81062-1

WASHINGTON STATE COURT OF APPEALS
DIVISION III

Appeal Number
25597-2

State of Washington
Respondent

v.

Ryan J. O'Hara
Appellant

APPELLANT'S REPLY BRIEF

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Ryan J. O'Hara replies to the State's responding argument as follows:

I. Crawford Issue

The Confrontation Clause of the Sixth Amendment guarantees the accused in every criminal prosecution the right to confront the witnesses against him. *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). This is a "bedrock procedural guarantee." *Id.*

This means that, if (a) people say things, (b) that implicate a criminal defendant in any way, and (c) the jury learns this, then those people are witnesses against the defendant. *State v. Greiff*, 141 Wn.2d 910, 927, 10 P.3d 390 (2000), citing *Ohio v. Roberts*, 448 U.S. 56, 65, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980). The Sixth Amendment then requires the State to produce the adverse witnesses so the defendant can confront and cross-examine them under oath. Statements by witnesses during police investigations are almost always testimonial for the purpose of a *Crawford* analysis. *Crawford* at 53; *State v. Tyler*, 2007 Lexis 767 at 1,

(Div. III, 2007).

Officer Yamada told the jury that his investigation included "contacting people" at Mr. Nevin's, and that, after that investigation, Mr. O'Hara was arrested. RP 72. Officer Boothe testified that the officers contacted "parties" – plural. RP 80. Officer Boothe said he talked both to Mr. Nevin and to Ms. Gumm and maybe others, too. RP 93.

The State says emphatically that *neither* officer did *anything* based on the witness investigations at the scene. (Rsp. Brief at 7.) But Officer Boothe explicitly said he arrested Mr. O'Hara "based on" this investigation. RP 100.

The officers' testimony clearly communicated to the jury that the police questioned other people at the scene besides Mr. Loree. The jury knew these people were Mr. Loree's friends. It is at least highly probable that the jury inferred that the witnesses' responses incriminated Mr. O'Hara. Saying "people were contacted" instead of "we obtained information from witnesses," is hardly a fool-proof device for hiding the fact that questions were asked and answered.

True, the specifics of what the police learned from Mr.

Nevin, Ms. Gumm, etc. were not put in evidence. But, for Confrontation Clause purposes, we don't need to know the details. The Confrontation Clause is in effect whenever testimony implicates a defendant **in some manner**. *Greiff*, 141 Wn.2d at 927.

Here, the State's obligation to make the witnesses available to Mr. O'Hara arose when the jury heard testimony from which it could reasonably infer that Mr. Nevin, Ms. Gumm and others made statements that implicated Mr. O'Hara and exonerated Mr. Loree.

Contrary to the State's argument, the Confrontation Clause operates independently of the rules of evidence. *Crawford*, 541 U.S. at 50-51; *State v. Davis*, 154 Wn.2d 291, 303, 111 P.3d 844 (2005), citing *Crawford* at 61.

This means that the absent witnesses' adverse impact on the defendant need not be inadmissible under the hearsay rules. Here, once the jury was tipped off that people made adverse testimonial statements, Mr. O'Hara was entitled under the Sixth Amendment to confront those people, regardless of what they may or may not have said.

In evaluating the prejudicial effect of a manifest

constitutional error, this court must presume the error resulted in the mischief the constitutional protection contemplates. *State v. Guloy*, 104 Wn.2d 412, 415, 705 P.2d 118 (1985). A *Crawford* violation is always deemed prejudicial, unless the untainted evidence is overwhelming. *Guloy*, 104 Wn.2d at 426; *State v. Edwards*, 131 Wn. App. 611, 615, 128 P.3d 631 (2006).

After listening to the testimony of Officers Yamada and Boothe, this jury could not have doubted that witnesses at the scene corroborated Mr. Loree's story and refuted Mr. O'Hara's. At the very least, a reasonable juror could very well have inferred as much.

And, since it cannot be said on this record that the jury would have believed Mr. Loree without the implied corroboration, Mr. O'Hara's conviction cannot stand.

II. Sufficiency of the Evidence

Without the "backdoor" corroboration of Mr. Loree's story by his friends, the untainted evidence is far from overwhelming. All we have are wildly conflicting stories by two guys about a physical altercation between them. One guy may be cooler and more confident on the stand. But it

cannot be ascertained beyond a reasonable doubt whether the cool one or the other guy is telling the truth.

The State says Mr. O'Hara claimed Mr. Loree's wound was "self-inflicted." This sounds like O'Hara suggested that Loree deliberately beaned himself with a blunt instrument. But what Mr. O'Hara testified was that Mr. Loree fell down while swinging at him with a heavy object and that Loree hit his head, either with the weapon or on the ground, in the fall.

By contrast to Mr. Loree, Mr. O'Hara *did* have evidence on his side – namely, the presumption of innocence. The presumption of innocence is evidence introduced by the law on behalf of the accused, and jury must regard it as such. *Coffin v. United States*, 156 U.S. 432, 459-60, 15 S. Ct. 394, 39 L. Ed. 481 (1895).

Viewed in this light, the admissible evidence of guilt falls short of a mere preponderance standard, let alone beyond a reasonable doubt.

Accordingly, the conviction cannot stand.

III. Jury Instructions

Mr. O'Hara contends the court committed reversible error by omitting from the jury instructions essential statutory language necessary to his lawful force defense. The State contends this error was not preserved for review. This is wrong.

Ordinarily, failure to object to an instruction precludes consideration of an alleged error for the first time on appeal. RAP 2.5(a). But this court will address an erroneous jury instruction that is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Constitutional Error: The constitution requires judges to fully instruct the jury. It is the duty of the trial judge, in instructing the jury, to "declare the law." Wash. Const. Art. IV, § 16.

> The court must adequately and properly instruct the jury concerning the law which they must follow, **regardless of whether or not counsel for the respective parties to the action submit proposed instructions for the court's consideration.**

State v. Brown, 31 Wn.2d 475, 502, 197 P.2d 590 (1948) (emphasis added).

Specifically, Washington courts recognize the particular importance of properly instructing the jury on the applicable law on the issue of lawful force. A jury instruction that fails to make the law of lawful force manifestly clear denies the defendant a fair trial. *State v. LeFaber*, 128 Wn.2d 896, 898, 913 P.2d 369 (1996). An error in the lawful force instruction is an error of constitutional magnitude and is presumed prejudicial. *State v. Curtis Woods*, 2007 Lexis 816 at 5, citing *LeFaber*, 128 Wn.2d at 900. This is because, when the facts present a question self-defense, the State must prove the absence of self-defense beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 622, 615-16, 683 P.2d 1069 (1984).

Manifest: Ordinarily, an error is "manifest" if it has " 'practical and identifiable consequences in the trial of the case.' " *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999), quoting *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

But instructional errors that are "of a constitutional magnitude" may be raised without regard to the degree to which the asserted error is "manifest." *State v. McCullum*, 98

Wn.2d 484, 487-88, 656 P.2d 1064 (1983); *State v. Peterson,* 73 Wn.2d 303, 306, 438 P.2d 183 (1968). "Manifest" in this context simply means that the error is truly of constitutional magnitude. *State v. Scott,* 110 Wn.2d 682, 688, 757 P.2d 492 (1988).

Thus, if the claimed error is constitutional, then the reviewing court examines the effect the error had on the defendant's trial, applying the harmless error standard of *Chapman v. California,* 386 U.S. 18, 87 S. Ct. 824, 17 l. Ed. 2d 705 (1967). *Scott,* 110 Wn.2d at 688.

State's Cases Distinguished: The State contends that no jury instruction need be given unless it is requested. But the cases holding that a particular instruction need not be given unless it is requested are distinguishable. They refer to instructions that go beyond the elements the State must prove – lesser included offense instructions, for example. *See, e.g., State v. Mak,* 105 Wn.2d 692, 745, 718 P.2d 407 (1986); *State v. Walker,* 13 Wn. App. 545, 550, 536 P.2d 657 (1975).

Here, in challenging the appealability of the defective lawful force instruction, the State relies upon two such

distinguishable authorities. Rsp. Brief at 11.

The State cites *State v. Hoffman,* 116 Wn.2d 51, 804 P.2d 577 (1991). But defendant Hoffman argued that a trial court has to instruct on all lesser included offenses, even over the express objections of the defendant. *Hoffman* rejects that and restates the general rule that lesser included offense instructions are required only if requested. *Hoffman,* 116 Wn.2d at111-12.

Likewise, *State v. Scherer,* 77 Wn.2d 345, 462 P.2d 549 (1969), holds simply that an instruction limiting the applicability of certain evidence need be given only when requested. *Scherer,* 77 Wn.2d at351-52.

Neither of these cases addresses manifest constitutional error like the one at issue here.

True, trial judges have considerable discretion in deciding how instructions are to be worded. *State v. Amezola,* 79 Wn. App. 78, 87-88, 741 P.2d 1024 (1987); *State v. Krup,* 36 Wn. App. 454, 461-62, 676 P.2d 507 (1984). But only insofar as the instructions <u>correctly state the law, are not misleading, and permit counsel to argue the defendant's theory of the case</u>. *Amezola,* at 87-88; *Krup,* at

461-62; *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

Specifically, the instructions are misleading if the trial court attempts to define the offense and fails to instruct the jury as to each and every essential element of the offense. *State v. Emmanuel*, 42 Wn.2d 799, 820, 259 P.2d 845, 857 (1953). An instruction that purports to define the offense but that does not cover each and every material element is necessarily misleading and prejudicial. It basically directs the jury that the State need prove only those elements of the offense included in the court's definition. *Id.*

And technical words and terms of art must be explained. *Amezola*, 79 Wn. App. at 87. Otherwise, the defendant may be convicted by a jury that does not understand the law. *Id.*

Here, the criminal statute defining the offense specifically requires the State to prove that the use of force was unlawful. Further, the legislature specifically included a provision that reasonable force is <u>not</u> <u>unlawful</u> if it is employed to defend oneself against a 'malicious' act. 'Malicious' here is a term of art. The statute says it includes

the willful disregard of the rights of another person. RCW 9A.04.110(12).

Therefore, the court committed reversible error in failing to inform the jury that Mr. O'Hara's use of force was lawful if the jury found that (a) Mr. Loree willfully disregarded Mr. O'Hara's rights not to have his property and privacy invaded, and (b) a swing with a flashlight was a reasonable degree of force to prevent that violation by a guy who clearly was not hearing "no."

The State asserts that the law does not permit striking a person with a flashlight to prevent the person from invading the privacy of one's car trunk. Rsp. Brief at 12. But this is precisely the dispositive factual question before Mr. O'Hara's jury. Did Mr. Loree's conduct constitute willful disregard of Mr. O'Hara's rights, and was the degree of Mr. O'Hara's defensive response reasonable? If the jury answers both these questions in the affirmative, then the law not only permits – it demands – a verdict to acquit. But Mr. O'Hara's jury could not ask and answer these crucial questions, because the court failed to inform them of the applicable law.

Not Harmless: An error of constitutional proportions

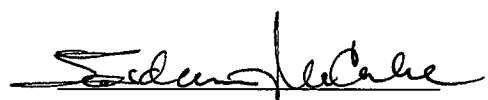
is harmless only if it is harmless beyond a reasonable doubt. *State v. Stephens*, 93 Wn.2d 186, 191, 607 P.2d 304 (1980); *Chapman*, 386 U.S. at 24.

Because of the court's instructional error, Mr. O'Hara was prejudiced in presenting his defense beyond a reasonable doubt. The error was not harmless, and reversal is required.

CONCLUSION

Mr. O'Hara was denied a fair trial both by the *Crawford* error and by the defective instruction, both of which constitute manifest and prejudicial constitutional error. Moreover, because Mr. Loree had a personal interest in implicating Mr. O'Hara, his uncorroborated testimony was insufficient to support a guilty verdict beyond a reasonable doubt. Accordingly, Mr. O'Hara asks the court to reverse his conviction and dismiss the prosecution.

Respectfully submitted this 9th day of May, 2007.



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Proof of Service

I certify under penalty of perjury under the laws of the State of Washington that on May 9, 2007, I hand-delivered one copy of the amended Reply brief to:

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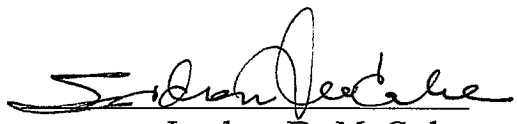

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