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NO. 62653-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,
Respondent,
v.
RICHARD BUSHAW,
Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Richard Bushaw's jury trial for third degree assault rested on the question of whether his struggle against being handcuffed during a police investigation amounted to an intentional assault. The trial court's refusal to expressly instruct the jury that specific intent was an essential element of the charged offense diminished the State's burden of proof and denied Bushaw a fair trial. Furthermore, the court denied Bushaw his fundamental right to be present at trial by excluding him from proceedings where questions from the deliberating jury were discussed and answered, which was particularly prejudicial because the jury's questions struck at the heart of the theory of defense and Bushaw could have offered pertinent and logical advice about answering these questions.

B. ASSIGNMENTS OF ERROR.

1. The court denied Bushaw a fair trial by jury as required by the Sixth and Fourteenth Amendments and Article I, sections 21 and 22 of the Washington Constitution by omitting an essential element from the "to convict" instruction for third degree assault. CP 50 (Instruction 7).

2. The court violated Bushaw's right to be present at all material stages of trial and defend against the charge, as protected

by the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, and the stricter requirements of Article I, sections 22, when it answered several jury questions without affording him the opportunity to know about or participate in responding to questions from the deliberating jury.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the trial court instructs the jury that all essential elements of a charge are set forth in a single instruction, the right to a fair trial by jury requires that this instruction include every necessary element. Here, the court gave a single “to convict” instruction claiming to include all essential elements of third degree assault, but refused to include the specific intent required to commit such an assault in its “to convict” instruction. Did the court’s refusal to instruct the jury on the essential element of intent in its “to convict” jury instruction, when the intentional nature of Bushaw’s conduct was the critical contested element in the case, deny him a fair trial by jury?

2. An accused person’s right to be present at all material stages in a trial is strictly protected by the state and federal constitutions. Here, the deliberating jury asked several questions directly pertinent to Bushaw’s theory of defense but the court

responded to the jury without any notice to Bushaw, even though Bushaw's personal knowledge of the case could have resulted in more appropriate, effective, and accurate answers than those provided by the court. Did the court's exclusion of Bushaw from proceedings involving questions from the deliberating jury deny him his right to be present at all material stages of his trial?

3. The Washington Constitution explicitly guarantees the right to be present at trial, unlike the implicit nature of the federal constitutional right. Does this more rigorously enforced state constitutional right require a heightened standard of review for a violation of an accused person's right to presence at trial, so that the court may not indulge any such violations when they occur during a substantive stage of the trial?

D. STATEMENT OF THE CASE.

On May 6, 2008, Richard Bushaw was homeless and temporarily living out of his broken-down van, parked on Fifth Avenue NE, a street abutting I-5 in Seattle. 9/23/08RP 13; 9/25/08RP 4, 25.¹ At approximately 12 noon, he and his wife

¹ The verbatim report of proceedings (RP) will be referred to herein by the date of the proceeding followed by the page number.

Shelley² left their van and walked toward the University District, a neighborhood on the other side of I-5, to get some food.

9/25/08RP 5, 25. They paused to enter a hole in a fence separating the street from an embankment leading to I-5, intending to get to a place where they could somewhat discretely use the bathroom and then follow a short cut to cross the highway.

9/25/08RP 5.

As Richard climbed through the well-trod ground by the hole in the fence, Seattle Police Officer John Smith drove by, saw the Bushaws entering an area where they should not be, and turned on his siren to get their attention. 9/23/08RP 61; 9/25/08RP 8, 11. Shelley stopped in place but Richard continued through the hole in the fence and stood behind a large electrical box where Smith could not see what Richard was doing. 9/23/08RP 15. Smith left his car and ordered Richard out of the fenced area. 9/23/08RP 24-25. He directed Richard to keep his hands on a guardrail while he investigated what Richard was doing behind the fence.

² Because Richard and Shelley Bushaw were both present during the incident, they will be referred to by their first names for purposes of clarity in the Statement of the Case. The remainder of the brief refers to Richard by his last name, as the legal issues do not require further reference to Shelley.

Richard had used this area of the fence to go to the bathroom on other occasions and did not understand why the officer was stopping him. 9/25/08RP 32. Richard was confused and vocal in his complaints to the officer that he had done nothing wrong. 9/25/08RP 27, 30. He cursed at the officer for detaining him. He stayed by the guardrail as ordered but did not keep his hands on the guardrail as he questioned why he was being held. 9/23/08RP 63-64. Smith then directed Richard to keep his hands on the police car, but again Richard stood in the place ordered without keeping his hands on the car. 9/23/08RP 25.

Smith did not intend to arrest Richard for trespassing, although he believed Richard had trespassed by entering the hole in the fence. 9/23/08RP 27. But Smith suspected Richard may have dropped something on the other side of the fence and wanted to continue investigating, so he decided to handcuff Richard while he continued his investigation.

Bushaw put his hands behind his back to be handcuffed but stiffened as the officer began cuffing him. 9/23/08RP 32; 9/25/08RP 29. The officer felt the resistance and did a leg "sweep" to knock Bushaw to the ground so it would be easier to handcuff him. 9/23/08RP 33, 74. Both men fell to the ground. Smith

grabbed one of Richard's hands but could not get control of the second hand in order to handcuff him. 9/23/08RP 34. Richard continued resisting, grasping for Smith's hand, wrist, or belt to stop him from cuffing him. 9/23/08RP 36. A back-up officer, Dave White arrived, did "control technique" called a "wrist lock" that involved pressing his knee into Bushaw's shoulder blades, and got control of Richard's other arm. 9/24/08RP 86, 101. It took approximately three minutes from the start of the verbal interaction until Richard was handcuffed. Id. at 97-98.

Smith found a bag of methamphetamine by the hole in the fence and the State charged Richard with possession of methamphetamine, but the jury acquitted him of this charge. 9/23/08RP 49-40; CP 7; CP 63. The State also charged Richard with one count of third degree assault for allegedly kicking White when White bent down to forcibly place Richard's foot into the patrol car, but the jury could not reach a unanimous verdict on this allegation. 9/26/08RP 131; CP 7.

Richard was convicted following a jury trial of one count of third degree assault for intentionally assaulting Smith during the struggle, pursuant to RCW 9A.36.031(1)(g). CP 6; CP 62. He

received a standard range sentence under the drug offender sentencing alternative (DOSA). CP 71-80. He timely appeals.

E. ARGUMENT.

1. THE TO-CONVICT INSTRUCTION FOR THIRD DEGREE ASSAULT DID NOT INCLUDE ALL ESSENTIAL ELEMENTS AS CHARGED IN THE INFORMATION

a. A “to convict” instruction must set forth every essential element of the crime charged. To ensure that the State is held to its burden of proving every essential element of the crime charged beyond a reasonable doubt, a “to convict” jury instruction must clearly set forth all essential elements of the crime. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Oster, 147 Wn.2d 141, 147-48, 52 P.3d 26 (2002); U.C. Const. amend. 5, 14; Wash. Const. art. I, §§ 21, 22. A “to convict” instruction is a uniquely critical instruction because it “serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Because the jury will heavily rely on a “to convict” instruction, and because the instruction expressly purports to include all essential elements, the jury need not “search the other

instructions to see if another element alleged in the information should have been added to those specified in [the instruction].” State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

A “to convict” instruction that does not “plainly, explicitly, and correctly” state all the elements required for conviction is “constitutionally defective.” Smith, 131 Wn.2d at 263; State v. Strasburg, 60 Wash. 106, 116-17, 110 Pac. 1020 (1910); McClaine v. Territory, 1 Wash. 345, 355, 25 Pac. 453 (1890). Although courts generally review the instructions “as a whole,” the reviewing court “may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” Mills, 154 Wn.2d at 7 (quoting DeRyke, 149 Wn.2d at 910). Put another way, “an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged.” Mills, 154 Wn.2d at 8.

In Mills, the “to convict” instruction included the essential elements for misdemeanor harassment and a separate special verdict asked the jury to decide whether the threat constituting harassment was a threat to kill, which elevated the offense to felony harassment. The court expressed reservations about but approved of using separate instructions for the essential elements

of the base crime and the additional elements that enhance the crime or the punishment attached, such as misdemeanor and felony harassment. *Id.* at 10. But the Mills Court reaffirmed the long-standing requirement that the “to convict” instruction otherwise include every essential element, and in a case such as the instant matter where there is no base offense and enhancement, a “to convict” must include all essential elements.

In the case at bar, the trial court refused to include the essential element of intent in the “to convict” instruction for third degree assault despite Bushaw’s specific request for such an instruction. 9/24/08RP 145-45; 9/25/08RP 58. The court insisted that other instructions adequately set forth the essential element of intent, even though caselaw plainly states that a court may not rely on other instructions to supply an element missing from a “to convict” instruction. DeRyke, 149 Wn.2d at 910 (citing Smith, 130 Wn.2d at 262-63).

b. The essential element of intent was a necessary component of the “to convict” instruction. By Amended Information, the prosecution charged that Bushaw “did intentionally assault” a police officer and thereby committed third degree assault. CP 6-7. The trial court agreed that the prosecution must

prove Bushaw intentionally assaulted the officer, but refused to include this language in the “to convict” instruction. 9/24/08RP 139, 145.

In State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008), the court emphasized the important role that the charging document plays in dictating the essential elements the State must prove.

The essential elements rule requires a charging document allege facts supporting every element of the offense and identify the crime charged. “Elements” are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.

Id. (internal citations omitted).

Here, the “to convict” instruction purported to set forth all essential elements of third degree assault. It told the jury that “the following elements of the crime must be proved beyond a reasonable doubt,” yet it contained no mention of intent. CP 50 (Instruction 7, attached as Appendix A). It simply directed the jury to find whether the prosecution proved Bushaw “assaulted” Smith. Id. It did not emphasize or imply that the intent to assault must be proven beyond a reasonable doubt.

The jury was given a definitional instruction of “assault” which included the requirement of intent. CP 52 (Instruction 9,

attached as Appendix B). This was inadequate. A definitional instruction cannot substitute for a “to convict” instruction. State v. Scott, 110 Wn.2d 682, 689, 757 P.2d 492 (1988); State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988). “The jury has the right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instruction in order to add elements necessary for conviction.” Oster, 147 Wn.2d at 147.

The incomplete “to convict’ instruction was given in error.

c. The instructional error requires reversal of the third degree assault conviction. Where a jury instruction purports to list the elements of the crime, the omission of an element essential to the crime relieves the State of its burden of proof beyond a reasonable doubt, potentially misleads the jury, and requires reversal. Oster, 147 Wn.2d at 147-48. Failure to instruct a jury on an essential element is a fatal defect. State v. Eastmond, 129 Wn.2d 497, 503, 919 P.2d 577 (1996); State v. Allen, 101 Wn.2d 355, 358, 678 mP.2d 798 (1984). Such an error is never subject to a harmless error analysis. State v. Vreen, 143 Wn.2d 923, 931, 26 P.3d 236 (2001).

Even if harmless error applied, instructional error is reviewed for constitutional harmless error. State v. Brown, 147 Wn.2d 330, 340, 58 P.3d 889 (2002) (adopting constitutional harmless error analysis set forth in United States v. Neder, 527 U.S. 1, 119 S. Ct. 1835, 144 L.Ed.2d 35 (1999)). Under this analysis, instructional error is presumed prejudicial unless the State can prove the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). “[A]n error of constitutional magnitude is harmless only if the State can prove beyond a reasonable doubt that the jury would have reached the same result in the absence of the error.” State v. Anderson, 112 Wn.App. 828, 837, 51 P.3d 579 (2002).³

A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and in *no way affected the outcome of the case*.

State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977), (quoting State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970)) (emphasis added by Wanrow court).

Here, the prosecution cannot prove that the instructional error “in no way affected the outcome of the case.” Wanrow, 88

³ By contrast, a non-constitutional error is reviewed under the standard of whether “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” Anderson, 112 Wn.App. at 837.

Wn.2d at 237. Bushaw's intent was the critical issue in the case, and the jury exhibited its confusion over the question of intent by asking the court for a further definition of "intent" and well as "offensive" when the conduct at issue involved "resisting/pulling away." CP 60. As the jury's questions demonstrated, the incident rested upon Bushaw's uncooperativeness when the police officer Smith tried to handcuff him but he did not affirmatively hit the officer. And throughout the incident, Bushaw was continually confused and frustrated by his treatment by the officer when he did not believe he did anything wrong, and yet he never tried to flee or actively cause injury to the officer; rather, he resisted and complained of being arrested.

Defense counsel emphasized in closing that Bushaw did not hit, claw, bite or punch, and identifying when the assault occurred required a decidedly nuanced inquiry into Bushaw's resistance. 9/25/08RP 103, 110-11. The jury's question about whether "resisting/pulling away" qualified as an intentional assault shows that the jury was fixated on whether Bushaw's actions amounted to an assault. CP 60. By failing to properly instruct the jury on the essential nature of this element, the jury was not adequately instructed on the essential elements.

The prosecution may contend on appeal that the jury's failure to convict Bushaw of another assault, against police officer Dave White, shows it understood the intent element. But the alleged assault against White was particularly tenuous and it is far more likely that the jury concluded Bushaw never touched White. Another officer observing the incident did not see Bushaw touch White, and although a sergeant claimed to have seen Bushaw kick White, he described it far differently than White did. See 9/24/08RP 74-75 (officer watched White escort Bushaw and did not see any kick); 92 (White picked up Bushaw's foot and Bushaw kicked him in thigh); 112, 118 (sergeant saw Bushaw twist and kick White in chest although did not write it in report). The acquittal on count two does not demonstrate the jury accurately understood the essential elements of the prosecution's burden of proof and Bushaw's conviction for third degree assault based upon an incomplete "to convict" instruction must be reversed.

2. THE TRIAL COURT IMPROPERLY INSTRUCTED THE DELIBERATING JURY IN VIOLATION OF BUSHAW'S RIGHT TO BE PRESENT, AND HIS RIGHT TO RECEIVE MEANINGFUL REPRESENTATION AT ALL CRITICAL STAGES OF THE PROCEEDINGS AS WELL AS HIS RIGHT TO A FAIR TRIAL BY JURY WERE VIOLATED.

a. A criminal defendant is entitled to be aware of and meaningfully represented at proceedings discussing the instructions for a deliberating jury. The discussion of a jury inquiry is a critical stage of a criminal proceeding at which a defendant has the right to be present and receive meaningful representation. Rogers v. United States, 422 U.S. 35, 39, 95 S.Ct. 2091, 45 L.Ed.2d 1 (1975); State v. Thomson, 123 Wn.2d 877, 880, 872 P.2d 1097 (1994); U.S. Const. amends. 5, 6, 14;⁴ Wash. Const. Art. I, § 22;⁵ CrR 3.4 (a). A trial court commits error when it communicates with the jury without notice to the defendant or counsel. State v. Caliguri, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); State v. Allen, 50 Wn.2d 412, 419, 749 P.2d 702 (1988). CrR 6.15(f)(1) provides:

⁴ The Fifth and Fourteenth Amendments protect the right to "due process of law," while the Sixth Amendment protects the right to "a speedy and public trial" with the assistance of counsel and right to confront witnesses.

⁵ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"

After retirement for deliberation, if the jury desires to be informed on any point of law, the judge may require the officer having them in charge to conduct them into court. Upon the jury being brought into court, the information requested, if given, shall be given in the presence of, or after notice to the parties or their counsel. Any additional instruction upon any point of law shall be given in writing.

There are some simple scheduling matters or pure legal discussions at which a defendant cannot meaningfully contribute and his presence is not constitutionally required. In re Pers. Restraint of Lord, 123 Wn.2d 296, 306, 868 P.2d 835 (1994) (conference on pretrial legal matter need not include defendant if no disputed facts involved). The theory underlying this exception to the rule requiring a defendant's presence during trial is that the defendant could not influence some basic housekeeping details or technical legal questions. But when the legal matter includes issues for which there are disputed facts or the defendant could potentially play a role in shaping the outcome, the defendant has the right to be present. For example, the court in Lord cited its agreement with a case finding the right to be present during a hearing on the admissibility of a prior conviction. Id. (citing People v. Dokes, 595 N.E.2d 836, 839 (N.Y. 1992)). In Dokes, the court found that one key factor in assessing the right to be present is whether the proceedings involve factual matters "about which

defendant might have peculiar knowledge that would be useful in advancing the defendant's or countering the [prosecution's] position." Id.

b. The trial court failed to give Bushaw an opportunity to respond to the jury inquiry the sought further information about the defense. The deliberating jury asked several questions and the court responded in writing without any on-the-record conversations. CP 60-61 (attached as Appendix C). Bushaw was not included in any discussion of how to respond to the jury's inquiries, even though the questions were pointedly directed to the factual underpinnings of his theory of defense and he could have suggested more case-specific responses.

The jury began deliberating on September 25, 2008, at 2:31 p.m. Supp. CP __, sub. no. 26A. They continued deliberations the following morning, and at 9:55 a.m., sent a written note to the court containing several questions. Id. The court sent a written response nine minutes later. Id. The jury submitted its verdict several hours later, convicting Bushaw of one count of third degree assault, acquitting him of one count of possession of a controlled substance, and failing to reach a unanimous verdict on a second count of third degree assault. CP 62, 63; 9/26/08RP 130.

The court did not conduct any on-the-record discussion of the jury note or its response. The clerk's minutes provide that the court wrote its answer to the jury's questions "[f]ollowing consultation with counsel," but do not explain with whom the conversations occurred or the substance of those conversations. Supp. CP __, sub. no. 26A.

The jury's questions were as follows:

1. Can we share personal experiences re: people outside of this case that may add knowledge to this case?
2. Can "intent" be resisting/pulling away or does it have to be grabbing/hitting/touching? "Offensive" – is offensive forceful resisting?

The court's response was:

1. No, you must only consider the evidence presented and the instructions as to the law.
2. It is not possible to further define "intent" or "offensive" beyond what is already provided in your instructions. Please re-read the instructions.

CP 60-61.

The minutes do not indicate that anyone discussed the note or response with Bushaw himself. Yet only nine minutes elapsed between the court receiving the note and issuing its written response, making it extremely unlikely that Bushaw was present. The jury was in its second day of deliberations, and the court told the parties they would not need to come to the courtroom in the

event the jury had questions. 9/25/08RP 126. Unlike the attorneys, who the court directed to be available by telephone, the court told Bushaw to be available to come to court in 15 to 20 minutes if needed for a verdict. 9/25/08RP 130. The possibility that defense counsel participated or acceded to the court's instruction does not protect Bushaw's personal right to know of, observe, and participate in this stage of proceedings. Consequently, the record does not demonstrate the court protected or respected Bushaw's right to be present and consult with counsel regarding the jury inquiry.

On occasion, courts have found a defendant need not be present during technical legal discussions or simply procedural matters such as scheduling. But this jury inquiry does not qualify as such a minor or purely legal matter. The jury's questions about the meaning of assault went directly to the heart of the case. The jury had read the instructions and found them lacking, and thus asked for further information. Had Bushaw been present during the discussion of how to respond to the jury's questions, he could have proffered a more complete response than telling the jury to read instructions it had already read. He could have asked the court to supplementally instruct the jury that whatever physical actions it

found Bushaw engaged in, they must have been done with the specific intent to assault the officer, as the “to convict” instruction had omitted and thus downplayed the critical importance of this intent.

Furthermore, the jury asked a vague question about whether it could consider personal experiences outside of the courtroom. CP 60. The court answered, “no,” even though jurors are not required to ignore personal experiences in deliberating, and in fact, needed to consider what an “ordinary person” would perceive to be offensive in deciding whether Bushaw’s resistance to Smith constituted an intentional assault. CP 52 (instruction defining assault). Had Bushaw been present during the discussion of the jury questions, he could have explained that the court’s supplemental instructions were unduly narrow and misplaced because the reasonableness of his actions and whether they offended an ordinary person were the precise issues to which he testified. At the least, he could have suggested the court seek a more specific question about the nature of the personal experiences the jurors wished to share, as not all personal experiences are prohibited during jury deliberations.

In sum, Bushaw could have provided more case and fact-specific suggestions for responding to the jury's questions as he best understood the facts of his defense. Excluding him from any participation in or even awareness of the jury's inquiries denied him his right to be present during a material stage of the trial.

c. The trial court's failure to give Bushaw an opportunity to respond to the jury inquiries requires reversal under the State and Federal Constitutions. The federal constitutional right to be present is culled from the rights to due process of law and to confront one's accusers, and if there is a violation of the right to be present, "the burden is on the prosecution to prove that the error was harmless beyond a reasonable doubt." United States v. Marks, 530 F.3d 759, 812 (9th Cir. 2008); State v. Rice, 110 Wn.2d 577, 613-14, 757 P.2d 889 (1988), cert. denied, 491 U.S. 910 (1989). But the Washington Constitution expressly declares a right to be present and thus more strictly requires the State to enforce this fundamental right. State v. Ahren, 64 Wn.App. 731, 735 n.4, 826 P.2d 1086 (1992).

Article I, section 22 explicitly guarantees,

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,[and] to meet the witnesses against him face to face

(emphasis added). Furthermore, when the Framers drafted the state constitution it was the prevailing understanding that an accused person had a personal right to be present during discussions of jury instructions. Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury with counsel but without defendant's presence is error "and we do not think this error was cured by the fact that defendant's attorney was present and made no objection."); State v. Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) (reversal where court repeated instructions to deliberating jury, because "The giving of an instruction in appellant's absence constituted prejudicial error, which was not cured" by later re-instructing the jury with defendant present, because the right to be personally present is mandatory for all substantive trial proceedings and is strictly enforced). A Gunwall analysis further demonstrates the substantive difference in the state and federal

constitutional protections, mandating stringent protection of this right in Washington.⁶

i. Textual Language and Texts of Parallel Provisions of State and Federal Constitutions (factors one and two). Because the right to appear in person is not expressly mandated in the federal constitution, while the state constitution forthrightly declares the “accused shall have the right to appear and defend in person,” the difference in textual language demonstrates the State Framers’ intent to provide greater protection for the right to be present at trial than the federal constitution. The framers of the Washington Constitution were certainly aware of the federal constitution, and they specifically drafted and adopted different language. State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998) (citing Robert F. Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 U. Puget Sound L. Rev. 491, 515 (1984) and Lebbeus J. Knapp, The Origin of the Constitution of the State

⁶ The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106

of Washington, 4 Wash. Hist. Q., No. 4, at 246 (1913)). In addition, Article I, section 22 lists several rights not included in the Sixth Amendment, such as the right to meet witnesses face to face, have a copy of the charge, testify on one's own behalf, and to appeal. Id. at 485-86.

ii. State constitutional and common law (factor three). The Constitutional Convention of 1889 provides no additional evidence of the framers' intent. Rosenow, Journal of the Washington State Constitutional Convention 1889, p. 511 (1962). In particular, little is known about the history of the drafting of Article I, section 22. Foster, 135 Wn.2d at 722, 734-35; State v. Silva, 107 Wn.App. 605, 619, 27 P.3d 663 (2001). Logically, the framers of the Washington Constitution did not intend Article I, section 22 to be interpreted identically to the federal Bill of Rights, since they used different language and the federal Bill of Rights did not then apply to the states. Utter, supra at 496-97; Silva, 107 Wn.App. at 619 ("The decision to use other states' constitutional language also indicates that the framers did not consider the

Wn.2d 54, 61-62, 720 P.2d 808 (1986).

language of the U.S. Constitution to adequately state the extent of the rights meant to be protected by the Washington Constitution.”).

iii. Preexisting state law. Preexisting law mandated a defendant’s presence as a necessary requirement before commencing trial. An 1854 territorial law provided, “No person prosecuted for an offense punishable by death or by confinement or in the county jail, shall be tried unless personally present during the trial.” Laws 1854, p. 412, § 109. Another territorial law provided, “On the trial of any indictment the party shall have the right . . . to meet witnesses produced against him face to face.” Laws 1854, p. 371, § 2. These preexisting laws demonstrate a desire at the time of the framing of the constitution to expressly protect a defendant’s personal right to be present throughout all material aspects of the trial upon its commencement, and these laws were strictly enforced. The court in Beaudin cited this law in reversing a conviction where the court answered a jury by re-instructing the deliberating jury without the defendant’s presence. 76 Wash. at 308; see also Linbeck, 1 Wash. at 339 (repeating instructions to jury without defendant’s presence not cured by counsel’s presence), State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914) (state constitution guarantees accused

person “right to be present at every stage of the trial when his substantial rights may be affected”). In Shutzler, the court emphasized that any violation of the right to be present cannot be tolerated, because “[t]he wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.” 82 Wash. at 367-68.

iv. Differences in structure between state and federal constitutional provisions. The United States Constitution is a grant of limited power to the federal government, whereas the Washington constitution imposes limitations on the otherwise plenary power of the state. Foster, 135 Wn.2d at 458-59; Gunwall, 106 Wn.2d at 61. This factor supports an independent analysis of the right to presence, just as it does the right to self-representation and the right to face to face confrontation. Foster, 135 Wn.2d at 458-59; Silva, 107 Wn.App. at 619. Because Article I, section 22 expressly grants the right to appear and defend in person, and the federal constitution does not, the state constitution embodies an intent to mandate such presence during any substantive legal proceedings unless expressly waived.

v. Matters of particular state or local concern.

The regulation of criminal trials in Washington is a matter of

particular state concern. State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); Gunwall, 106 Wn.2d at 62. This includes the protection provided to criminal defendants by the confrontation clause, and similarly, throughout proceedings that may affect the substantial rights of the accused. Foster, 135 Wn.2d at 494; Shutzler, 82 Wash. at 367. Jury instruction is plainly a matter of particular local concern as it is predicated on the jury understanding state law in a state court prosecution. See State v. Lanciloti, 165 Wn.2d 661, 666-67, 201 P.3d 323 (2009) (discussing constitutional requirement that juries shall be drawn from county where offense occurred).

vi. The greater protection afforded by the Washington Constitution means courts may not deny a defendant the opportunity to participate in a substantive stage of proceedings without an express waiver. As articulated in Shutzler, a violation of the right to be present is “conclusively presumed to be prejudicial.” 82 Wash. at 367. It is a right that cannot be waived without being afforded the opportunity to do so. Duckett, 144 Wn.App. at 806-07.

Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally

present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68; see also Beaudin, 76 Wash. at 308;

Linbeck, 1 Wash. at 339.

In State v. Easterling, 157 Wn.2d 167, 181, 137 P.3d 825 (2006), the Supreme Court ruled that even if the federal constitutional right to a public trial may be reviewed for the harmlessness of the closure, the Washington constitution's explicit protection of the public trial right precludes any de minimus analysis. A similar approach should apply to the violation of Bushaw's right to be present during a material portion of the trial, because the Washington Constitution expressly guarantees the right to be present at trial. His right to be present at trial is not meaningful unless he may participate in the process of properly explaining to the jury the type of evidence they may consider or the specific application of the law to the facts of the case.

Even under a constitutional harmless error test, the prosecution cannot prove this error harmless. The court dismissively answered "no" to the jury's vague question about

whether they could share “personal experiences” that may add to knowledge of the case. The jury’s question did not explain the nature of the information they wished to discuss or its purpose in deliberations. Jurors are not required to disregard or suppress their personal experiences in deliberations. For example, a prosecutor may ask jurors to draw inferences based on life experience or their experience with children. See State v. Brett, 126 Wn.2d 136, 175-76, 892 P.2d 29 (1995) (approving argument that witness was truthful because it was a traumatic event that was ‘the kind of scenario of events that she’s going to remember’), cert. denied, 156 U.S. 1121 (1996); State v. Robinson, 44 Wn.App. 611, 624, 722 P.2d 1379, rev. denied, 107 Wn.2d 1009 (1986) (argument that “young girls that age or young boys that age don’t make up stories like that” not improper).

Bushaw was denied his right to be present for a material stage in the trial, at which the court refused to provide further illumination of its ability to consider Bushaw’s theory of defense, direct it to the importance of the specific intent necessary to commit the crime, or explain how the jury could consider information from its common experience, and this error affected the outcome of the

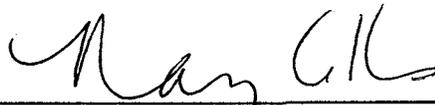
case. Thus, Bushaw's conviction must be reversed and his case remanded for a new trial.

F. CONCLUSION.

For the foregoing reasons, Richard Bushaw respectfully requests this Court reverse his conviction and remand his case for a new trial.

DATED this 10th day of July 2009.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Nancy Collins", written in black ink.

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

No. 7

To convict the defendant of the crime of assault in the third degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about May 6, 2008, the defendant assaulted John D. Smith;

(2) That at the time of the assault, John D. Smith was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and

(3) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

APPENDIX B

No. 9

An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

APPENDIX C

FILED

KING COUNTY WASHINGTON

SEP 26 2008

SUPERIOR COURT CLERK

BY DAWN TUBBS

DEPUTY

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON
Plaintiff/Petitioner

vs.

RICHARD BUSHAW
Defendant/Respondent

No. 08-1-04081-6 SEA

INQUIRY FROM THE JURY
AND COURT'S RESPONSE
(JYN)

JURY INQUIRY:

1. Can we share personal experiences re: people outside of this case that may add knowledge to this case.
2. Can "Intent" be resisting/pulling away or does it have to be grabbing/kitting/touching? "Offensive" - is offensive forceful resisting?

Lisa Edwards

FOREMAN

9/26/08

DATE AND TIME

DATE AND TIME RECEIVED: 9/26/08 9:55 am

****DO NOT DESTROY- LEAVE IN JURY ROOM****

Inquiry From the Jury and Court's Response, Page 1 of 2 SC Form JO-117 (7/00)

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

1. No, you must only consider the evidence presented and the instruction as to the law.

2. It is not possible to further define "intent" or "offensive" beyond what is already provided in your instructions. Please re-read the instructions.

Greg P. Cannon
JUDGE

DATE AND TIME RETURNED TO JURY: 9/26/08 10:04 a.m.

****DO NOT DESTROY- LEAVE IN JURY ROOM****

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 RICHARD BUSHAW,)
)
 Appellant.)

NO. 62653-1-I

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 JUL 10 PM 4:56

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| APPELLATE UNIT | () | HAND DELIVERY |
| KING COUNTY COURTHOUSE | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| [X] RICHARD BUSHAW | (X) | U.S. MAIL |
| 786862 | () | HAND DELIVERY |
| MCNEIL ISLAND CORRECTIONS CENTER | () | _____ |
| PO BOX 881000 | | |
| STEILACOOM, WA 98388-1000 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JULY, 2009.

X _____ 

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