685741

68574-1-I

NO. 68574-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MILLER,

Appellant.

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

The Honorable Mariane Spearman, Judge

BRIEF OF APPELLANT

LENELL NUSSBAUM
Attorney for Appellant

Market Place One, Suite 330
2003 Western Ave.
Seattle, WA 98121
(206) 728-0996

TABLE OF CONTENTS

TABLE OF CONTENTS (cont'd)

TABLE OF AUTHORITIES

WASHINGTON CASES

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

TABLE OF AUTHORITIES (cont'd)

WASHINGTON CASES (cont'd)

OTHER JURISDICTIONS

TABLE OF AUTHORITIES (cont'd)

OTHER JURISDICTIONS (cont'd)

STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (cont'd)

STATUTES AND OTHER AUTHORITIES

APPENDIX

A. ASSIGNMENTS OF ERROR

1. The court erred and violated due process by instructing the jury on recklessness in a manner that created a mandatory presumption and reduced the State's burden of proof, violating due process. U.S. Const., amend. 14; Const., art. I, § 3.

2. Appellant assigns error to the court's failure to instruct the jury that a criminal assault requires the State to prove the defendant acted with the specific intent to injure or offend Mr. Rasar or to make Mr. Rasar afraid he was about to be injured or offended.

3. Appellant assigns error to the court's failure to include the right to defend one's property in the "to convict" instruction. CP 62.

4. Appellant assigns error to the court instructing the jury it had a "duty to return a verdict of guilty." CP 62.

5. Appellant assigns error to the court's instruction No. 5, quoted in full below. CP 61.

6. Appellant assigns error to the court's instruction No. 6, quoted in full below. CP 62.

7. Appellant assigns error to the court's instruction No. 7, quoted in full below. CP 63.

8. Appellant assigns error to the court's instruction No. 9, quoted in full below. CP 65.

9. Appellant assigns error to the court's instruction No. 10, quoted in full below. CP 66.

10. Appellant assigns error to the court's instruction No. 12, quoted in full below. CP 68.

Issues Pertaining to Assignments of Error

1. Where the charge requires proof of an intentional assault and reckless infliction of substantial bodily harm, did the court err by instructing the jury that recklessness is disregard of the risk of some undefined "wrongful act or result" instead of the risk of causing substantial bodily harm?

2. Where intentional physical contact was not disputed and the reckless disregard did not specify the risk of substantial bodily harm, did the court err by instructing the jury that recklessness was established if a person acted intentionally?

3. Does a criminal assault require the specific intent either to harm or offend another, or to cause the other to fear he is about to be

harmed or offended, even if physical contact occurs?

4. Is a property owner who is physically removing a man from his property after the man struck him in the face entitled to an instruction on defense of property?

5. May the court instruct the jury it has a "duty to return a verdict of guilty" if it finds each element in the "to convict" instruction, without considering the defense theory of defense of property?

6. Did the court err by instructing the jury if it found each element in the "to convict" instruction was proven, it had a "duty to return a verdict of guilty," instead of:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.

B. STATEMENT OF THE CASE

The issues in this appeal turn on jury instructions. When determining whether the evidence was sufficient to support giving an instruction, this Court views the evidence in the light most favorable to the party requesting the

instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). For this reason, appellant presents the facts based on the defense theory of the case, noting the State's theory as well.

1. SUBSTANTIVE FACTS

a. Defense Theory of the Case

On Friday, November 6, 2009, Tania Miller was at home completing her final project for her computer science degree from the University of Washington. Her learning disability required that she have complete quiet to concentrate. She was working in the back bedroom of the home she shared with her husband, Kenneth Miller. She had to file the completed project electronically by 11:00 p.m. that night. RP 331-32.

About 5:30 p.m. Mr. Miller was working on a remodeling project in the kitchen at the front of the house. UPS left a message it would deliver a package requiring a signature. As he worked, Mr. Miller saw the UPS truck drive up in front of the driveway. He set his tools down and headed for the door. He wanted to get there before the UPS driver

so there would be no noise to disturb his wife. RP 358-61.

Before he reached the door, the doorbell rang several times, followed by loud pounding on the door several times. He opened the door to find the UPS driver, Randall Rasar, his hand raised about to strike the wooden door with his flashlight again. RP 331-32, 361.

Mr. Miller asked if he had to make so much noise, both ringing the doorbell and pounding. Mr. Rasar responded he thought the doorbell was disconnected. Mr. Miller stepped outside and rang the doorbell to see if it could be heard from outside. He heard it and told Mr. Rasar it worked. Mr. Miller stepped back into the doorway and turned to sign the electronic DIAD. Mr. Rasar then said he was wearing earplugs. Mr. Miller leaned out the doorway and saw the earplugs. He then signed the DIAD and returned it to Mr. Rasar. Mr. Rasar turned to walk down the steps as Mr. Miller picked up the package from the porch and put it inside the door. RP 361-62.

As he walked away, Mr. Rasar called to Mr. Miller, "Enjoy your package, jerk." RP 362.

Mr. Miller walked down the steps after Mr. Rasar, calling out "hey." As Mr. Miller approached him in the driveway, Mr. Rasar shouted, "Get away from me, leave me alone." He turned and swung at Mr. Miller with the flashlight in his hand. Mr. Miller tried to block the swing. The flashlight struck him in the face and on the elbow he raised to block the blow. RP 362-63.

Mr. Miller put his hand on Mr. Rasar's shoulder. He firmly directed him down the driveway toward his truck and off his property. As they went down the incline, they picked up speed. Near the bottom of the driveway, realizing they were fast approaching the truck, Mr. Miller pushed Mr. Rasar off to his right and put up his hands to brace himself against the truck, which was parked across the driveway. He fell against the truck, fell to the ground, caught himself with his hands, and got up again. He headed back up the driveway. RP 363.

Toward the top of the driveway, he saw Mr. Rasar's flashlight. He called down to him, "Your flashlight's in the driveway, I'll bring it to you." He also found Mr. Rasar's hat. He shouted

he'd bring that too. He cautiously approached the truck with both items. He saw Mr. Rasar's silhouette in the truck. He placed the hat and flashlight on the seat. "Now go." He went back into his home. RP 363.

Mr. Miller went into the bathroom and looked at his face. His cheek was red, tingly and numb. RP 366-67.

Meanwhile Ms. Miller had completed her project. While she ran it once to confirm it worked, she took a quick break. She had heard the repeated doorbells and loud pounding on the door. She went out to announce she was nearly finished, thrilled that it was early enough they could still have a nice dinner. Mr. Miller was sitting on a footstool in the kitchen. He looked bewildered and dazed. She asked him what was wrong, what all the noise had been about. RP 332-33.

Mr. Miller said the UPS driver took a swing at him. Ms. Miller immediately began exclaiming, excited and worried. She asked him if he was all right. He said he was okay, quietly shushed her and told her to return and finish her project, they would talk about it when she was done. She

refocused and returned to her work. RP 333-35, 347-48.

A few minutes later, Ms. Miller heard more loud knocking at the door. Emerging from the back room, she found a police officer. Mr. Miller had been arrested. He was in a patrol car. She told the officer Ken had been attacked and was defending himself. RP 335.

The officer asked Mr. Miller if he was hurt in any way. He said he'd been hit in the cheek with a flashlight. The officer took a photograph of his cheek. RP 124-25.

Mr. Miller was released from jail Saturday night. The bruises on his face and arms kept getting darker. Ms. Miller urged him to see the doctor. He had to work 6:00 a.m. to 6:00 p.m. the four days immediately after he was released. RP 335-37, 369-71. On Thursday his family doctor documented a very deep bruise to his cheek and bruises on his right elbow and his left forearm. Mr. Miller said the flashlight struck his cheek and elbow; the left forearm was where he braced himself as he hit the truck. The depth of the cheek bruise

indicated a greater degree of force was used. RP 290-95.

Mr. Miller testified he did not touch Mr. Rasar before Mr. Rasar struck him with the flashlight. He did not intend to hurt or scare Mr. Rasar when he approached him or when he pushed him off his property. He did not use his hands to force Mr. Rasar's face into the truck. He was never on top of Mr. Rasar, never on his back, never pounded him with his fists and did not pound his face into the pavement. He did not touch him in any way except to put one hand on his shoulder and get him off his property. RP 364-65, 374. He pushed him down the driveway because he wanted him off his property so he wouldn't hit him again. RP 375.

Mr. Miller took the flashlight and hat to Mr. Rasar because they belonged to him, and Mr. Miller did not want him to come back on his property to get them. RP 365.

Two individuals who knew Mr. Miller for many years, one through his job and one through a social circle, testified by reputation he was extremely

peaceful, calm, nonviolent, and truthful. RP 308-10, 407-09.

b. State's Theory of the Case

Mr. Rasar testified he "tapped gently" on the door two to three times with his flashlight. He pushed the doorbell only once, then remembered it had been disconnected. RP 32-33. He testified Mr. Miller got "right in my face" when he stepped out onto the porch and rang the doorbell. RP 34-35. He testified he only "thought under my breath" "what a jerk." Eventually he admitted he said it aloud. RP 37.

Mr. Rasar denied he swung at or struck Mr. Miller. He testified Mr. Miller suddenly grabbed him from behind, shoved him face first into his truck, then threw him to the ground, got on top of him, sat astraddle his back, pummeled him on the back of his head and back, and forced his face into the pavement. RP 53-55, 96. He testified Mr. Miller then calmly got off him, walked up the driveway and into his house without saying a word. He denied Mr. Miller returned the flashlight or hat. He claimed he didn't see either item after that. RP 96-97.

Mr. Rasar's face was bleeding from where he struck the truck. He tried to summon help with the DIAD, but found blood dripping onto the device. He went to a neighbor's carport and asked that they call the police. An ambulance responded and took him to the hospital. RP 39, 97.

A photograph of Mr. Rasar in the carport showed his UPS hat with him. RP 160; Ex. 4. Photos of his face showed a bleeding cut on his cheek and swelling by his eye. His skin showed no indication it was pushed into pavement. Exs. 1, 4, 6, 7, 16, 33; RP 40, 93-95.

Mr. Rasar told the police that Mr. Miller had a long history of intimidating and harassing him. Mr. Rasar was unable to describe any incident of intimidation or harassment.[1] Although the Millers had asked Mr. Rasar a few times over 15 years to do

---

[1] Mr. Rasar agreed Mr. Miller never touched him, threw anything at him, swore, sent a dog after him, chased him, or came to his truck. RP 86-87.

something differently than he did,[2] he didn't recall any problems with them. RP 76-78.

Mr. Rasar told the detective he had told his supervisor and manager, long before November 2009, about Mr. Miller's intimidation and harassment and asked to be relieved of having to deliver to him. RP 83-87, 283-84. His supervisor and manager testified that was not true: he never expressed concern or made such a request. They did not consider the Millers' customer concerns to be significant. A driver hitting a customer in the face with a flashlight, however, would definitely be a concern. RP 134-45, 156-59, 160-62, 312-13.

Mr. Rasar told the emergency room nurse his pain was "0" on a 0-10 scale, meaning no pain. RP 172. She noted a "slight deformity" of his nose, misshapen "from the swelling" of his cut cheek. RP 168-70. A CT scan revealed no facial fractures. Nonetheless, the emergency room doctor diagnosed a "clinically" broken nose. She never touched it,

---

[2] Specifically they asked him not to walk across the lawn and flowerbeds, not to leave packages on the driveway in front of the garage, and not to ring the doorbell if the door had a sign saying "Day Sleeper, Do Not Disturb." RP 16-23, 56-57, 76-78.

but she saw the nose was out of alignment. She stitched up a cut on his cheek. Mr. Rasar was released that night. RP 196-97, 214-15.

2. PROCEDURAL FACTS

a. Charge and Trial

The State charged Mr. Miller with assault in the second degree, in violation of RCW 9A.36.021(1)(a). CP 1.

On cross-examination, Mr. Miller responded that the flashlight pounding had left a mark on his door. When the prosecutor then asked whether he was defending himself or his property, Mr. Miller said himself, not his property. RP 380-81. On redirect, he clarified that he did not push Mr. Rasar off his property because of his door. He wanted him off his property after he hit him with the flashlight. Mr. Miller thought he should be safe on his own property. RP 394-95.

b. Defense Proposed Instructions

The defense proposed the following instructions:

> No. 1
> An assault is an intentional touching or striking of another person, done with unlawful force, and done

(1) with the intent to inflict bodily injury upon the other person, or
(2) with the intent to create in the other person an apprehension or fear of bodily injury,

regardless of whether any physical injury is done to the person.

No. 2

A person commits the crime of assault in the second degree when he intentionally touches or strikes another, with unlawful force, intending to inflict bodily injury or intending to make the other person afraid he is about to inflict bodily injury, and thereby recklessly inflicts substantial bodily harm.

No. 3

To convict the defendant, Kenneth Miller, of assault in the second degree as charged, you must find the State has proved each of the following elements beyond a reasonable doubt:

1. That on or about November 6, 2009, Kenneth Miller intentionally assaulted Randall Rasar;

2. That Mr. Miller intended to injure Mr. Rasar or intended to make Mr. Rasar afraid he was about to injure him;

3. That Mr. Miller was not acting in self defense or defense of his property;

4. That by this assault Mr. Miller recklessly caused substantial bodily harm to Mr. Rasar; and

5. That these acts occurred in King County, Washington.

In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all 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.

No. 4

A person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances as he reasonably perceives them, to remove an unwanted person from that property. Such use of force is not an assault.

A person is not required to experience or fear injury to himself in order to defend his property.

CP 30-33. The defense briefed instruction issues for the court. CP 13-27.

c. Court's Instructions

The court gave the following instructions:

No. 5

A person commits the crime of assault in the second degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

No. 6

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

(1) That on or about the 6th day of November, 2009, the defendant intentionally assaulted Randall Rasar;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Randall Rasar;

(3) That the defendant was not acting in self-defense; and

(4) That the 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.

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.

No. 7

As assault is an intentional touching or striking of another person, with unlawful force, 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.

No. 9

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act or result may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

No. 10

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 12

It is a defense to a charge of Assault that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by

> a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.
>
> The use of force upon or toward the person of another is lawful when used in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

CP 61-63, 65-66, 68.

The defense took exception to Instructions No. 6 and 10; to the court's failure to instruct that criminal assault required the specific intent to harm or offend or to scare into believing about to be harmed or offended; and to all the court's instructions to the extent they differed from those the defense proposed. RP 402-04, 413; CP 13-49, 62, 66.

d. Closing Arguments

During closing argument, the prosecutor directed the jury's attention to Instruction No. 6, the "to convict" instruction. "This is all we have to prove to prove assault in the second degree." RP 428. He argued it was an assault to push somebody off your property for no reason. RP 432.

The defense argued Mr. Miller pushed Mr. Rasar off his property and away from him because he hit him with the flashlight. It was not "for no reason," and he was entitled to push him off his property and away from himself. RP 447-51.

The jury found Mr. Miller guilty as charged. CP 80. With no criminal history, he was sentenced to, and served, six months in jail. CP 81-87.

C. ARGUMENT

> We review de novo alleged errors of law in jury instructions. ... Jury instructions are improper if they do not permit the defendant to argue his theories of the case, mislead the jury, or do not properly inform the jury of the applicable law.

State v. Vander Houwen, 163 Wn.2d 25, 29, 177 P.3d 93 (2008). The instructions in this case present many of these problems and require reversal.

1. THE TRIAL COURT'S INSTRUCTION DEFINING RECKLESSNESS FAILED TO SPECIFY THE RISK THE STATE HAD TO PROVE THE DEFENDANT KNEW OF AND DISREGARDED, CREATED A MANDATORY PRESUMPTION RELIEVING THE STATE'S BURDEN TO PROVE AN ELEMENT, AND CONFLATED INTENT AND RECKLESSNESS.

> [T]he 'wrongful act' required for a finding of recklessness depends on the specific crime charged.

State v. Harris, 164 Wn. App. 377, 383-84, 263 P.3d 1276 (2011). Under RCW 9A.36.021(1)(a), the State must prove Mr. Miller knew of and disregarded a substantial risk that his actions would cause substantial bodily harm. Instruction No. 9 required only that he disregarded a risk of "a wrongful act or result." It further directed the jury, "Recklessness is established if a person acts intentionally or knowingly as to that fact or result." CP 65. The instructions did not define "a wrongful act or result."

a. The Instruction Defining Recklessness Was Constitutionally Inadequate, Omitting the Specific Risk Required.

The instruction on recklessness lowered the State's burden of proving each element of this crime beyond a reasonable doubt. State v. Peters, 163 Wn. App. 836, 261 P.3d 199 (2011).

> Jury instructions must inform the jury that the State bears the burden of proving each essential element of a criminal offense beyond a reasonable doubt. ... It is reversible error to "instruct the jury in a manner" that would relieve the State of the burden of proof.

State v. Peters, 163 Wn. App. at 847, citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970), and State v. Schulze, 116 Wn.2d 154, 167-68, 804 P.2d 566 (1991). U.S. Const., amend. 14; Const., art. I, § 3. When an instruction lowers the State's burden of proof for the charge, the appellant may challenge the instruction for the first time on appeal. Peters, 163 Wn. App. at 847; RAP 2.5(a)(3).

This Court reviews alleged errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

To prove felony murder based on assault 2° under RCW 9A.36.021(1)(a), the State must show the defendant knew of and disregarded a substantial risk of causing "substantial bodily harm." State v. Gamble, 154 Wn.2d 457, 465-69, 114 P.3d 646 (2005). The Gamble Court distinguished knowledge of this risk from knowledge of the risk of death, which is required to prove manslaughter.

In State v. Peters, supra, this Court reversed a conviction for manslaughter 1° because the court instructed the jury:

> A person is reckless or acts recklessly when he knows of and disregards a substantial risk that *a wrongful act* may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Peters, 163 Wn. App. at 845 (Court's emphasis). The instruction must specify "a substantial risk that death may occur." Id. at 850.

In State v. Harris, 164 Wn. App. 377, 263 P.3d 1276 (2011), Division Two applied the Peters analysis to reverse a conviction of first degree assault of a child. The crime required proof of an intentional assault and reckless infliction of "great bodily harm." Id. at 383-84; RCW 9A.36.120(1)(b)(i). The trial court gave the same instruction defining "reckless" as in Peters, supra. As here, it did not define "a wrongful act [or result]." Id. at 384 n.2. Division Two reversed, holding:

> the jury had to find that Harris recklessly disregarded the substantial risk that "great bodily harm" would occur to TH as a result of his actions ..., not that "a wrongful act" would occur.

Id. at 385.

As in Harris, here the State had to prove Mr. Miller knew of and disregarded a substantial risk that his actions would cause "substantial bodily harm." The instruction did not require this fact.

Under these cases, this instruction misstated the law. It was constitutional error that reduced the State's burden of proving the charge.

b. The Instructions Created a Mandatory Presumption for the Jury.

> A mandatory presumption is one that requires the jury "to find a presumed fact from a proven fact." ... Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged.

State v. Hayward, 152 Wn. App. 632, 642, 217 P.3d 354 (2009). In Hayward, the Court reversed a conviction of second degree assault under RCW 9A.36.021(a)(1), requiring intent and recklessness as here. The trial court instructed the jury:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> Recklessness also is established if a person acts intentionally.

Hayward, 152 Wn. App. at 640. The Court of Appeals held:

> [T]he jury instruction here impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that he intentionally assaulted Baar. ...
>
> Furthermore, we hold that the presumption created by the second paragraph of jury instruction 10 violated Hayward's due process rights because it relieved the State of its burden to prove that he *recklessly* inflicted substantial bodily harm, a separate element of the charged crime.

Id. at 645 (court's emphasis). Hayward also relied on State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005) (reversing assault 3° conviction because "knowledge" instruction allowed jury to conflate "intentional" assault with "knowledge" that person was a police officer). Accord: State v. Atkins, 156 Wn. App. 799, 236 P.3d 897 (2010) (same; error harmless because evidence of knowledge was overwhelming).[3]

---

[3] Hayward distinguished State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007), review denied, 163 Wn.2d 1041 (2008), on the grounds that at the time of Keend's trial, the parties did not have the benefit of the 2008 amendment to WPIC 10.03. "Had this court considered Keend after the amendment, it may have reached a different result." Hayward, 152 Wn. App. at 645. Mr. Miller's trial was after the WPIC amendment and after Hayward.

As in these cases, instructing the jury that "recklessness is established if a person acts intentionally or knowingly" required the jury to find "reckless infliction of substantial bodily harm" if it found Mr. Miller intentionally assaulted Mr. Rasar and such bodily harm occurred. It thus relieved the State of the burden of proving recklessness.

c. The Error Was Not Harmless.

The State bears the burden of showing a jury instruction that misstates the law is harmless beyond a reasonable doubt. Peters, 163 Wn. App. at 850; Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).

> In cases involving "omissions or misstatements of elements in jury instructions, 'the error is harmless if that element is supported by uncontroverted evidence.'"

Hayward, 152 Wn. App. at 646.

Here a jury could understand "a wrongful act or result" meant an assault. The instruction further conflates the two distinct mens rea elements by telling the jury that recklessness is "established if a person acts intentionally or knowingly as to that fact or result." CP 65. Thus

if the jury found Mr. Miller intentionally assaulted Mr. Rasar, that assault is "a wrongful act or result," and Mr. Rasar suffered substantial bodily harm, it had a duty to return a verdict of guilty.

This case presents an even more compelling case of prejudice than the cited cases because it also involved self-defense. There was no question that Mr. Miller intentionally put his hand on Mr. Rasar's shoulder and moved him down the driveway. There was nothing in the instructions that said self-defense negated the element of intent.[4] Conceding this intentional contact, however, did not concede reckless infliction of substantial bodily harm. Yet the jury instructions created that presumption. Thus they relieved the State's burden to prove that element.

As in the cases cited above, this error was not harmless. This Court should reverse this conviction and remand for a new trial.

---

[4] Case law has adopted that reasoning, holding the State bears the burden of proving the absence of self-defense because it negates the mens rea elements of intent and knowledge. See State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984).

2. THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE SPECIFIC INTENT REQUIRED FOR CRIMINAL ASSAULT.

a. Criminal assault requires specific intent.

"Assault" is not statutorily defined, so Washington courts apply the common law definition. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006); State v. Byrd, 125 Wn.2d 707, 712, 887 P.2d 396 (1995); State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577 (1996).

> Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.

Stevens, 158 Wn.2d at 311. These definitions however are incomplete: the law requires a specific intent to either cause injury or offense, or to cause fear of injury or offense. Byrd, supra; Eastmond, supra. This specific intent is the "criminal intent" required with an unlawful touching.

In Byrd, the State accused Mr. Byrd of drawing a gun and pointing it at the complaining witness, who was frightened. The defendant testified he

merely displayed the gun, but did not aim it. The Supreme Court held that assault required the specific intent to harm, or to cause fear of harm, as an essential element of criminal assault.

> It is not enough to instruct a jury that an assault requires an intentional unlawful act because, given the circumstances, Byrd's act of drawing a gun could be found to be an unlawful intentional act. **Even where an act is done unlawfully and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told.**

Byrd at 715-16 (emphasis added).

In Eastmond, the State accused Mr. Eastmond of pointing his gun at a cashier; he said he was trying to check his weapon by handing her the butt of the gun. 129 Wn.2d at 499. The court reconfirmed Byrd that failing to instruct on specific intent to cause bodily injury or fear was constitutional error requiring reversal.

> By omitting an element of the crime of assault, the trial court here committed an error of constitutional magnitude. ... We reject the State's characterization of the disputed error as located in the definition of assault and thereby falling short of the manifest error standard. ... As we settled in Byrd, specific intent represents an

> "essential element" and its omission results in manifest error.[5] ...
>
> Nor do the instructions viewed as a whole cure the deficiency. ... Contrary to the State's assertions, Instruction 6, requiring a finding "the defendant intentionally assault," and Instruction 8, defining "intent," afford no further indication of the essential specific intent element. ...
>
> ... By relieving the State of its burden of proving every essential element beyond a reasonable doubt, the omission of an element of the crime produces such a fatal error.

Eastmond, 129 Wn.2d at 502-03.

The gravamen of Byrd and Eastmond is that whether an assault is a crime turns not merely on the perception of the complaining witness, but on the specific intent of the accused. This requirement is consistent with the way people interact in our society. There are countless ways in society that we intentionally and innocently touch one another without first asking permission: an impulsive embrace, a touch to get one's attention, brushing to get past. A person can

---

[5] In State v. Daniels, 87 Wn. App. 149, 940 P.2d 690 (1997), review denied, 133 Wn.2d 1031 (1998), the court rejected a similar issue raised for the first time on appeal, concluding that the specific intent was merely a "definition" and not an "essential element" of assault by battery. 87 Wn. App. at 155-56. This conclusion was directly rejected by Eastmond.

intentionally touch another, perhaps not knowing the other person has an injury in that particular spot, and so unintentionally cause pain, harm or offense. But if the contact was intended for innocent purposes, it cannot be considered a crime merely because it was harmful or received as an offense.

Thus in this case, Mr. Miller intended to touch Mr. Rasar and to direct him off his property; but he did not intend to harm or offend him or to scare him. Under the law, this was a permissible touching to defend his property.

b. Assault based on battery

In this case, unlike Byrd and Eastmond, the State claimed assault based on actual battery, not merely an attempt. The same specific intent, however, must be found, or innocent actions are made a crime.

Court decisions have incorporated the civil battery definition into the criminal definition of assault. Seattle v. Taylor, 50 Wn. App. 384, 388, 748 P.2d 693 (1988). Those civil cases are clear that battery requires the intent to harm or offend.

> An act cannot, however, be considered a battery unless the actor

> intended to cause a harmful or offensive contact with another person.

O'Donoghue v. Riggs, 73 Wn.2d 814, 820, 440 P.2d 823 (1968). Causing an injury without this specific intent creates a cause of action in negligence, not battery. Negligence cannot be an intentional assault.

> The rule that determines liability for battery is given in 1 Restatement, Torts, 29, § 13, as:
>
> "An act which, directly or indirectly, is the legal cause of a harmful contact with another's person makes the actor liable to the other, if
>
> "(a) **the act is done with the intention of bringing about a harmful or offensive contact or an apprehension thereof** to the other or a third person, and
>
> "(b) the contact is not consented to by the other or the other's consent thereto is procured by fraud or duress, and
>
> "(c) the contact is not otherwise privileged."

Garratt v. Dailey, 46 Wn.2d 197, 200-01, 279 P.2d 1091 (1955) (emphasis added).

If intent to cause offense or harm is an essential element of civil battery, there is no legitimate reason not to require this element for a crime based on the same act. Indeed, it would make all three of our criminal definitions of assault

consistent with one another and with the civil definitions.

c. The Error Requires Reversal.

In both Byrd and Eastmond, the instructions as applied to the specific acts would have permitted the jury to convict although they believed the defense theory of the case. This case presents the same dilemma. Without the element of specific intent to harm or offend, an intentional touching, even if it does inadvertently harm or offend, cannot be a crime.

Here, Mr. Miller intentionally put his hand on Mr. Rasar's shoulder and pushed him down the driveway and off his property. He did so to remove Mr. Rasar from his property so he could not assault him again. It was lawful to use force to remove Mr. Rasar from his property after he struck him with a flashlight and to protect himself.

He did not intend to cause Mr. Rasar injury, offense, or fear of injury or offense. RP 364.

Given the particular evidence and defense theory of this case, Instructions No. 6 and 7 required conviction even if the jury believed Mr. Miller intended to remove Mr. Rasar from his

property after Mr. Rasar struck him with the flashlight. Application of these instructions to these facts demonstrates the constitutional error of omitting an essential element: the intent to harm or offend by intentionally touching.

Due process requires the court to instruct the jury on every element of the charged crime. The right to a jury trial requires the jury to consider each of the legal elements. By omitting this element of specific intent, the court denied Mr. Miller these constitutional rights. U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 21, 22.

3. THE TRIAL COURT ERRED BY FAILING TO INCLUDE DEFENSE OF PROPERTY IN THE TO-CONVICT INSTRUCTION.

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following cases:
>
> ...
>
> (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary; ....

RCW 9A.16.020; Laws 1909, ch. 249, § 164.

Despite the many clauses in this statute,[6] the law is clear that a person has a right to use force to protect property he lawfully owns or possesses, even if he is not "about to be injured" in his person. This defense of property includes removing the other person from the property.

> It is the generally accepted rule that a person owning, or lawfully in possession of, property may use such force as is reasonably necessary under the circumstances in order to protect that property, and for the exertion of such force he is not liable either criminally or civilly.

Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 506, 125 P.2d 681 (1942), quoted with approval in State v. Ladiges, 66 Wn.2d 273, 276, 401 P.2d 977 (1965).

"In defense of property, there is no requirement to fear injury to oneself." State v. Bland, 128 Wn. App. 511, 513, 116 P.3d 428 (2005).

It thus is lawful to display a weapon to prevent a trespass, i.e., to convince someone to leave who has been asked to leave and who is not leaving one's property. State v. Bland, supra

---

[6] WPIC 17.02 contains many bracketed phrases with instructions to "use bracketed material as applicable."

(displayed gun to persuade woman to leave defendant's home); State v. Redwine, 72 Wn. App. 625, 865 P.2d 552 (1994) (displayed shotgun to urge process server to leave property after serving papers); State v. Murphy, 7 Wn. App. 505, 500 P.2d 1276, review denied, 81 Wn.2d 1008 (1972) (carried handgun to emphasize request that inspectors leave his property when they had not first requested permission to enter).

Under RCW 9A.16.020(3), force may be used

> in preventing or attempting to prevent ... a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession....

State v. Mierz, 72 Wn. App. 783, 798, 866 P.2d 65 (1994), affirmed, 127 Wn.2d 460, 470, 901 P.2d 286 (1995).

As with self-defense, "[t]he instruction on defense of property must be manifestly clear." State v. Bland, 128 Wn. App. at 515. An instruction that "could be interpreted to require the jury to find" the defendant reasonably believed he was about to be injured before he could exert reasonable force to expel a malicious trespasser required reversal as constitutional error. Id.

Mr. Bland permitted Ms. Moore to stay a couple of nights at his home. Late one night she started cursing him. He told her to get out. Instead, she began poking him with her finger, claiming she'd "whooped up a whole lot of mother fuckers bigger than [him]." He then got out his gun to persuade her to leave his home. After running in circles through his house, she went into his bedroom, closed the door, and called the police. Bland, 128 Wn. App. at 516-17.

Here Mr. Rasar was permitted to come onto Mr. Miller's property to deliver a package for UPS. However, once he struck Mr. Miller, Mr. Miller had the right to use reasonable force to remove him from his property. The law does not require that Mr. Miller feared Mr. Rasar would damage his property. As in Bland, it was enough that he had assaulted Mr. Miller, and Mr. Miller wanted him off the property.

The defense proposed accurate instructions on this issue. CP 32-33. The trial court limited the defense to "the defendant was not acting in self-defense." CP 62. The judge explained that Mr. Miller had testified he was "not defending his

property" when asked about Mr. Rasar damaging his front door. This conclusion overlooked Mr. Miller's consistent testimony that he intended to remove Mr. Rasar from his property after he struck him. RP 375, 395. Removal from the property is "defense of property." Bland, supra; Redwine, supra.

By removing this defense from the elements instruction, No. 6, the court violated Mr. Miller's right to present a defense and to have the jury instructed on his defense.

> [A] "to convict" instruction must contain all of the element of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. ... We are not to look to other jury instructions to supply a missing element from a "to convict" jury instruction.

State v. Sibert, 168 Wn.2d 306, 311, 230 P.3d 142 (2010), quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), and State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); U.S. Const., amends. 6, 14; Const., art. I, §§ 3, 22.

Reversal is all the more compelled by instructing the jury it had a "duty to return a verdict of guilty" if it found all of the elements

listed in that single instruction, without regard to defense of property. CP 62.

4. IT WAS ERROR TO INSTRUCT THE JURY IT HAD A "DUTY TO RETURN A VERDICT OF GUILTY" INSTEAD OF REQUIRING THE JURY TO FIND EACH ELEMENT PROVED BEYOND A REASONABLE DOUBT "IN ORDER TO RETURN A VERDICT OF GUILTY."

The defense proposed the following language to conclude the "to convict" instruction:

> In order to return a verdict of guilty, you must unanimously find from the evidence that each of these elements has been proved beyond a reasonable doubt.

CP 32. Instead, the court instructed the jury that if it finds each element of the charge is proved beyond a reasonable doubt, "it will be your duty to return a verdict of guilty." CP 62.

The defendant's proposed language is the same as that used in WPIC 160.00, the concluding instruction for a special verdict, in which the burden of proof is precisely the same. It is a correct statement of the law.

Appellant is unable to find any legal authority for the proposition that the jury ever has a "duty to return a verdict of guilty." It is a misstatement of the law to tell the jury it has such a duty.

a. The Jury's Power Never Imposes a "Duty to Convict."

> We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence ... If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969). See also Horning v. District of Columbia, 254 U.S. 135, 138, 41 S. Ct. 53, 65 L. Ed. 185 (1920) ("[T]he jury has the power to bring in a verdict in the teeth of both law and facts."). The history of the jury's right of acquittal to temper the power of the executive and legislature is well discussed in Jones v. United States, 526 U.S. 227, 244-48, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999). Despite "countervailing measures to diminish the juries' power,"

> the denouement of the restrictive efforts left the juries in control ... over the ultimate verdict, applying law to fact ... . That this history had to be in the minds of the Framers is beyond cavil. ... Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion.

Id., 526 U.S. at 246-48. The Sixth Amendment incorporates this understanding in the right to a jury trial. Id.

If a court improperly withdraws even a particular issue from the consideration of the jury, it denies the defendant the right to jury trial. United States v. Gaudin, 515 U.S. 506, 510-11, 132 L. Ed. 2d 444, 115 S. Ct. 2310 (1995) (improper to withdraw issue of "materiality" of false statement from jury's consideration).

The courts of this state similarly have recognized that a jury always has the option to acquit. A judge cannot direct a verdict for the State because this would ignore "the jury's prerogative to acquit against the evidence, sometimes referred to as the jury's pardon or veto power." State v. Primrose, 32 Wn. App. 1, 4, 645 P.2d 716 (1982). See also State v. Salazar, 59 Wn. App. 202, 211, 796 P.2d 773 (1990) (relying on jury's "constitutional prerogative to acquit" as basis for upholding admission of evidence).

If anything, the Washington Constitution provides a greater protection of the right to a jury trial and a jury's powers than the United

States Constitution. The founders of our state constitution not only granted the right to a jury trial, Const., art. I, § 22; they expressly declared it "shall remain inviolate." Const. art. I, § 21.

> The term "inviolate" connotes deserving of the highest protection. ... Applied to the right to trial by jury, this language indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assault to its essential guarantees.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 711 P.2d 711, 780 P.2d 260 (1989). The Constitution, article 1, section 21 "preserves the right [to jury trial] as it existed in the territory at the time of its adoption." Pasco v. Mace, 98 Wn.2d 87, 94-95, 653 P.2d 618 (1982); State v. Strasburg, 60 Wash. 106, 110 P. 1020 (1910).

If the law gives the jury this power, it is inaccurate to tell the jury it does not have this power.

A "duty to return a verdict of guilty" further limits the jury's consideration to those elements listed in the "to convict" instruction. It prohibits the jury from considering any separate

considerations in other instructions if they are not incorporated into this instruction. In this case, it prevented the jury from considering the right to defend property because that element was not included in Instruction No. 6 -- even though the court included a paragraph describing it in a separate Instruction No. 12.

The effect of this language was evident in the State's closing argument: Referring the jury to Instruction No. 6, the prosecutor argued, "This is all we have to prove to prove assault in the second degree." RP 428. That argument accurately conveyed the court's instructions. Yet it was an incorrect statement of the law.

The defendant's proposed language of the "to convict" instruction was a complete and accurate statement of the law. It permitted the jury to consider defense of property. It permitted the jury to return a verdict of guilty, but only if it found each element proven beyond a reasonable doubt. It was reversible error for the court to refuse this instruction in favor of the instruction it gave.

b. This Case Presents a Different Issue Than Meggyesy, Bonisisio, or Brown.

In State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1028 (1998),[7] the appellant challenged the WPIC "duty to return a verdict of guilty" for the first time on appeal. Unlike here, the defense did not propose alternative language or take exception to the instruction. He argued on appeal that better language would be the jury "may" return a verdict of guilty. The court held the federal and state constitutions did not "preclude" the language, and so affirmed. 90 Wn. App. at 696.

In its analysis, the Court of Appeals characterized the language "you **may** return a verdict of guilty," as "an instruction notifying the jury of its power to acquit against the evidence." 90 Wn. App. at 699.[8] It spent much of its opinion concluding there was no legal authority

---

[7] Overruled on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.2d 188 (2005).

[8] Division Two has followed Meggyesy without much further analysis. State v. Bonisisio, 92 Wn. App. 783, 964 P.2d 1222 (1998), review denied, 137 Wn.2d 1024 (1999); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005).

requiring the court to instruct a jury it had the power to acquit against the evidence.

The Meggyesy court acknowledged the Supreme Court has never considered this issue. 90 Wn. App. at 698. It then considered "two categories of cases" in the federal courts of appeals.

> The first category includes cases in which the trial judge refused to give an instruction informing the jury that it has the power to acquit against the evidence. The courts have uniformly affirmed refusals to give such instructions. The second category includes cases where the language of a given instruction effectively directed a verdict of guilty. In these cases, the courts have reversed because the challenged instructions invaded the province of the jury.

Meggyesy, 90 Wn. App. at 698. The court acknowledged that the jury has the power to acquit against the evidence. "This is an inherent feature of the use of general verdict. But the power to acquit does not require any instruction telling the jury that it may do so." Id. at 700.

Unlike Meggyesy, Bonisisio, and Brown, the defendant here proposed the same language used in WPIC 160.00. Certainly this pattern instruction was not designed to "inform the jury that it has the power to acquit against the evidence." It

simply explains the statutory threshold for returning a verdict of guilty.

Indeed, the federal courts use language equivalent to WPIC 160.00. See Ninth Circuit Model Criminal Jury Instructions, sections 8 and 9:[9]

> In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt: ... .

The Meggyesy court incorrectly stated the issue. The question is not whether the court is required to tell the jury it can acquit despite finding each element beyond a reasonable doubt. The question is whether **the law** ever requires the jury to return a verdict of guilty. If the law never requires the jury to return a verdict of guilty, it is an incorrect statement of the law to instruct the jury it does.

If the law does not require the jury to return a verdict of guilty even if it finds every element proven beyond a reasonable doubt, then an instruction that says it has such a duty directs a verdict. Sullivan v. Louisiana, 508 U.S. 275, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (1993).

---

[9] These sections present the "elements" instructions for various crimes.

The law never requires a jury to return a verdict of guilty. Due process has a threshold requirement that it cannot return a verdict of guilty unless it finds each element was proven beyond a reasonable doubt. The language of the "to convict" instruction is an incorrect statement of the law. It infringes on the Constitutional right to a jury trial. U.S. Const., amends. 6, 14; Const., art. I, §§ 21, 22.

The trial court's use of this instruction instead of that proposed by the defense requires reversal of this conviction.

D. CONCLUSION

The jury instructions in this case omitted the following essential elements: (1) the specific risk the State must prove the defendant knew of and disregarded; (2) the specific intent to harm, offend, or frighten to believe about to be harmed or offended, required for a criminal assault; (3) the right to defend one's property. The instructions required the jury to return a verdict of guilty without considering these elements when the defense proposed language that did not impose a "duty to return a verdict of guilty." The

instruction defining recklessness further required the jury to find recklessness from the conceded act of intentional contact.

Each of these errors was prejudicial, preventing the defendant from arguing he intended no harm or offense when he touched Mr. Rasar to remove him from his property.

For these reasons, this Court should reverse this conviction.

DATED this 4th day of September, 2012.

Respectfully submitted,

LENELL NUSSBAUM
WSBA No. 11140
Attorney for Appellant

APPENDIX

United States Constitution, Amendment 6, provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... .

United States Constitution, Amendment 14, provides in relevant part:

> ... [N]or shall any State deprive any person of life, liberty, or property, without due process of law; ...

Constitution, article I, § 3 provides:

> **Personal Rights.** No person shall be deprived of life, liberty, or property, without due process of law.

Constitution, article I, § 21 provides:

> **Trial by Jury.** The right of trial by jury shall remain inviolate ... .

Constitution, article I, § 22 provides:

> **Rights of Accused Persons.** In criminal prosecutions, the accused shall have the right ... to have a speedy trial by an impartial jury of the county in which the offense is alleged to have been committed, ...

RCW 9A.36.021 provides in relevant part:

> **Assault in the second degree**
>
> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; ... .

CERTIFICATE OF SERVICE

Alexandra Fast declares:

I certify that on this date I caused a true and correct copy of the Brief of Appellant to be served on the following individual, postage prepaid, addressed as indicated:

King County Prosecutor's Office
Appellate Unit W-554, King County Courthouse
516 Third Ave.
Seattle, Wa 98104

I declare under penalty of perjury under the laws of the state of Washington that the statement is true and correct to the best of my knowledge.

9/4/12-SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEXANDRA FAST

LENELL NUSSBAUM
ATTORNEY AT LAW
2003 WESTERN AVENUE, SUITE 330
SEATTLE, WASHINGTON 98121
(206) 728-0996