

NO. 49196-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONNA JESMER,

Appellant.

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

The Honorable Daniel Stanhke, Judge

BRIEF OF APPELLANT

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INTRODUCTION

This case arose out of a dispute between appellant Donna Jesmer and her mother, Sandy Rodewald, regarding who owned certain real and personal property. The dispute was exacerbated by their volatile relationship, which included each allegedly assaulting the other at various times. Due to two trial errors, Jesmer's convictions for first degree robbery, second degree assault and felony harassment should be reversed.

A. ASSIGNMENTS OF ERROR

1. The trial court deprived Jesmer of her constitutional right to present a defense when it refused to instruct the jury on the legal effect of a quitclaim deed to real property.

2. The trial court erred by failing to instruct the jury on how to structure its deliberations in order to protect Jesmer's right to a unanimous jury verdicts under Wash. Const. Art. 1, §7.

Issues Pertaining to Assignments of Error

1. Did the trial court deprive Jesmer of her constitutional right to present her defense when it refused to instruct the jury on the legal effect a quitclaim deed has on real property ownership when an understanding of that was necessary to assess Jesmer's defense?

2. Was Jesmer deprived of her constitutional right to unanimous jury verdicts where the court failed to instruct that

deliberations must always involve all jurors, and was this error structural, such that reversal is required?

B. STATEMENT OF THE CASE

1. Procedural Fact

By a 3rd Amended Information the Clark County Prosecutor charged appellant Donna Jesmer (Jesmer) with first degree robbery, second degree assault, felony harassment, first degree theft, first degree trafficking in stolen property, and fourth degree assault, all allegedly committed against her mother, Sandra Rodewald (Rodewald), so a “domestic violence” allegation attached to each charge. CP 33-35; RP¹ 712-14. Jesmer’s 17-year-old son K.J. was also charged, although not named in the theft, trafficking and fourth degree assault charges. Id.

They were tried together before the Honorable Daniel Stahnke, Judge, June 27-30, 2016. RP 5-693, 711-43. A jury acquitted Jesmer of the theft, trafficking and fourth degree assault, but convicted her of the robbery, second degree assault and harassment. CP 93-99, 101-02; RP 682-85. The jury acquitted K.J. of the second degree assault and

¹ There are seven consecutively paginated volumes of verbatim report of proceedings collected referenced herein as “RP.” The seventh volume is, however, out of order, and represents the beginning of the trial proceedings instead of the end.

harassment charges, and could not reach a verdict as to him on the robbery charge. RP 686-87.

At sentencing, the State conceded Jesmer's second degree assault conviction merges with the robbery for purposes of sentencing, and the court so ordered. RP 695, 702. Thereafter the court imposed a standard range sentences of 70 months for the robbery, a concurrent 22 months for the harassment, and \$700 in assessments and fees. CP 106-20; RP 701-02. Jesmer, who is indigent, appeals. CP 121, 125-26.

2. Substantive Facts

Rodewald, Jesmer and K.J. all testified at trial. Each gave slightly different accounts of what transpired.

a. *Sandy Rodewald's Testimony*

65-year old Rodewald testified that she and her husband, Robert,² had lived for 20 years in their home in Vancouver, Washington on NE Bradford Dr. RP 50-52, 55. Rodewald's only child, 44-year old Jesmer, has three sons -- Tyler (24), Stephen (19) and K.J. (17). RP 54-55.

Rodewald recalled that when K.J. was about 9 months old, he and his two brothers moved in with Rodewald and her husband, and Jesmer would visit on occasion. RP 56. In late 2008 or early 2009, Jesmer also

² For purposes of succinctness and clarity, first names are used in some circumstances. No disrespect is intended.

moved in after she lost her home to foreclosure. RP 56, 109. Rodewald and her husband were in El Salvador at the time, having moved there for work in early October 2008, with the intent of potentially relocating there permanently if things went well. RP 56-57, 106.

While Rodewald was in El Salvador, the heat pump at the Vancouver home needed repair, and Jesmer learned Puget Power would help with the repair cost, but could only work with the home owner, so Rodewald quitclaim deeded the property to Jesmer, and gave her two power of attorneys to give Jesmer control over Rodewald's assets. RP 58-59, 108-10. Rodewald stated at trial she never intended to give the property to Jesmer, claiming it was to revert back to her once the heat pump was repaired, but it never was. RP 59, 110.

Rodewald and Robert moved back to the Vancouver home in October or November 2013. RP 58, 60, 110. Jesmer, Stephen, K.J. and "another kid" were living there at the time. RP 60.

Rodewald claimed that when she and Robert lived at the home they paid all the associated bills, but in their absence Jesmer would cover some. RP 61-62. This created tension between Rodewald and Jesmer. RP 62, 111. Rodewald recalled three instances after they had moved back from El Salvador in which she claims Jesmer assaulted her in the garage of the home. RP 62-67.

In January 2016, Rodewald could not find a jewelry collection she recalled keeping in a cedar chest in her bedroom. RP 67-71. Rodewald believed she had last seen the collection the summer of either 2014 or 2015. RP 71-72. She said the collection was worth at least \$25,000. RP 72, 134. Rodewald admitted she had jewelry stolen in the past, and had also possibly misplaced jewelry, but claimed it was found in place she had not put it. RP 116-17. She also admitted accusing Jesmer of taking her jewelry in the past, only to have it returned by someone later. RP 117.

On January 26, 2016, Rodewald accused her daughter of taking her jewelry collection. RP 74. Rodewald recalled being in the garage when Jesmer came in and “started in” on her about something. When she ignored Rodewald’s requests to leave her alone, Rodewald made her accusation and Jesmer “went ballistic on me.” RP 75. So Rodewald armed herself with a baseball bat and told Jesmer, “You come close to me and I will hit you. You are done hitting me.” RP 76, 121. Jesmer allegedly then approached her, grabbed the bat out of her hands, hit her on her back-right shoulder knocking her to the ground, and then left as Rodewald said she was calling police. RP 76-78, 122. Rodewald reported the missing jewelry, and later provided a list of items she believed were missing. RP 78; Ex. 30.

Rodewald next saw Jesmer when she drove up to the house in her van at about 3 pm on January 29, 2016. RP 78-79, 122. K.J. was with her. RP 79. Jesmer used her key to enter though the locked front door. RP 81. Rodewald was standing in the entry when they walked in. Id. She told them they were not supposed to be there, to which Jesmer replied, “We’re coming in to get our things.” RP 82, 122-23.

Rodewald said she followed them upstairs because she did not trust Jesmer, but did not call police because she thought “they would just grab some things and leave.” RP 83. Rodewald recalled K.J. and Jesmer going to their respective bedrooms. Jesmer then stood at her bedroom door, accused Rodewald of starting the conflict, and then grabbed Rodewald by her hair, eventually knocking her to the floor. RP 84. At that point K.J. got ahold of Rodewald, took her to the top of the stairs and told her to “just go downstairs.” Id. When she refused, she claims K.J. was “trying to push me down the stairs a little bit,” but she held the bannister. RP 85. Once K.J. stopped, Rodewald went downstairs on her own, but promptly returned despite K.J.’s pleas to stay downstairs. RP 85, 91.

When Rodewald returned, she went into K.J.’s room as he was packing a box of his stuff, and out of anger picked up a laptop and tossed it across the bed and walked out. RP 91, 125. In response, K.J. started punching holes in the walls of the home, and asked, “How do you like

that, Grandma?" RP 92. When Rodewald tried to stop him, Jesmer blocked her way and told her she could not touch K.J., and when Rodewald asked Jesmer to stop him, she allegedly encouraged K.J. to continue. RP 92.

K.J. eventually made his way downstairs, leaving Rodewald and Jesmer alone upstairs. RP 92-93. Rodewald claims Jesmer started punching her in the head, knocked her down in the hall outside Jesmer's bedroom and continued to hit her after she was down. RP 93. When Rodewald took her cell phone out, Jesmer twisted it out of her hand and refused to return it.³ RP 93-94, 131. Rodewald claimed Jesmer then struck her with something "very, very hard," possible a coffee mug, once on the back of her head and once on the middle of her back. RP 94-95. Rodewald said that when she fell to the ground, Jesmer getting on top of her, hitting her some more and then told her not to move or Jesmer would "snap" her neck. RP 96-97, 130.

Rodewald complied until she thought they were gone and then went downstairs, only to discover they were still there, having misplaced the van keys. They were also trying to capture the dogs that had gotten

³ Rodewald's phone was found two days later along a roadside shoulder near Camas, Washington, by Theresa Luke while she was walking her dog. RP 155, 298-99. She gave it to a sheriff's deputy, who then returned it to Rodewald. RP 132, 301.

out while they were there. RP 98. Rodewald did not know what Jesmer had done with her phone when she had taken it away, but K.J. told her she would find it “out in the forest – amongst the trees.” RP 98, 154.

Rodewald recalled seeing K.J. take the 42” flat-screen TV out of the house and put it in the van, and she said Jesmer removed “the house phone” off the wall. RP 99. Rodewald admitted she was unsure if the TV taken was hers, or if instead it was one she had previously given Jesmer, but in either case “felt” it was her TV because she had paid for it. RP 100, 117-19. Rodewald also reported missing the cable box that had been attached to the TV, although she never saw it get removed. RP 100.

Jesmer eventually drove away in the van, and K.J. left to look for the dogs, which had gotten out, so Rodewald made her way to her closest neighbor, Wanda Fugate. RP 51, 101. She was bleeding from the back of her head. RP 101. The police were called and Rodewald provided a statement, and she then went by ambulance to the hospital, where she declined medical treatment. RP 102-03.

On March 8, 2016, Rodewald showed Fugate a text message exchange she had with a phone number she did not recognize, but assumed it was Jesmer’s given the content of the exchange. RP 104-05, 217; Exs. 25-27. In the exchange the sender offers to return the jewelry if Rodewald first drops the charges against K.J., to which Rodewald agrees

provided the jewelry is returned first, but the sender declined to negotiate and promised to make Rodewald's life miserable if she pursues the claims against K.J. RP 225-26; Exs 25-27.

b. *Donna Jesmer's Testimony*

According to Jesmer, before Rodewald and her husband moved to El Salvador, she and her mother were "best friends." RP 339. She acknowledged, however, that it was a volatile relationship, with both being stubborn and prone to screaming, yelling and letting their feelings known and then moving on. RP 339-40.

Jesmer moved into the Vancouver home in January 2009. RP 328. No one else was living there at the time. RP 329. Jesmer moved in her furniture, including the 42" TV her mother had given her in December 2007. RP 330.

Jesmer said that in the winter of 2010, her mother, while still in El Salvador gifted her the Vancouver home via a quitclaim deed, along with two powers of attorney so Jesmer could manage Rodewald's financial affairs. RP 334-36, 391. Rodewald told Jesmer, "We're not coming back. The house is yours." RP 383. Jesmer recalled keeping the quitclaim, which she never recorded, and powers of attorney in a file box in her room where she kept other documents, such as her children's birth certificates. RP 336. Jesmer believed Rodewald knew where she kept her important

papers. RP 365. Rodewald never asked for the quitclaim deed back, but Jesmer has not seen it since January 29, 2016. RP 336-37.

Jesmer agreed that part of the impetus for the quitclaim deed had been the need to work with Puget Power to get the heat pump repaired. RP 337-38, 391-92. But Jesmer insisted the deed was also meant to convey ownership of the home and property to her. RP 335, 338

Jesmer also recalled that when she moved into the house in 2009, she moved into her mother's bedroom and discovered Rodewald's jewelry collection. RP 383-84. When she called Rodewald in El Salvador to ask if she wanted it sent to her, Rodewald declined and said, "You can have all of Grandma's jewelry. . . . You can have what – whatever jewelry I left in the safe because I have what I want." RP 384. Jesmer admitted pawning jewelry in Portland, Oregon, including some she bought herself, and items she received as gifts from both her ex-husband and Rodewald. RP 372-73.

Jesmer and her mother began having conflicts soon after Rodewald and her husband moved back from El Salvador. Jesmer specifically recalled an early incident where K.J. was upset with his grandmother and asked Jesmer if he could confront her about it, to which Jesmer agreed, provided he did so in a respectful manner. RP 355. Unfortunately, Rodewald did not respond well to K.J.'s respectful attempt to broach the subject and responded by trying to hit him. RP 355-56. K.J. grabbed her

hands before she could, and then Jesmer stepped between them. RP 356. Rodewald pushed Jesmer out of the way and “stormed out” of the room.

The next incident Jesmer recalled occurred on January 26, 2016. RP 356-58. Rodewald and Jesmer got into an argument in the garage, in part over the fact that Jesmer had revealed to Rodewald’s husband how much debt he and Rodewald were in as a result of Rodewald’s business dealings, but also over Rodewald’s accusation that Jesmer stole her jewelry collection. RP 357, 360-61, 394, 418-19. Rodewald was getting upset and eventually stood up, picked up a baseball bat and started swing it at Jesmer, yelling that she hated Jesmer, wanted to kill her, and at one point hit Jesmer with the bat in the head, which resulted in a black eye. RP 357, 394; see Ex. 32 (picture of injury). Jesmer eventually got ahold of the bat, tried to disarm Rodewald but failed, so she let go and Rodewald fell over and her glasses came off. RP 359, 395. Jesmer left and did not return to the home until January 29, 2016. RP 359.

On January 29, 2016, Jesmer returned to the house with K.J. to retrieve some of their belongings. RP 359-60, 395-96. Jesmer used her key to enter the locked front door, but Rodewald tried to hold the door closed from the inside. RP 361, 363, 396. Jesmer explained she did not want to fight and just wanted to pick up some of her things, and then Rodewald let them in, but told them to “hurry up.” RP 363-64. When

Jesmer headed upstairs to her room, however, Rodewald had apparently changed her mind and was telling Jesmer to get out and that everything in the house now belonged to Rodewald. RP 364. Jesmer stood in the doorway of her bedroom while her mother yelled at her, before eventually starting to gather her things. RP 365. When she stepped back out to ask Rodewald why she was being so difficult, Rodewald tried to hit her a couple of times before losing her footing and falling, possibly hitting her head on a dresser in Jesmer's room before getting up and leaving. RP 365-67. At some point Rodewald tried to hit Jesmer with her cell phone, but Jesmer managed to get it away from her and later tossed it on the floor somewhere in the house. RP 399-400, 402, 415-16. Jesmer denied taking the phone from the house or tossing it out of her van after she left. RP 402. Jesmer eventually closed her bedroom door and continued packing. RP 366.

Jesmer next recalled hearing noises from K.J.'s room, and when she looked to see what was happening, K.J. was yelling at Rodewald not to hit him with something and then she saw Rodewald pick up and throw a laptop computer and hit K.J. in the elbow. RP 366-68. Jesmer grabbed Rodewald by the hair, dragged her into the hall, threw her on the floor and hit her, told her to stay on the floor until they left, and admitted she may have told Rodewald she would "snap her fucking neck" if she did not

comply. RP 368-69. Jesmer never saw Rodewald bleeding during the incident. RP 404.

Jesmer and K.J. finished packing the van with what little of their stuff they had managed to gather, including the TV Rodewald had given Jesmer and left, with Jesmer driving the van and K.J. in pursuit of the dogs on foot with plans to get picked up by a friend. RP 370. 377-79, 380-81.

Jesmer later admitted sending the text messages to Rodewald about returning the jewelry if Rodewald would drop the allegations against K.J. RP 373-75, 404-05. Jesmer agreed at trial that she was lying to Rodewald because she did not have any of Rodewald's jewelry to return because she had not stolen any. RP 375-77, 405.

c. *K.J.'s Testimony*

17-year old K.J. described Jesmer's and Rodewald's relationship as "Kind of touchy." RP 511. He estimated they argued on average twice a month. RP 524. K.J. he had lived with Rodewald since about third grade. RP 538.

K.J. recalled his mother picking him up from school on January 29, 2016, having asked him to accompany her home so she could get some of her things. When they arrived, the front door was locked, so Jesmer opened it with her key. RP 511. When they walked in, Rodewald was standing there and told them they were not supposed to be there. RP 511-

12. When K.J. pleaded with her to let them in long enough to get their things, Rodewald agreed. RP 512, 543.

Jesmer and K.J. both went upstairs to their rooms, followed by Rodewald, who went to Jesmer bedroom door and started yelling at Jesmer, who was sitting on her bed crying. Jesmer eventually started yelling back and pleading with Rodewald to leave her alone so she could pack her things and leave. RP 513-14. At that point, K.J. came out of his room, turned his grandmother around and asked her to please just go downstairs. K.J. denied trying to push Rodewald down the stairs, but admitted he kept her at the top of the stairs because she was continuing to yell at Jesmer. RP 514. K.J. eventually stopped blocking her, returned to his room and carried a load of his things to the van, and then returned for more stuff. RP 515.

After K.J. returned to his room, Rodewald entered and started yelling at him that he was not moving out. She then picked up K.J.'s laptop and threw it at him, hitting him in the elbow, which prompted K.J. to punch holes in the walls before going outside to yell and cool off. RP 515-16, 529-30. K.J. remembered his mother reacting to Rodewald's assault of him by grabbing Rodewald and pushing her into another room before he went outside. RP 516, 523.

K.J. denied ever witnessing Rodewald or Jesmer strike the other, even accidentally. RP 524, 529. He also denied taking anything from the house that was not his, including Rodewald's phone or the cable box for the TV. RP 518, 557, 563.

C. ARGUMENTS

1. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON LEGAL EFFECT OF A QUITCLAIM DEED REQUIRES REVERSAL.

Jesmer's trial counsel proposed several jury instructions. CP 36-

39. One of those proposed provides:

Quitclaim deeds may be in substance in the following form:

The grantor (here insert the name and place of residence), for and in consideration of (insert consideration) conveys and quitclaims to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of, state of Washington. Dated this day of, 19. . .

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his or her heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described, but shall not extend to the after acquired title unless words are added expressing such intention.

CP 39 (quoting RCW 64.04.050).

Jesmer's counsel argued this instruction was appropriate and necessary to present the defense theory of the case, which was that Jesmer

should not be found guilty of the robbery because she only took what was already hers, she should not be found guilty of the second degree assault or harassment charges because the quitclaim deed gave her legal authority to remain in the house, and therefore the right to protect herself and her son from harm while there, including from assaults by Rodewald. RP 481-85, 488-89. The trial court's refusal to give the instruction warrants reversal of Jesmer's convictions.

A defendant is entitled to have the jury fully instructed on the defense theory of the case when there is evidence to support that theory. State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). This is a due process requirement. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011); U. S. Const. amend. XIV; Const. art I, § 3. Failure to so instruct is prejudicial error. State v. Riley, 137 Wn.2d 904, 908 n.1, 976 P.2d 624 (1999).

“Instructions are flawed if, taken as a whole, they fail to properly inform the jury of the applicable law, are misleading, or prohibit the defendant from arguing their theory of the case.” State v. Mancilla, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 354306, at *5 (COA No. 31187-2-III Slip Op. filed Jan. 24, 2017) (citing State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)). Although a defendant is not entitled to have his argument included in the court's instruction to a jury, he should be able to

argue his theory of the case based upon instructions given. In determining whether the instructions given furnish a framework from which a party's theory of the case may be argued, the instructions are to be read and understood as a whole. State v. Lane, 4 Wn. App. 745, 748, 484 P.2d 432, review denied, 79 Wn.2d 1007 (1971). "A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory." State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703, 710 (2009) (citing State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984)).

Here there was substantial evidence to support Jesmer's defense theory that the quitclaim deed Rodewald admitted executing in Jesmer's favor made her sole owner of the house on NE Bradford Drive and its contents. RP 58-59, 108-10, 334-36, 391. And if she owned what she took because of the legal effect of the quitclaim deed, then she should not be found guilty of the robbery because she only took what was already hers, and she should not be found guilty of second degree assault or harassment charges because the quitclaim deed gave her legal authority to remain in the house, and therefore the right to protect herself and her son from harm while there, including from assaults by Rodewald. See RP 481-85, 488-89 (Jesmer's counsel's argument in favor of the defense proposed quitclaim deed instruction); RP 631-41 (Jesmer's counsel's

closing argument expressing the important of the quitclaim deed to Jesmer's self defense claims and Rodewald's motive to lie).

A trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). When an otherwise discretionary decision is based solely on application of a court rule or statute to particular facts, the issue is also one of law reviewed de novo. See Fernandez-Medina, 141 Wn.2d at 454 (test to be employed includes legal and factual components); State v. Dearbone, 125 Wn.2d 173, 178, 883 P.2d 303 (1994) (noting that mixed questions of law and fact are reviewed de novo).

De novo review is appropriate here because the court refused to grant Jesmer's requested 'quitclaim' instruction for several legally incorrect reasons. First, it erroneously concluded that who owned the house at NE Bradford Drive was not an element of any of the charged offenses, and therefore it would be error to give the instruction. RP 486-87. Second, the court rejected the proposed instruction based its own factual determination that the deed was only intended to facilitate fixing the heat pump and not to transfer title to the property, a disputed issue at trial. RP 486. Third, the court found the proposed instruction would not be helpful to the jury's consideration of motive and would only cause confusion because it is not a burglary case in which home ownership

would be relevant. RP 492. Finally, the court simply refused to provide any basis for rejecting Jesmer's attorney's argument that the proposed instruction was necessary to help the jury's understand Jesmer's self defense claims. RP 492-93. These errors require reversal.

In determining whether the evidence supports giving an instruction, appellate courts view the evidence in the light most favorable to the requesting party. Fernandez-Medina, 141 Wn.2d at 455-56. The evidence must affirmatively establish the theory. Fernandez-Medina, 141 Wn.2d at 455-56.

Here, there was ample evidence to affirmatively establish Jesmer was the lawful owner of the house on NE Bradford Drive, and its contents. It was undisputed that Rodewald executed a quitclaim deed to the home in Jesmer's favor approximately six years before the charged incidents. RP 58-59, 108-10, 334-36, 391. There is also evidence to support finding Rodewald gave Jesmer the contents of the house, including the jewelry collection, TV and everything else, when she told Jesmer, "We're not coming back. The house is yours[,]” and also specifically said she could have whatever jewelry was left, as she had everything she wanted already with her in El Salvador. RP 383.

If believed, this evidence negates the unlawful-taking-of-the-property-of-another element the State had to prove beyond a reasonable

doubt to convict Jesmer of first degree robbery. CP 62 (Instruction 15, 'to-convict' for first degree robbery). If Jesmer owned the TV, cable box and house phone by virtue of the quitclaim deed, then three of the four potential pieces of property taken relied on for the robbery charge⁴ cannot support a finding of guilt. As to cell phone taken from Rodewald by Jesmer and later found on the side of a road, a jury could reasonably find the initial taking was done in lawful self-defense⁵ by Jesmer when Rodewald was trying to hit her with the phone, and that the State failed to prove she ever caused it to be removed from the home. RP 399-400, 402, 415-16. As such, the trial court's finding that who owned the home was irrelevant to the proceeding was error.

Similarly, the trial court erred in rejecting the proposed instruction based on its determination that the quitclaim deed was never intended to transfer title to Jesmer. RP 486. This was not an appropriate determination for the trial court to make. Such factual dispute should be resolved only by the trier of fact, which was the jury in this case. In re Parentage of L.B., 155 Wn.2d 679, 684, 122 P.3d 161 (2005). There was

⁴ In closing, the prosecutor identifies the these three items plus Rodewald's cell phone as items taken from Rodewald against her will during the incident. RP 613. In this regard, the jury was provided a Petrich instruction regarding the robbery charge. CP 55 (Instruction 8).

⁵ The jury was instructed on self defense as it pertained to the assault and harassment charges. CP 71-73 (Instructions 24-26)

evidence to support the court's finding, but there was also ample evidence that Rodewald did intend to transfer title of the house to Jesmer. RP 59, 110, 383-84. The court erred relying on this inappropriately made factual finding to reject Jesmer's request for a jury instruction defining the legal effect of a quitclaim deed.

The trial court's finding that the instruction would confuse the jury because it was not a burglary case, and would not assist the jury access whether Rodewald had a motive to lie is similarly misguided. If the jury had been instructed about the effect of the quitclaim deed on the ownership of the home, it would have strengthened the defense claim that Rodewald was lying about what happened because she feared losing her home if Jesmer ever recorded the deed. RP 619-20, 634-37.

Finally, the trial court's failure to recognize that the proposed instruction was essential to Jesmer's self defense claims is indefensible, particularly in light of other instructions that were provided. For example, in addition to the standard self defense instruction, the court also instructed the jury that "It is lawful for a person who is in a place where that person has a right to be and who has reasonable grounds for believing that he or she is being attacked to stand his or her ground and defend against such attack by the use of lawful force." CP 73 (Instruction 26). If Jesmer owned the home, she had a right to be in it, and had a right to stand

her ground and use lawful force to thwart the attacks of other. The proposed instruction would have assisted the jury in assessing Jesmer's defense theory that she had the right to stand her ground and use lawful force to protect herself against her mother's physical and verbal attacks at the house, because it was Jesmer's home, not Rodewald's.

A proper understanding of Jesmer's basis for asserting her ownership of the home was essential to understanding the defense theory. The trial court's failure to instruct on the effect of a quitclaim deed on ownership when the record supports it constitutes reversible error. State v. Griffin, 100 Wn.2d 417, 420, 670 P.2d 265 (1983).

2. THE TRIAL COURT'S FAILURE TO PROPERLY INSTRUCT THE JURY ON HOW TO DELIBERATE DEPRIVED JESMER OF A FAIR TRIAL AND UNANIMOUS JURY VERDICT.

The trial court failed to instruct jurors about the constitutionally dictated framework for deliberations that must be followed to reach a constitutionally unanimous verdict. This error rendered Jesmer's trial fundamentally unfair and violated Jesmer's right to a fair trial and unanimous verdicts. This Court should reverse.

In Washington, criminal defendants have a constitutional right to trial by jury and unanimous verdicts. Wash. Const. art. I, §§ 21 & 22⁶;

⁶ Wash. Const. art I, § 21 provides:

State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). One essential element of this right is that the jurors reach unanimous verdicts, and that the deliberations leading to those verdicts be "the common experience of all of them." State v. Fisch, 22 Wn. App. 381, 383, 588 P.2d 1389, 1390 (1979) (citing People v. Collins, 17 Cal.3d 687, 552 P.2d 742 (1976)). Thus, constitutional "unanimity" is not just all twelve jurors coming to agreement. It requires they reach that agreement through a completely shared deliberative process. Anything less is insufficient.

The Washington Supreme Court unanimously concurred with the California Supreme Court's description of how a constitutionally correct unanimous jury verdict is reached, and how it is not:

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash Const. art I, § 22 provides:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: . . .

"The requirement that 12 persons reach a unanimous verdict is not met unless those 12 reach their consensus through deliberations which are the common experience of all of them. It is not enough that 12 jurors reach a unanimous verdict if 1 juror has not had the benefit of the deliberations of the other 11. Deliberations provide the jury with the opportunity to review the evidence in light of the perception and memory of each member. Equally important in shaping a member's viewpoint are the personal reactions and interactions as any individual juror attempts to persuade others to accept his or her viewpoint."

State v. Lamar, 180 Wn.2d 576, 585, 327 P.3d 46 (2014) (quoting Collins, 17 Cal.3d at 693).

This heightened degree of unanimity necessitates, for example, that when a juror is replaced on a deliberating jury, the reconstituted jury must be instructed to begin deliberations anew. State v. Ashcraft, 71 Wn. App. 444, 462, 859 P.2d 60, 70 (1993) (citing CrR 6.5). Failure to so instruct deprives a criminal defendant of his right to a unanimous jury verdict and requires reversal. Lamar, 180 Wn.2d at 587-89; State v. Blancaflor, 183 Wn. App. 215, 221, 334 P.3d 46 (2014); Ashcraft 71 Wn. App. at 464. A trial court's failure to properly instruct the jury on the constitutionally required format for deliberating towards a unanimous verdict is error of constitutional magnitude that may be raised for the first time on appeal. Lamar, 180 Wn.2d at 585-86.

Sometimes jurors receive instruction that at least touches on the need for this heightened degree of unanimity, such as in California, where at least one jury was instructed they "must not discuss with anyone any subject connected with this trial,' and 'must not deliberate further upon the case until all 12 of you are together and reassembled in the jury room.'" Bormann v. Chevron USA, Inc., 56 Cal. App. 4th 260, 263, 65 Cal. Rptr. 2d 321, 323 (1997) (quoting BAJI No. 1540, a standardized jury instruction); see also, United States v. Doles, 453 F. App'x 805, 810 (10th Cir. 2011) ("court instructed the jury to confine its deliberations to the jury room and specifically not to discuss the case on breaks or during lunch."). In this regard, the Washington Supreme Court Committee (Committee) on Jury Instructions recommends trial courts provide an instruction at each recess that includes:

During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends. This applies to your internet and electronic discussions as well — you may not talk about the case via text messages, e-mail, telephone, internet chat, blogs, or social networking web sites. Do not even mention your jury duty in your communications on social media, such as Facebook or Twitter. If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

WPIC 4.61 (emphasis added).

The Committee also recommends an oral instruction following jury selection explaining the trial process, and includes the following admonishment about the process after closing arguments are made:

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a verdict. Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it. "No discussion" also means no e-mailing, text messaging, blogging, or any other form of electronic communications.

WPIC 1.01, Part 2.

The same instruction also provides:

You must not discuss your notes with anyone or show your notes to anyone until you begin deliberating on your verdict. This includes other jurors. During deliberation, you may discuss your notes with the other jurors or show your notes to them.

Id.

The Committee has also prepared a Juror Handbook. WPIC Appendix A. It advises readers that as jurors, "DON'T talk about the case with anyone while the trial is going on. Not even other jurors." Id., at 9.

These WPIC-based admonishments, if provided, make clear that deliberations may only occur after all the evidence is in, and only then when jurors are in the jury room. What they fail to make clear, however,

is that any deliberations must always involve all twelve jurors. Thus, there is no instruction informing the jury that it must suspend deliberations whenever one of them is absent. Without such instruction, there is no valid basis to assume the verdicts rendered were the result of "the common experience of all of [the jurors]," which our State constitution requires. State v. Fisch, 22 Wn. App. at 383.

Here, what instructions the court did provide failed to make clear the constitutional unanimity requirement that deliberation occur in the jury room, only then when all twelve jurors are present.

The trial court's first on-the-record admonishment of Jesmer's jury venire was prior to voir dire. RP 735-38. It included no admonishment not to talk about the case, nor did it touch on the deliberative process required for a valid verdict.

Despite the Committee's recommendation to give the full WPIC 4.61 before every recess, it was never provided during Jesmer's three-day trial, in which there were 11 recesses.⁷ This is not to say the court never admonished the jury not to discuss the case. It did, but not as recommended by the Committee. RP 133, 202, 264, 428, 569-70, 645.

⁷ The trial court sent the jury to recess with no admonishment whatsoever on five of the eleven recesses. RP 218, 245, 303, 342, 420. The court gave only brief admonishments not to discuss the case with anyone prior to the other six recesses. RP 133, 202, 264, 428, 569-70, 645.

Prior to closing arguments, the court read its instructions on the law to the jury. RP 582-605. These instructions informed the jury "During your deliberations, you must consider the instructions as a whole." RP 585; CP 48 (last page of Instruction 1). The next instruction informs the jury they "have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict." RP 586; CP 49 (Instruction 2).

Instruction 40 instructed the jury how to initiate and carry out the deliberative process. RP 602-03; CP 87-88. Like the first two instructions, Instruction 40 also reminds the jurors they each have the right to be heard. RP 602; CP 87.

Missing, however, are any written or oral instructions informing the jury of its constitutional duty to deliberate only when all 12 jurors are present. Nor did the court ever admonish jurors they were precluded from discussing the case with anyone during any recess, as recommended by WPIC 4.61 ("During this recess, and every other recess, do not discuss this case among yourselves or with anyone else, including your family and friends.").

The court's failure to instruct the jury that deliberation may only occur when all twelve jurors are present constitute manifest constitutional error. Lamar, 180 Wn.2d at 585-86. The Lamar Court unanimously held

this type of error is presumed prejudicial, and the prosecution bears the burden of showing it was harmless beyond a reasonable doubt. 180 Wn.2d at 588 (citing State v. Lynch, 178 Wn.2d 487, 494, 309 P.3d 482 (2013)).

The test for determining whether a constitutional error is harmless is "[w]hether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). Restated, "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different but for the error. A reasonable probability exists when confidence in the outcome of the trial is undermined." State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). It is undermined here and the prosecution cannot show harmlessness.

That Jesmer's jurors had opportunities for improper deliberations is not just theoretical. The record shows the jury deliberated for about an hour on June 29, 2016, before recessing for the night, and returned at 8 a.m. the next day, had lunch brought in and deliberated until 3:37 p.m. before reaching the verdicts it did. RP 688; Supp CP ___ (sub no. 89, Court Minutes, filed 06/30/16). It is safe to assume one or more jurors left the

jury room during deliberations during this two-day period, if for no other reason than to use a bathroom. If other jurors continued deliberations in that juror's absence, it violated the "common experience" requirement for constitutional unanimity, but not the instructions provided by the court. Lamar, 180 Wn.2d at 585. The jury was never instructed not to engage in such improper deliberations.

The court's written and oral instructions only limited the jurors' ability to discuss the case with fellow jurors. There is a reasonable probability some jurors discussed the case in the absence of other jurors, whether walking to and from the jury room, or waiting for other jurors to arrive in the jury room following a break. Nothing informed them such discussions were not allowed. There was nothing provided to inform them their verdicts must be the product of "the common experience of all of them." Fisch, 22 Wn. App. at 383. If even just one of the jurors was deprived of deliberations shared by others, then the resulting verdict is not constitutionally "unanimous." Lamar, 180 Wn.2d at 585; Collins, 17 Cal.3d at 693. Because the State cannot prove this error was harmless beyond a reasonable doubt, this Court should reverse and remand for a new trial. Lamar, 180 Wn.2d at 588.

In the event this Court concludes Jesmer fails to show actual prejudice arising from this error, reversal is still warranted. The failure to

instruct a jury in a criminal trial how to achieve constitutional unanimity constitutes structural error for which reversal is required without the need to show actual prejudice because it renders the entire proceeding fundamentally flawed.

“Structural error is a special category of constitutional error that ‘affect[s] the framework within which the trial proceeds, rather than simply an error in the trial process itself.’” State v. Wise, 176 Wn.2d 1, 13–14, 288 P.3d 1113 (2012) (quoting Arizona v. Fulminante, 499 U.S. 279, 310, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)).

Where there is structural error, “a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” Rose v. Clark, 478 U.S. 570, 577-78, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). Structural error is not subject to harmless error analysis. Fulminante, 499 U.S. at 309-10. Nor is a defendant required to show specific prejudice to obtain relief. Waller v. Georgia, 467 U.S. 39, 49, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984).

There can be no confidence in the constitutionality of Jesmer’s convictions. They are fundamentally flawed because there is no basis to assume the verdicts rendered were unanimous as required by our State

constitution as recognized by our Supreme Court. Lamar, 180 Wn.2d at 585.

Although we assume jurors following the instructions given, there is no basis to assume they know what to do in the absence of instruction. State v. Smith, 181 Wn.2d 508, 519 n.13, 334 P.3d 1049 (2014); State v. Emery, 174 Wn.2d 741, 764 n.14, 278 P.3d 653 (2012). To the contrary, we assume the citizenry needs to be informed in certain contexts about the specifics of the constitutional framework involved. See e.g., Miranda v. Arizona, 383 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)⁸; State v. Ferrier, 136 Wn.2d 103, 116, 960 P.2d 927 (1998)⁹.

The same is true in the context of jury trials. Certain concepts a criminal jury must understand to properly deliberate are so important to the framework of a criminal trial that the failure to properly instruct on them requires reversal. For example, the failure to correctly instruct a

⁸ The Fifth Amendment requires that a person interrogated in custody by a state agent must first “be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” Miranda, 383 U.S. at 444; also State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988) (finding Miranda warnings are required to overcome presumption that self-incriminating statements are involuntary when obtained by custodial interrogation). Where Miranda warnings are not provided, statements elicited from custodial interrogation are not admissible as evidence at trial. Miranda, 383 U.S. at 444, 476-77.

⁹ A warrantless search based on consent is constitutional only when the consent is knowingly and voluntarily given.

criminal jury on the “reasonable doubt” standard constitutes structural error for which reversal is automatic. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993).

Although most constitutional errors have been held amenable to harmless-error analysis, see Arizona v. Fulminante, 499 U.S. 279, 306–307, 111 S. Ct. 1246, 1263, 113 L. Ed.2d 302 (1991) (opinion of REHNQUIST, C.J., for the Court) (collecting examples), some will always invalidate the conviction. Id., at 309–310, 111 S. Ct. at 1264–1265 (citing, inter alia, Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963) (total deprivation of the right to counsel); Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927) (trial by a biased judge); McKaskle v. Wiggins, 465 U.S. 168, 104 S. Ct. 944, 79 L. Ed.2d 122 (1984) (right to self-representation)). The question in the present case is to which category the present error belongs.

Sullivan v. Louisiana, 508 U.S. at 279.

This Court should conclude that the failure to adequately instruct a jury in a criminal trial on how to reach a constitutionally unanimous verdict constitutes structural error. The same reasons a flawed reasonable doubt instruction requires automatic reversal also apply here.

The inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.

508 U.S. at 279.

Just as “a misdescription of the burden of proof . . . vitiates all the jury's findings” because it renders the mechanism by which guilty is determined fundamentally flawed, so too does the failure to educate a jury that its deliberations must comply with the constitutional requirement that they occur only when all 12 jurors are assembled in the jury room. Id., at 281; Lamar, 180 Wn.2d at 585. The failure to instruct Jesmer’s jury on how to structure deliberations to achieve constitutional unanimity vitiates all of its findings. It constitutes structural error requiring reversal.

D. CONCLUSION

For the reasons stated, this Court should reverse Jesmer’s judgment and sentence and remand for a new trial.

DATED this 16th day of February 2017.

Respectfully Submitted,

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February 16, 2017 - 3:01 PM

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