to kill himself and Tinitali. RP 536. Defendant left when Tinitali’s children arrived for Mother’s Day. RP 525.

Defendant misplaced his wallet and called Tinitali believing he may have left it in her room. RP 526. He needed his last \$5.00 bill. RP 526. After Tinitali's children left, defendant returned to the room. RP 527. Defendant was depressed. RP 527. He began searching his car for his wallet. RP 527. Defendant had forgotten he had McCullough's revolver in defendant's car. RP 528. After finding his wallet, defendant returned to Tinitali's room. RP 529. He left briefly when Tinitali's son arrived but returned with the gun after the son had left. RP 528-529. Defendant tried to convince Tinitali that he was not unfaithful to her. RP 529. In an effort to get her attention, defendant pointed the gun to his head. RP 530. Three times defendant had the gun to his head with the hammer cocked back. RP 534. Defendant went into the bathroom and put the gun in his throat. RP 534. Tinitali did not believe defendant had not been cheating on her and threatened to leave defendant. RP 534.

The phone rang and Tinitali answered it. RP 535. Defendant told the jury that while Tinitali was on the phone, defendant lowered the gun and accidentally shot her. RP 537. Defendant testified that he was not angry at Tinitali, did not point the gun at her, and never threatened her with the gun. RP 535. Defendant panicked and misdialled a phone, could not find a phone, and eventually ran out the door and screamed for someone to call 911. RP 538. Defendant claimed Tinitali did not want

defendant to go to jail for the shooting and they agreed that she would lie to the police. RP 538-39.

Defendant admitted telling McCulloch that he could kill Tinitali but testified that he was just “venting.” RP 540-41. Defendant grabbed the gun instead of his fishing knife from his car because, “It was the quickest, fastest way to kill myself with no pain.” RP 541.

Under cross-examination, defendant testified that he lost his finger seven years before the assault and had handled a firearm once after the losing the finger. RP 542. Defendant had both the .22 revolver and a 308 caliber rifle when he hunted in 2004. RP 544. He was aware he could not possess a firearm as a convicted felon. 542-43. Defendant took the gun from McCullouch for hunting season and did not inform McCullouch until hunting season was over. RP 545. While hunting deer, defendant carried the revolver in the event he saw birds he wanted to hunt. RP 544. Defendant carried the revolver for a couple of weeks before the assault. RP 544. He intended to take his son target practicing with the gun. RP 546-48. Defendant kept the loaded gun under the back seat in the car. RP 556. Defendant was not concerned about shooting the revolver with his missing finger around his son. RP 556. Defendant claimed to have told the police that he was trying to decock the revolver when he accidentally shot Tinatali. RP 588. When pressed further, defendant admitted this fact

was not contained in his taped statement to the detectives nor in his statements to the officers at the scene. RP 559-63. Defendant believed he might have told the detectives about this fact before giving the taped statement. RP 560. Defendant claimed to have consumed methamphetamine the morning of the assault and was tired. RP 567-68. Defendant claimed he was only angry about his missing wallet, not angry about finding the massage oils on the counter. RP 569-71. Defendant could not explain why the massage oils were not viewed on the crime scene video. RP 565. When he saw the oils, defendant claimed he was frightened about losing his relationship with Tinatali, not angry with her. RP 570.

In rebuttal, Detective Davis testified that defendant appeared to be alert and not drowsy. RP 586. During the detectives' interview with defendant, defendant never mentioned decocking the gun before shooting Tinitali. RP 587. Defendant did tell the police that maybe the gun discharged because defendant could not feel the trigger tension very well with his injured finger. RP 588.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY REJECTED DEFENDANT'S INSTRUCTION ON THE DEFENSE OF ACCIDENT BECAUSE THE STATE HAD TO PROVE INTENT, WHICH NECESSARILY DISPROVES ACCIDENT.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by* State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed *de novo*. Id. A defendant is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, *overruled on other grounds*, 141 Wn.2d 448, 6 P.3d 1150 (2000), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions must be considered as a whole, and it is not error for the trial court to refuse to give a requested instruction when the other instructions given adequately and correctly state the law. State v. Birdwell, 6 Wn. App. 284; 297, 492 P.2d 249 (1972)(citing State v. Passafero, 79 Wn.2d 495, 487 P.2d 774 (1971); State v. Stringer, 4 Wn. App. 485, 481 P.2d 910 (1971). “While a defendant is entitled to argue his theory based on the instructions given by the court, he is not entitled to put his argument into the court's instructions.” Birdwell, 6 Wn.App at 297 citing State v. Lane, 4 Wn. App. 745, 484 P.2d 432 (1971); State v. Dana, 73 Wn.2d 533, 439 P.2d 403 (1968).

A trial court has broad discretion in determining the number and wording of jury instructions. Dana, 73 Wn.2d at 536. CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert

the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963). A challenge to a jury instruction may not be raised for the first time on appeal unless the instructional error is of constitutional magnitude. State v. Dent, 123 Wn.2d 467, 478, 869 P.2d 392 (1994).

- a. The court's instructions to the jury accurately stated the law and permitted the defendant to argue his theory of the case.

In the instant case, Defendant's proposed instructions do not accurately represent the law and the trial court properly refused its inclusion. Defendant proposed instructions on the defense of accident.

The first instruction stated the following:

It is a defense to a charge of assault that the assault was excusable as defined in this instruction. An assault is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

Defense Proposed Instruction No. 22, CP 64, RP 598.

Defendant proposed a California Pattern Jury Instruction that stated:

When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose or criminal negligence he does not thereby commit a crime.

Defense Proposed Instruction No. 23, CP 65, RP 598, 606. Defendant's Proposed Instruction No. 32 defined accident as follows: Accident means a sudden unexpected or unintentional happening, consequence or event from either a known or unknown cause. CP 65, RP 607. As discussed below, these instructions do not accurately state the law of Washington.

The State bears the unalterable burden of proving every element of the crime charged beyond a reasonable doubt. State v. Camara, 113 Wn.2d 631, 640, 781 P.2d 483 (1989) (citing Martin v. Ohio, 480 U.S. 228, 233-34, 107 S. Ct. 1098, 94 L.Ed.2d 267 (1987)). Intent is a court-implied element of assault; assault is not generally understood to be unknowing or accidental. State v. Davis, 119 Wn.2d 657, 662-63, 835 P.2d 1039 (1992). Assault by actual battery is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in any physical injury. WPIC 35.50; see State v. Shelley, 85 Wn. App. 24, 28-29, 929 P.2d 489 (1997); State v. Mathews, 60 Wn. App. 761, 766, 807 P.2d 890 (1991). Actual battery requires intent to do

the physical act constituting assault." State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000).

Here, the trial court gave the Washington Pattern Jury Instructions for first, second, and third degree assault. 113-128. The court instructed the jury that an assault is an intentional touching, or striking, or shooting of another person that is harmful or offensive. CP 115. The court further instructed the jury that a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime. CP 117.

By not finding defendant guilty of first degree assault, the jury was convinced defendant did not intend to cause Tinitali great bodily harm. By finding defendant guilty of second degree assault, the jury found defendant intended to assault Tinitali but recklessly caused substantial bodily harm. Similarly, by not finding defendant guilty of third degree assault, the jury necessarily decided defendant's assault was intentional, not negligent. In so doing, the jury found not credible defendant's evidence of accident. Because the State proved beyond a reasonable doubt that defendant intentionally assaulted Tinatali, it necesailry disproved beyond a reasonable doubt that defendant accidentally or unintentionally shot Tinitali.

In addition, the defendant was able to argue his theory of the case to the jury. In closing, trial counsel repeatedly told the jury that the defendant and Tinali's testimony demonstrated that the shooting was accidental. RP 651-673. The jury chose not to believe defendant or Tinali's version of an accidental shooting. CP 85. Because the court's instructions to the jury accurately stated the law and permitted defendant to argue his theory of his case, the court did not err in refusing to give defendant's proposed instructions.

Finally, the proposed instruction regarding the broad definition of accident is also confusing as it suggests that a defendant could be aware of the risk of accidentally shooting someone, but disregard that risk and not be culpable of committing assault. By defining accident as a sudden unexpected or unintentional happening, consequence or event from either a known or unknown cause, the jury could easily confuse that definition with criminal negligence.⁴ Criminal negligence requires a defendant to fail to be aware of a substantial risk that a wrongful act may occur. Criminal negligence is the requisite mental state of the relevant form of assault in the third degree. RCW 9A.36.031(d). Because this mental state

⁴ The court instructed the jury that a person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. CP 127.

is based on a reasonable person standard, evidence of defendant's accidental conduct cannot work in any way to negate this mental state. Put another way, because of an accident, a particular defendant may not act with intent to inflict great bodily harm, or recklessly inflict substantial bodily harm. Nonetheless, if a reasonable person would have avoided the wrongful act, and the defendant's failure to do so is a gross deviation from this reasonable course of conduct, the defendant has acted with criminal negligence.

In the present case, the "wrongful act" was the shooting. Defendant's claimed reason for failing to be aware that the victim was being shot was defendant's own mishandling of the revolver. A reasonable person would not have shot the victim, and defendant's action was at minimum a gross deviation from the reasonable course of conduct. Consequently a jury could reasonably conclude defendant was criminally negligent despite his accidental conduct. Conceivably, this mental exercise could confuse the jury. This is an inaccurate statement of the law as well. The trial court reached the same conclusion. RP 607-08. This definition was taken from civil tort law (CP 64) and has no counterpart in criminal law. The court wisely rejected the proposed instructions.

Defendant relies on State v. Hendrickson, 81 Wn.App. 397, 399, 914 P.2d 1194 (1996) for his claim that Washington case law specifically recognizes the defense of accident. Defendant's reliance on Hendrickson is misplaced. In Hendrickson, defendant killed her boyfriend with a knife

after a heated argument. Hendrickson, 81 Wn.App at 398. Defendant claimed she did not intend to kill her boyfriend and did not remember inflicting the fatal stab wound. Id. at 398-99. Defendant testified that during her boyfriend's attack, she managed to get the knife away before he fell to the floor. Id. at 398. She thought he was joking. Id.

At trial, defendant sought to present evidence to support her theory of self-defense. Because defendant's testimony amounted to a claim that the fatal stabbing was accidental, the trial court refused to permit testimony relevant to the issue of self-defense or instruct the jury on that defense. Id. at 399-400.

On Appeal, the reviewing court found that contrary to the State's claims, the defendant never claimed the act was accidental or unintentional. Id. at 400-01. The reviewing court concluded that the fact defendant could not remember administering the fatal blow did not preclude the inference that she intended to strike that blow but could not precisely recall that event over the prolonged course of the assault. Id. at 401. Accordingly, the reviewing court found defendant's testimony was sufficient to raise the issue of self-defense and that the trial court erred in ruling to the contrary. Id. at 401.

In support of his claim, defendant relies on the following language from Hendrickson:

The State insisted that Hendrickson could not claim self-defense because her testimony amounted to a claim that the fatal stabbing was accidental. The State relied on the

established rule that an *unintentional assault* or killing can be excused through the defense of accident but it cannot be justified through a claim of self-defense. (emphasis added)

Id. at 399 (citing State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38 (1975), *review denied*, 87 Wn.2d 1001 (1976)). Though the Hendrickson court relies on Kerr for this “established rule”, the word assault is never mentioned in the Kerr opinion.

Like Henrickson, Kerr is a homicide case. As defendant correctly asserts, excusable homicide is a defense in Washington for homicide cases. RCW 9A.16.030, WPIC 15.01. In State v. Kerr, 14 Wn. App. 584, 587, 544 P.2d 38(1975), *review denied*, 87 Wn.2d 1001 (1976), defendant was convicted of manslaughter for killing a trespasser who was poaching plants from defendant’s property. Id. at 585-86. At trial, defendant claimed he shot his victim accidentally. Id. at 586. The appellate court held that defendant was not entitled to an excusable homicide instruction because his conduct was not lawful where it was doubtful the victim was committing a crime on defendant’s property or was shot on defendant’s property. Id. at 588-90.

Nothing in the language of the court’s opinion in Kerr reflects support for the rule that an unintentional assault can be excused through the defense of accident. As such, there is no authority supporting this “established rule” defendant now relies upon. Accordingly, defendant’s

claim that the defense of accident is recognized as a defense for assault on par with excusable homicide is without merit.

- b. The mere fact that defendant raised a defense that negates an element of the charged crime does not place the burden on the State to prove the absence of this defense beyond a reasonable doubt.

Relying on State v. McCullum, 98 Wn.2d 484, 656 P.2d 1064 (1983), defendant argues that because the defense of accident negates an element of the offense, the trial court erred by not requiring the State to prove the absence of accident beyond a reasonable doubt. The Supreme Court in State v. Camara, 113 Wn.2d 631, 639, 781 P.2d 483 (1989), expressed "substantial doubt" about the correctness of the McCullum "negates" analysis and concluded "that assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense 'negates' an element of a crime." Camara, 113 Wn.2d at 640. Rather, the court held that although consent remains a defense to a charge of rape by forcible compulsion, nonconsent is no longer an element of the crime and the State did not have the burden of proving nonconsent. Id. at 638-40. Similarly here, accident or an unintentional act is not an element of the intentional act of assault and the state. As such, the State necessarily disproves accident beyond a reasonable doubt when it proves second degree assault and the State is not required to shoulder the additional burden defendant suggests here.

Defendant acknowledges that there are no Washington cases that address whether or not a defendant is entitled to an instruction on the defense of accident and whether the defense negates the element of intent, requiring the State to bear the burden of disproving accident beyond a reasonable doubt. Brief of Appellant at 12-13. Defendant discusses several nonbinding foreign authorities for the proposition that defendant is entitled to a jury instruction specifying the defense of accident and an instruction informing the jury that the State has the burden to disprove this defense beyond a reasonable doubt. As argued above, this instruction is contrary to Washington law. The discussion below illustrates why this court should not consider these authorities persuasive.

Defendant's Proposed Instruction No. 23 is taken from a California Pattern Criminal Jury Instruction. CALJIC 4.45. Not surprisingly, the California Penal Code sets forth an exception to the class of persons capable of committing crimes for "persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence." Cal. Pen. Code § 25 (5). There is no equivalent Washington statute. RCW 9A.08.010 sets forth the general requirements of culpability. This statute does not exclude this class of persons from those who can commit crimes. Nor is the defense of accident included in the statutory defenses listed in

RCW 9A.16 outside the context of homicide.⁵ Accordingly, defendant's proposed jury instruction is not an accurate statement of Washington law. The trial court wisely refused defendant's instructions on the defense of accident.

Defendant argues that this court should find persuasive other jurisdictions that fail to recognize accident as a defense in their criminal codes, but entitle defendants to such an instruction where there is some evidence to support that defense. Defendant first relies on State v. Rosciti, 144 N.H. 198; 740 A.2d 623 (1999) for this proposition. The defendant's reliance on Rosciti is misplaced. In Rosciti, defendant was convicted of robbery and second degree assault. Rosciti, 144 N.H. at 199. The defendant proposed the following New Hampshire Pattern Jury Instruction.

Evidence has been presented that the defendant's acts were accidental. You must find the defendant not guilty if you find that the defendant's acts were accidental. The State has the burden of proving beyond a reasonable doubt that the defendant did not act accidentally; that is, the State must prove that the defendant acted (purposely, knowingly, recklessly, or negligently), which I have already defined for you.

N.H. Criminal Jury Instructions 3.01. Id. at 199-200. The trial court refused to give this instruction. Id. at 199. The appellate court affirmed

⁵ Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent. 9A.16.030.

the lower court, finding the defendant's evidence was insufficient to support the instruction. Id. at 201. Unlike the definition of second degree assault in Washington, the relevant portion of the second degree assault statute involved in Rosciti does not include the element of intent.⁶ Accordingly, this case offers little support for defendant's claim.

In a similar fashion defendant relies on a Supreme Judicial Court of Massachusetts case. In Commonwealth v. Podkowka, 445 Mass. 692, 840 N.E.2d 476, 482 (2006), the court that defendant was not entitled to a jury instruction on accident where defendant was charged with assault and battery resulting in bodily injury or substantial bodily injury. Id. at 699-70. The appellate court reasoned that where the incident of the defendant's slamming the infant into the chair involved an intentional assault and battery, a general intent crime, defendant is not entitled to an accident instruction. Id. at 700 (citing Commonwealth v. Figueroa, 56 Mass. App. Ct. 641, 649-650, 779 N.E.2d 669 (2002)). Accordingly, Podkowka actually supports the State's position that such an instruction is not required where the State must prove an intentional assault.

Finally, defendant relies on a Supreme Court of Georgia case for the proposition that even though the defense of accident is not codified as

⁶ person is guilty of a class B felony if he:
N.H. Rev. Stat. Ann. § 631:2, I (b) defines second degree assault as follows: A person is guilty of a class B felony if he Recklessly causes bodily injury to another by means of a deadly weapon ...

an affirmative offense in the criminal code, it is reversible error for the trial court to fail to instruct the jury on this defense. Griffin v. State, 267 Ga. 586, 481 S.E. 2d 223 (1997) is distinguishable on two major points: (1) Unlike Washington, Georgia has long recognized the defense of accident. See Griffin v. State, 267 Ga. at 586(citing Chandle v. State, 230 Ga. 574, 198 S.E.2d 289 (1973); State v. Moore, 237 Ga. 269, 227 S.E.2d 241 (1976)); and (2) Griffin v. State is a homicide case, and thus, offers no more guidance on this issue than Washington excusable homicide cases, the only area of Washington criminal law where the defense of accident is recognized.

2. EVEN IF THE COURT ERRED BY NOT GIVING THE DEFENDANT'S PROPOSED INSTRUCTIONS ON THE DEFENSE OF ACCIDENT, THIS ERROR WAS HARMLESS.

The United States Supreme Court has recognized that "most constitutional errors can be harmless." Arizona v. Fulminante, 499 U.S. 279, 306, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless error analysis." United States v. Neder, 527 U.S. 1, 8, 119 S. Ct. 1827, 1833, 144 L.Ed.2d 35 (1999). Defects in jury instructions, including jury instructions that omit a necessary element of a

criminal offense, do not necessarily require automatic reversal of a criminal conviction. Neder, 527 U.S. at 8-15, 119 S.Ct. 1833-37. This court has followed Neder in finding errors in the accomplice liability instruction are subject to harmless error analysis. State v. Brown, 147 Wn.2d 330, 341-42, 58 P.3d 889 (2002).

Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 119 S.Ct. 1827, 1838, 144 L.Ed.2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 232 (1973) (internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The

harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error."). The crucial assumption underlying the constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions. Jurors are presumed to follow the trial court's instructions. State v. Grisby, 97 Wn.2d 493, 499, 647 P.2d 6 (1982).

In the instant case, the jury was instructed on first, second and third degree assault. CP 1113-123. By convicting defendant of second degree assault, the jury was convinced beyond a reasonable doubt that defendant intentionally assaulted his victim but recklessly inflicted substantial bodily harm or intentionally assaulted her with a deadly weapon. This conviction clearly demonstrated that the jury rejected defendant's evidence that he accidentally shot Tinitali. In so doing, the jury determined defendant and the victim were not credible. The court must give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992). "Credibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *rev. denied*, 109 Wn.2d 1008 (1987)). An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Prestegard, 108 Wn. App.

14, 28 P.3d 817, 822 (2001). Accordingly, the court's failure to give the defendant's proposed jury instructions on the defense of accident did not affect the outcome of the case.

Moreover, had the jury been convinced that defendant had not acted intentionally, they would have likely convicted defendant of third degree assault, which contemplates defendant's negligent criminal conduct.⁷ What defendant suggests is that the State must doubly prove his crime where evidence of accident is presented. Put another way, defendant is suggesting the State must prove beyond a reasonable doubt that he intended to commit assault with a firearm or by force likely to produce great bodily harm and prove beyond a reasonable doubt that his assault was not accidental. By proving intent, the State necessarily proved defendant's conduct was not accidental. As such, any error was harmless because, again, the jury could not have found defendant had the requisite intent to violate RCW 9A.36.021 and also have found he had acted accidentally. The two conclusions are mutually exclusive.

⁷ As indicated in two jury questions, the jury carefully considered the issue of intent before convicting defendant of second degree assault. CP 137-38.

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D. CONCLUSION.

For the foregoing reasons, the State request this court affirm
defendant's convictions.

DATED: October 11, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney


TODD CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

10-11-06 Theresa K
Date Signature

Sepe