68574-1

68574-1 SD

NO. 68574-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH FRANKLIN MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARIANE SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The defendant was convicted of assault in the second degree. All of the issues pertain to the jury instruction.

1. Must the Washington Pattern Jury Instruction (hereinafter WPIC) defining "recklessness" include a new additional element, specifically, the level of harm element of the different degrees of assault?

2. Does the WPIC instruction defining "recklessness" create an impermissible mandatory presumption?

3. Must the WPIC instruction defining "assault" include a new additional element, specifically, a "specific intent" element?

4. Did the trial court appropriately decline to give a "defense of property" instruction after the defendant testified he was not defending his property when he assaulted the victim?

5. Is every WPIC "to convict" instruction constitutionally faulty because it informs the jury they have a duty to return a verdict of guilty if they find all the elements met beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

In November of 2009, the defendant was charged with Assault in the Second Degree for intentionally assaulting Randall Rasar and thereby recklessly inflicting substantial bodily harm—a broken nose and facial lacerations. CP 1. On July 22, 2010, a jury found the defendant guilty as charged. CP 97. The defendant received a standard range sentence of six months. CP 98-104. The defendant appealed his conviction. The State conceded that the trial court committed reversible error by refusing to give a "no duty to retreat" instruction. CP 105-06. This Court accepted the State's concession and remanded the defendant's case back to the superior court to be tried anew. Id.

On March 22, 2012, a jury again found the defendant guilty as charged. CP 80. The defendant received a standard range sentence of six months, with credit for time served. CP 81-87. The defendant is again appealing his conviction.

2. SUBSTANTIVE FACTS

Randall Rasar is a 50 year old married father of three. 2RP[1] 11-12. He has been a UPS driver for almost 30 years. 2RP 11. In those nearly 30 years of work, Rasar has never had a single physical confrontation with anyone—until November 6, 2009, when he delivered a package to the defendant. 2RP 17.

The defendant works at a cement plant and lives at 3714 140th Avenue SE in Bellevue. 4RP 350, 352. The house is only half painted, the grass is a foot long and full of weeds, and at times there are so many cars tightly parked in the driveway that Rasar could not get to the front door to deliver packages. 2RP 20, 27-28. Rasar had to deliver packages to the defendant's house a couple times a month. 2RP 22.

Despite the unkempt lawn, when Rasar bypassed the clogged driveway and walked over the grass to get to the front door, the defendant called UPS and complained. 2RP 20. On another occasion, the defendant called UPS and complained when Rasar left a package at the garage door because he could not get to the front door. 2RP 22. Additionally, the defendant complained when Rasar rang the doorbell because at times he was a "day

[1] The verbatim report of proceedings is cited as follows: 1RP—3/13/12; 2RP—3/15/12; 3RP—3/19/12; 4RP—3/21/12; 5RP—3/22/12; and 6RP—3/30/12.

sleeper." 2RP 22. Rasar testified that he felt harassed by the defendant. 2RP 27.

On November 6, 2009, at approximately 6:00 p.m., Rasar had a package to deliver to the defendant that required a signature. 2RP 31. The defendant had been notified via phone that UPS would be arriving that evening with a package that required a signature. 2RP 31. When Rasar arrived, he parked his truck in the street at the foot of the driveway. 2RP 38. Rasar then took the package, his flashlight, and a handheld computer device (a DIAD) and proceeded up the walkway to the defendant's front door. 2RP 32.

When Rasar rang the doorbell once, he did not hear anything so he tapped on the cracked weather-beaten door with his flashlight. 2RP 32-33, 35. The defendant answered the door and told Rasar not to knock on his door with the flashlight. 2RP 35. Rasar told the defendant that he had not heard the doorbell and that he also recalled that the defendant had disconnected the doorbell a while back because he was a day sleeper. 2RP 35. The defendant then got "right in my face" and rang the doorbell so that Rasar could hear it. 2RP 35. Rasar, feeling intimidated, explained that he was also wearing earplugs. 2RP 36. The defendant then

leaned forward and looked at Rasar side-to-side to confirm that he was indeed wearing earplugs. 2RP 36. Rasar then asked the defendant to just sign the DIAD so that he could be on his way. 2RP 36.

After the defendant signed the DIAD and handed it back, Rasar proceeded down the porch steps. 2RP 37, 59. When he got to the bottom of the stairs, he said under his breath, "what a jerk," not intending the defendant to hear him. 2RP 37, 59. Rasar continued to walk down the driveway towards his truck while inputting information on his DIAD. 2RP 37. He was just a few feet from his truck when he was suddenly grabbed from behind by the defendant and shoved into the side of his truck. 2RP 38. Rasar then fell to the ground whereupon the defendant shoved his head down on the asphalt and punched him in the back of the head. 2RP 38.

Along with other injuries, Rasar suffered a broken nose, multiple lacerations to his face (above and below his eye), with part of the bone pinching through the skin, bumps to his head and abrasions to his face, upper arms, forearms, knees and his hip. 2RP 40; 3RP 170-71, 196-97; Trial Exhibits 1, 4, 6, 7. He was out of work for three to four weeks and had to undergo two surgical

operations to repair his broken nose. 2RP 40, 62, 64-65; 3RP 230, 233.

After assaulting Rasar, the defendant said nothing, got up, and went back into his house. 2RP 38. Rasar attempted to obtain help by typing a message onto his DIAD, but he was bleeding so profusely that his blood filled the screen and he could not see what he was typing. 2RP 38. He then went to a nearby house where a neighbor called 911. 2RP 38, 42-43; Trial Exhibit 5. In a clearly emotional state, Rasar was able to tell the 911 operator what happened. 2RP 43, 46.

The police arrived shortly thereafter. Officers described Rasar as being frightened, stunned, and with his face covered in blood, lacerations to his cheek and eye area and that his nose was not pointed in the right direction. 2RP 123. Rasar was transported by ambulance to the ER, while the defendant was placed under arrest for assault. 2RP 97, 124. Officers observed absolutely no injuries to the defendant and he did not appear to be in any distress. 2RP 125-27. The defendant was photographed at the scene to document that he was uninjured. 2RP 125-27; Trial Exhibits 8 and 9.

The defendant's version of the incident was markedly different than Rasar's. The defendant said that he was expecting UPS to deliver a package that night and that he had turned on the porch light for the driver. 4RP 359-60. The defendant testified that he saw the UPS truck pull up to his driveway but that before he could even make it to his front door, Rasar had rung the doorbell multiple times and pounded on the door with his flashlight. 4RP 360-61. He said that he opened the door and asked Rasar if it was really necessary to ring the doorbell and pound on the door. 4RP 361.

Rasar told the defendant that he did not think the doorbell worked--the defendant testifying and admitting that he had once disconnected it because he was a day sleeper. 4RP 361. The defendant said that he then stepped outside, shut the door and rang the bell so that Rasar could hear it. 4RP 362. Rasar told him that he had earplugs in and the defendant admitted that he cocked his head over to confirm Rasar's statement. Id. He then signed the DIAD and handed it back to Rasar. Id.

When Rasar reached the bottom of the landing, the defendant claims Rasar turned around and said to him, "enjoy your package, jerk." Id. The defendant, who was at this point back

inside his house, called out, "hey," and then took off down the stairs in pursuit of Rasar to "try and talk about it." 4RP 362, 375, 383. When he reached midway down his driveway, Rasar turned back towards him and told him to get away from him and leave him alone. 4RP 362-63. Rasar, he claims, then swung his flashlight at him, hitting him once. 4RP 363, 367.

At this point, the defendant says he then put his hand on Rasar's shoulder and started pushing him forward so that he would not get hit again. 4RP 363. When they got down to Rasar's UPS truck, the defendant pushed Rasar to the side because he, the defendant, fell into the side of the truck. Id. He did not see what happened to Rasar. Id. He then headed back to his house but found Rasar's flashlight and hat in the driveway. Id. He picked them up, called out that he had them and would bring them to him. Id. He walked back and set them on the seat of the truck. Id. At this point, Rasar was inside his truck, according to the defendant, and he did not see any blood on Rasar even though he was only a few feet from him. 4RP 366, 387.

The defendant spent the next 24 hours in jail and then worked the following four days. 4RP 371. He claimed that his appearance changed dramatically over those five days, to the point

where his wife claimed people thought he had been "in a terrible accident." 4RP 336, 371. The defendant went to his family doctor, who found no significant injury after ordering a CT scan of his head and x-rays of his elbow. 4RP 295-96, 373. The defendant's doctor could provide limited details of what had occurred because the defendant intentionally gave him only limited information upon instruction from his attorney. 4RP 302.

Additional facts are included in the sections below that they pertain.

C. ARGUMENT

1. THE JURY INSTRUCTIONS WERE SUPPORTED BY THE EVIDENCE, ACCURATELY INFORMED THE JURY OF THE LAW, AND THEY ALLOWED THE PARTIES TO ARGUE THEIR THEORIES OF THE CASE.

This appeal concerns a single issue--the propriety of the jury instructions. The trial court gave a set of instructions comporting with the Washington Pattern Jury Instructions. The defendant proposed a set of instructions of his own creation. The court did not give the defendant's proposed instructions. The WPIC instructions given by the court were supported by the evidence, accurately stated the law, and allowed the parties to argue their theories of the case.

The defendant's specific claims are as follows: (1) that the WPIC definition of "recklessness" is faulty because it must include a new additional element—the level of harm required to prove each level of assault, (2) that the WPIC definition of "recklessness" is faulty because it creates an impermissible mandatory presumption, (3) that the WPIC definition of "assault" is faulty and must include a new additional element--a "specific intent" element to an assault by battery, (4) that the court erred in not giving a "defense of property" instruction even though he testified he was not acting in defense of his property, and (5) that every single WPIC "to convict" instruction is faulty because it informs the jury that if they find from the evidence that each of the elements of the crime has been proved beyond a reasonable doubt, it is their duty to return a verdict of guilty. The defendant's arguments are mostly controlled by existing case law and are without merit.

2. A LIST OF THE INSTRUCTIONS GIVEN BY THE COURT.

Instruction	WPIC	Title	CP
1	1.02	Introductory Instruction	54-57
2	4.01	Burden of Proof - Presumption of Innocence - Reasonable Doubt	58
3	5.01	Direct and Circumstantial Evidence	59
4	6.51	Expert Testimony	60
5	35.10	Assault - Second Degree - Definition	61
6	35.13	Assault - Second Degree - Substantial Bodily Harm - Elements[2]	62
7	35.50	Assault - Definition	63
8	2.03.01	Substantial Bodily Harm - Definition	64
9	10.03	Recklessness - Definition	65
10	10.01	Intent - Intentionally - Definition	66
11	10.02	Knowledge - Knowingly - Definition	67
12	17.02	Lawful Force - Defense of Self, Others, Property	68
13	17.05	Lawful Force - No Duty to Retreat	69
14[3]			
15	4.11	Lesser Included Crime or Lesser Degree	71
16	35.20	Assault - Third Degree - Definition	72
17	35.24	Assault - Third Degree - Criminal Negligence and Suffering - Elements[4]	73
18	2.03	Bodily Injury - Physical Injury - Bodily Harm - Definition	74
19	10.04	Criminal Negligence – Definition	75
20	1.04	Jurors' Duty to Consult with One Another Concluding Instruction - Lesser	76
21	155.00	Degree/Lesser Included/Attempt	77-79

[2] At the request of the defendant, the "to convict" instruction was modified to include the sentence "that the defendant was not acting in self-defense." 4RP 399-400.

[3] No instruction 14 was given. CP 70

[4] At the request of the defendant, the "to convict" instruction was modified to include the sentence "that the defendant was not acting in self-defense." 4RP 399-400; 5RP 413.

3. THE STANDARD OF REVIEW.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole, properly inform the jury of the applicable law. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). An appellate court will "review the instructions in the same manner as a reasonable juror." State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); Mills, 154 Wn.2d at 7. The court must be mindful that there are no "magic words" that must be used. Rather, trial courts are given discretion to determine the specific language to include in the instructions. State v. Coe, 101 Wn.2d 772, 787, 684 P.2d 668 (1984).

Jury instructions are interpreted and read as a whole and in a commonsense manner. State v. Bowerman, 115 Wn.2d 794, 809 P.2d 116 (1990). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008).

4. THE STATUTE.

In pertinent part, the second-degree assault statute reads:

> A person is guilty of assault in the second degree if he or she ... [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.

RCW 9A.36.021(1)(a).

5. THE DEFINITION OF "RECKLESSNESS" AND THE INSTRUCTIONS DEFINING THE CRIME.

Consistent with the statute and as charged here, the jury was instructed that:

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

CP 61 (emphasis added); CP 1; RCW 9A.36.020(1)(a).

The "to convict" instruction reads as follows:

> 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 act occurred in the State of Washington.

CP 62.

The jury was also provided with the statutory definitions for "intentionally," "substantial bodily harm" and "recklessly." CP 64-66; RCW 9A.04.110(4)(b); RCW 9A.08.010(1)(c). "Recklessly" was defined as follows:

> 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.***

CP 65 (emphasis added).

6. THE INSTRUCTION DEFINING "RECKLESSLY" ACCURATELY DEFINED THAT TERM—IT IS NOT INTENDED TO DEFINE ANY OTHER TERM OR ELEMENT.

The defendant contends that the definition of the term "recklessly" impermissibly lowered the State's burden of proof because it stated that a person acts recklessly when he disregards "a substantial risk that a ***wrongful act or result may occur***," instead of a substantial risk that "substantial bodily harm" may

occur. This argument has no merit. The argument is fatally flawed for two related reasons. First, the defendant reads each instruction in isolation, not as a whole, as is required. Second, the defendant's argument presumes that the instruction defining "recklessly" is intended to define an entire element of the crime. It is not. The instruction defines a single term--in this case, a single word.

One of the elements of the crime of assault in the second degree is that the person who committed the assault, "recklessly inflicted substantial bodily harm" on the victim. RCW 9A.36.021(1)(a). The defendant is correct that "substantial bodily harm" is the wrongful act or result that the perpetrator must know of, and disregard, i.e., he acts recklessly as to this result. Where the defendant errs is in assuming that the phrase "substantial bodily harm" must be substituted for the words "wrongful act or result" in the definition of "recklessly" in instruction number 9.

Instruction number 9 does not define the element of the crime "that the defendant thereby recklessly inflicted substantial bodily harm on Randall Rasar." Rather, it defines a single word, "recklessly," just as the word "intent," the word "assault" and the phrase "substantially bodily harm," are separately defined. As

pertinent here, instruction number 9 tracks the statutory definition of "recklessly" word for word. See RCW 9A.08.010(1)(c).

Additionally, the effect of a particular phrase in an instruction is not considered in isolation. Rather, the effect of a phrase must be determined by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Two other separate instructions were intended to--and did, inform the jury that the "wrongful act or result" the defendant must have recklessly disregarded was the substantial bodily harm suffered by Randall Rasar—instruction number 5, the definition of the crime, and instruction number 6, the "to convict" instruction. Both instructions, in no uncertain terms, told the jury that it needed to find that the defendant "recklessly inflicted substantial bodily harm" on Randall Rasar. CP 61-62. Read in the commonsense manner as required, the jury could not have believed it could convict the defendant by finding that he recklessly inflicted some other result other than the substantial bodily harm suffered by Randall Rasar.

To the extent State v. Harris,[5] a Division Two case, suggests otherwise—it is incorrect. In Harris, the court was attempting to interpret this Court's decision in State v. Peters, 163 Wn. App. 836, 845, 261 P.3d 199 (2011). Peters was charged with manslaughter in the first degree. The jury was instructed that to convict Peters it had to find that:

> (1) That on or about the 16th day of November, 2008, the defendant engaged in ***reckless conduct***;
>
> (2) That [S.P.] died as a result of defendant's ***reckless acts***; and
>
> (3) That **any of these acts** occurred in the State of Washington.

Peters, 163 Wn. App. at 845 (emphasis added). The jury was further instructed that:

> 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.

Id. (emphasis in original). This Court held that the instructions were flawed because, per the instructions, the jury only had to find that "Peters knew of and disregarded a substantial risk that a wrongful act may occur," rather than that "a substantial risk that death may

[5] 164 Wn. App. 377, 263 P.3d 1276 (2011).

occur." Id. at 850. As is readily apparent, the "to convict" instruction limited the scope of the crime only to "reckless conduct" or "reckless acts," not recklessly causing death. This is not the situation here.

Where the Harris court erred, was in trying to apply this Court's holding in Peters to a situation it did not apply. Harris was convicted of first-degree assault of a child, a crime that requires that a jury find he intentionally assaulted a child and recklessly inflicted great bodily harm upon the child. See RCW 9A.36.120. The jury was instructed that to find Harris guilty, it had to find that:

> (1) That on or about the 25th day of August 2007, the defendant intentionally assaulted [TH] and ***recklessly inflicted great bodily harm***;
>
> (2) That the defendant was eighteen years of age or older and [TH] was under the age of thirteen; and
>
> (3) That the acts occurred in the State of Washington.

Harris, 164 Wn. App. at 384-85 (emphasis added). The jury was also provided with the standard definition for recklessness as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that *a wrongful act m*ay occur and this disregard is a gross

> deviation from conduct that a reasonable person would exercise in the same situation.

Id. at 385 (emphasis in original, footnote omitted).

Harris argued that the trial court should have substituted the term "great bodily harm" for the term "a wrong act," in the definition of recklessness. Division Two agreed with Harris, stating "[w]e agree with Division One's analysis [in Peters] and hold that the jury instruction here relieved the State of its burden to prove that Harris acted with disregard that a substantial risk of great bodily harm would result when he shook TH." Harris, at 387. The problem with this conclusion is that the rationale of Peters did not apply to the situation that existed in Harris.

The "to convict" instruction for manslaughter, as charged in Peters, did not inform or define for the jury the wrongful act or result that the defendant must act recklessly towards. Instead, it used the terms "conduct" and "acts." Peters, at 845. Thus, with neither the "to convict" instruction, nor the "recklessness" definition instruction informing the jury what wrongful act or result the defendant had to disregard, the instructions did not properly state the law. But in Harris, like the situation here, the jury was specifically instructed that the defendant must have recklessly inflicted a specific and

defined level of harm. In Harris, the jury was instructed that it had to find he "recklessly inflicted great bodily harm." Harris, at 384. Here, the jury was instructed that it had to find the defendant "recklessly inflicted substantial bodily harm." CP 61-62. Because the instructions in Harris specifically informed the jury of the wrongful act or result it was required to find, there was no error in the instructions and its application of Peters was misguided.

7. THE INSTRUCTION DEFINING "RECKLESSLY" DID NOT CREATE AN IMPROPER MANDATORY PRESUMPTION.

The defendant also contends that the instruction defining "recklessly" created an impermissible mandatory presumption that relieved the State of its burden of proving an element of the crime. However, in making this argument the defendant fails to acknowledge two things. First, he relies on a case from Division Two, State v. Hayward,[6] but fails to acknowledge cases by this Court that have since held contrary to that case. Second, he does not acknowledge that the instruction given in this case does not track the instruction given in the case he relies. In short, his claim has no merit.

[6] 152 Wn. App. 632, 217 P.3d 354 (2009).

A mandatory presumption requires the jury to find a presumed fact from a proven fact. State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). Such a presumption violates a defendant's right to due process of law only if it relieves the State of its burden of proving an element of the crime. State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Hayward was charged with assault in the second degree for intentionally assailing the victim and recklessly inflicting substantial bodily harm. The jury was provided with an older (although still legally correct) version of WPIC 10.03, the instruction defining "recklessness." That instruction stated in pertinent part that "[r]ecklessness is also established if a person acts intentionally or knowingly." Hayward, 152 Wn. App. at 639-40. A panel of Division Two held that the instruction created an impermissible mandatory presumption that conflated the *mens rea* for the assault with the *mens rea* required for the resulting harm. Id. at 645. Specifically, the court felt that jurors would believe that if they found the defendant intentionally assaulted the victim (element number one of second-degree assault), that they would mistakenly believe that this also proved the defendant recklessly inflicted substantial bodily harm (the second element of second-degree assault). Id. This

"conclusion," however, has been soundly rejected by other courts in cases not cited by the defendant.

In State v. Holzknecht, this Court criticized Hayward's conclusion that the recklessness instruction created an impermissible mandatory presumption that relieved the State of its burden of proof of both elements.

> We are persuaded the instructions here followed the statute and correctly informed the jury of the applicable law, including the rule that a mental state is established by proof of a more serious mental state. The instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm. The instructions thus clearly required two separate inquires, and nothing in the instructions suggests otherwise.

157 Wn. App. 754, 765-66, 238 P.3d 1233 (2010), rev. denied, 170 Wn.2d 1029 (2011); accord State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007), rev. denied, 163 Wn.2d 1014 (2008).

Moreover, while the defendant relies on Hayward, the instruction given in Hayward is not the instruction given herein. In 2008, WPIC 10.03 was modified to include more clarifying language. The old instruction stated that "recklessness also is established if a person acts intentionally or knowingly." The current version of WPIC 10.03 provides that:

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

This is substantially similar to the recklessness instruction given herein, which reads in pertinent part that:

> 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***.

CP 65 (emphasis added).

Division Two has recently approved the 2008 version of WPIC 10.03, distinguishing it from the version used in Hayward. See State v. McKague, 159 Wn. App. 489, 506-10, 246 P.3d 558, aff'd, 172 Wn.2d 802 (2011). The court concluded that the new language makes clear that a finding of intent as to the act of assault could not support a finding of recklessness as to the infliction of substantial bodily harm. McKague, at 509-10. Thus, the instruction did not create an impermissible mandatory presumption. Id.

This is the exact same holding of the court in State v. Nordgren, 167 Wn. App. 653, 273 P.3d 1056 (2012).

> Contrary to Nordgren's assertion, [WPIC 10.03] did not require the jury to find that he had "recklessly" inflicted "substantial bodily harm," the second element of the charged crime, if it found that he had intentionally assaulted Eichstadt [the victim], the first

> element of the crime...Rather, in order to convict Nordgren, the instructions taken together and read as a whole required the jury to find, not only that Nordgren intentionally assaulted Eichstadt, but also that, as a result of this intentional assault, Nordgren intentionally, knowingly, or recklessly caused the substantial bodily harm Eichstadt suffered.

Id. at 659.

8. WPIC 35.50 PROPERLY DEFINES ASSAULT.

The defendant contends that WPIC 35.50, the jury instruction defining assault, is an incorrect statement of the law. Specifically, he claims that assault by battery is a specific intent crime, that one must intend not only a battery but one must also intend harmfulness. This is contrary to the law; assault by battery is not a specific intent crime, and WPIC 35.50 properly defines assault.

The defendant was charged with "intentionally assault[ing]" Randall Rasar. CP 1; RCW 9A.36.021(1)(a). The term assault is not statutorily defined, therefore, Washington courts apply the common law definition of assault. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006). Washington recognizes three common law definitions of assault: (1) assault by actual battery; (2) assault by attempting to inflict bodily injury on another while having apparent present ability to inflict such injury; and (3) assault

by placing the victim in reasonable apprehension of bodily harm. State v. Hall, 104 Wn. App. 56, 62, 14 P.3d 884 (2000) (citing State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995), rev. denied, 143 Wn.2d 1023 (2001).

Here, in pertinent part, the court instructed the jury that to find the defendant guilty of assault in the second degree, the jury had to find "that on or about the 6th day of November 2009, the defendant intentionally assaulted Randall Rasar." CP 62. Because this case was predicated on an actual battery, the court used the WPIC instruction defining "assault" as follows:

> An 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.

CP 63; WPIC 35.50. Consistent with the WPIC definition, "intent" was defined as follows:

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

CP 66; WPIC 10.01.

These WPIC instructions accurately state the law on assault. Hall, 104 Wn. App. at 61-63. Still, the defendant suggests that

assault by battery should contain a new element, a requirement that a defendant must intend not only an actual battery, but that a defendant must specifically intend the battery to be harmful. This suggestion is in direct conflict with existing authority. See e.g., Hall, supra; Keend, 140 Wn. App. at 866-67; State v. Baker, 136 Wn. App. 878, 883-84, 151 P.3d 237 (2007), rev. denied, 162 Wn.2d 1010 (2008); State v. Daniels, 87 Wn. App. 149, 155, 940 P.2d 690 (1997), rev. denied, 133 Wn.2d 1031 (1998); State v. Esters. 84 Wn. App. 180, 183-85, 927 P.2d 1140 (1996), rev. denied, 131 Wn.2d 1024 (1997).[7]

An assault does require proof of a *mens rea* component, specifically, an intent to commit an assault. Keend, 140 Wn. App. at 866; Davis, 119 Wn.2d at 662-63. However, "assault by battery does not require specific intent to accomplish some further result, such as inflicting substantial bodily harm." Keend, at 866. Rather, common-law assault by battery is defined simply as "an unlawful touching with criminal intent." Keend, at 867 (citing State v. Russell, 69 Wn. App. 237, 246, 848 P.2d 743, rev. denied, 122

[7] While some of these cases dealt with different degrees of assault, all levels of assault share the same requirement that the defendant intended to assault the victim. See State v. Davis, 119 Wn.2d 657, 662-63, 835 P.2d 1039 (1992) (intent is a court-implied element of assault). It is this shared element that is discussed in these cases--the same element that exists for every level of assault.

Wn.2d 1003 (1993)). "In other words, assault by battery simply requires intent to do the physical act constituting assault." Keend, at 867.

In making his argument, the defendant suggests that all three common-law forms of assault possess, or should possess, a "specific intent" requirement. He is incorrect. Only assaults that do not constitute actual battery contain a specific intent element. See Baker, 136 Wn. App. at 883. For example, when a defendant attempts to assault another, but does not commit an actual battery, the State must prove that the defendant had the specific intent to cause bodily injury. Baker, at 883. A battery, on the other hand, is a consummated assault. Byrd, 125 Wn.2d at 712 n.3. As such, a battery requires "an intent to do the physical act [the battery] that produces the result," as opposed to a specific intent "to produce a specific result." Esters, 84 Wn. App. at 183.

Despite the clear case law holding that assault by battery does not contain a "specific intent" component, the defendant suggests that this Court should incorporate the restatement of torts definition of battery. There is no support in the law for such a suggestion. The doctrine of *stare decisis* provides that this Court must adhere to its prior ruling unless the defendant can make "a

clear showing" that the rule is "incorrect and harmful." In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970); see also State v. Kier, 164 Wn.2d 798, 804, 194 P.3d 212 (2008) (this court does "not lightly set aside precedent, and the burden is on the party seeking to overrule a decision to show that it is both incorrect and harmful"). As the court held in Hall, the giving of the definition of assault, in conjunction with the giving of the definition of intent, appropriately instructs the jury on the elements of the crime assault by battery. Hall, 104 Wn. App. at 61-63.

9. THE DEFENDANT WAS NOT ENTITLED TO A DEFENSE OF PROPERTY INSTRUCTION.

The defendant contends that it was error for the trial court to decline to give a "defense of property" instruction. This was not error. The defendant specifically testified that he was acting in self-defense, not defense of property. As the trial court held, there was no evidence supporting the giving of a "defense of property" instruction.

Under the law, a person is allowed to use what would otherwise be unlawful force in certain limited and specific situations. As pertinent here, the law provides as follows:

> The use, attempt, or offer to use force upon or toward the person of another is not unlawful in the following

> cases ... [w]henever 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(3) (emphasis added).

Malicious is defined as "an evil intent, wish, or design to vex, annoy, or injure another person." RCW 9A.04.110(12). A person commits a "trespass" when he or she "knowingly enters or remains unlawfully in or upon premises of another." RCW 9A.52.080. A person "'enters or remains unlawfully' in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain." RCW 9A.52.010(5).

Here, the defendant's argument fails for multiple reasons. First, the defendant was specifically asked whether he was acting in defense of his property when he assaulted Rasar--he was adamant that he was not.

> Q: Well here's what I want to clarify. You were not defending your property that day. Is that right?
>
> A: Beg your pardon?
>
> Q: When this incident happened, when Mr. Rasar ended up on the side of that truck, you were not defending your property.

A: I was defending my person.

Q: Okay. I asked you, were you defending your property?

A: No.

4RP 381-82.

Even defense counsel's subsequent direct attempt to elicit testimony that the defendant was acting to protect his property failed, as the defendant again stated that the only reason he tried to get Rasar off his property was to prevent himself from being hit.

Q: Mr. Miller, you said that there was a mark on the door from Mr. Rasar pounding on it with the flashlight?

A: Yes.

Q: Did you push Mr. Rasar down the driveway because he made a mark on your door?

A: No.

Q: So when you said you were not defending your property when you pushed him down the driveway, did you mean because you were not responding to the damage to your door. Is that correct?

A: He had struck me and I was, yeah, trying not to get, excuse me, hit again and so –

...

Q: So why did you push him all the way down the driveway?

A: Because I wanted him off my property.

Q: In that sense you were defending your property?

A: I was struck in the face and I was trying not to get struck again, so I figured I should be safe on my property.

4RP 394-95.

Based on the defendant's own testimony, the court denied the defendant's request to give a "defense of property" instruction. The court stated, "I took that out after I heard your client testify that he was not acting in defense of his property." 5RP 413-14.

To be entitled to a jury instruction on defense of property, a defendant must actually produce some evidence demonstrating that he acted in defense of property. See State v. Walden, 131 Wn.2d 469, 473-74, 932 P.2d 1237 (1997) (citing State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (defendant bears initial burden of producing evidence assault occurred in circumstances amounting to self-defense)). There is none here.

Second, even if the defendant had testified that he assaulted Rasar with the purpose of defending his property, he would not have been entitled to a "defense of property" instruction because the situation did not fall within the purview of the statute. With no evidence that the defendant thought Rasar intended to physically damage his real property, the only prong of the statute that could

even conceivably apply is if Rasar were "a malicious trespasser." See RCW 9A.16.020(3). However, as those terms are defined, Rasar was neither a trespasser nor was he acting maliciously.

Access routes to a house are impliedly open to the public. See State v. Seagull, 95 Wn.2d 898, 902, 632 P.2d 44 (1981). Rasar was performing his job of delivering a package addressed to the defendant, and the defendant was expecting the package to be delivered to his front door. Thus, Rasar was not a trespasser. Further, any argument that Rasar was transformed into a trespasser due to his alleged striking of the defendant is without merit. Case law is clear that the entry or remaining in a location open to the public is not rendered unlawful by the person's intent to commit a crime, nor does it revoke any license or privilege to be present. State v. Miller, 90 Wn. App. 720, 725-26, 954 P.2d 925 (1998) ("Washington courts have never held that violation of an implied limitation as to purpose is sufficient to establish unlawful entry or remaining"). To hold otherwise, courts have stated, would turn every shoplift into a burglary. State v. Klimes, 117 Wn. App. 758, 767-68, 73 P.3d 416 (2003), overruled in part by State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005).

Third, under either the defendant's version of the incident or Rasar's version, Rasar was leaving the property of his own accord at the time of the assault. Thus, the defendant could not have been acting in defense of his property.

And finally, Rasar's presence on the defendant's property would have had to been done maliciously. There is no evidence of this. In fact, Rasar was present for a single purpose, to deliver a package addressed to the defendant. For all of the above reasons, the defendant was not entitled to a "defense of property" instruction.

10. THE DEFENDANT HAS FAILED TO SHOW THAT THE WPIC "TO CONVICT" JURY INSTRUCTIONS ARE UNCONSTITUTIONAL.

The defendant contends that certain language in every single WPIC "to convict" jury instruction renders them all unconstitutional. In short, the defendant contends that every single conviction ever obtained using a WPIC "to convict" jury instruction is subject to reversal. Specifically, the defendant contends that the following language is a misstatement of the law:

> 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 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.

CP 62; WPIC 35.13. The language he complains is included in every WPIC "to convict" jury instruction. See e.g., WPIC 26.02, 26.04, 26.06. This same argument has been rejected in State v. Fleming,[8] State v. Brown,[9] State v. Bonisisio,[10] and State v. Meggyesy,[11] The Supreme Court has repeatedly denied review. Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is both incorrect and harmful. See In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). The defendant has failed to make any new arguments sufficient to meet this burden.

In Meggyesy, the defendant argued that the above cited language violated his "right to trial" under the state and federal constitutions. This Court rejected that argument. Here, in short, the defendant claims that this Court got it wrong—over and over again.

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[8] 140 Wn. App. 132, 170 P.3d 50 (2007), rev. denied, 163 Wn.2d 1047 (2008).

[9] 130 Wn. App. 767, 124 P.3d 663 (2005).

[10] 92 Wn. App. 783, 964 P.2d 1222 (1998), rev. denied, 137 Wn.2d 1024 (1999).

[11] 90 Wn. App. 693, 958 P.2d 319, rev. denied, 136 Wn.2d 1028 (1998), abrogated on other grounds by State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005).

In Meggyesy, this Court held that the "to convict" instruction did not implicate the federal constitutional right to a jury trial or misstate the law, and that neither the state nor the federal constitutions invalidated the instruction. Meggyesy, 90 Wn. App. at 701-04 (applying the six-step analysis set forth in State v. Gunwall, 106 Wn.2d 54, 59, 720 P.2d 808 (1986)).[12] In rejecting Meggyesy's argument, the Court noted that the challenged language appropriately directed the jury to consider the evidence and to determine whether the State had proven each element of the offense beyond a reasonable doubt. Meggyesy, 90 Wn. App. at 699. In so ruling the Court was fully aware and acknowledged that juries do have the power to acquit against the evidence—the defendant's argument here. Meggyesy, at 700 (citing United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972)). At the same time, the Court recognized that instructing the jury that it "may" convict, is tantamount to notifying the jury of its power to acquit against the evidence and that a defendant is not entitled to a jury nullification instruction. Meggyesy, at 700. The Court noted that under the

[12] The Gunwall factors are: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern.

federal constitution, the circuit courts have clearly held that while jury nullification is always possible, no case has held that an accused is entitled to a jury nullification instruction. Meggyesy, at 700. The defendant does not cite contrary authority here. As the Court stated, because the judge did not instruct the jury to render a guilty verdict, but only to convict if all elements of the charge were met beyond a reasonable doubt, the instruction did not invade the province of the jury. Meggyesy, at 699-701.

Meggyesy also argued, as the defendant does, that under the state constitution, the result must be different. This Court, followed by Fleming, supra; Brown, supra; and Bonisisio, supra; all rejected this argument.

Finally, the defendant does not address State v. Wilson,[13] discussed in Meggyesy. Wilson complained of an instruction that stated that if the jury found the elements of the crime, the jury "must" find the defendant guilty. Wilson, 9 Wash. at 21. The Supreme Court stated that taking all the language in context, "it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law ***made it their***

[13] 9 Wash. 16, 36 P. 967 (1894).

duty to find him guilty." Wilson, at 21 (emphasis added). The Court held that there was no instructional error. Id.

This challenge has been made multiple times--in Meggyesy, Brown, Bonisisio, and Fleming, if not other cases. The Supreme Court has denied review of this issue at least three times (Meggyesy, Fleming, and Bonisisio). Under the principles of *stare decisis*, a court cannot overturn a prior holding unless it is shown by clear evidence that it is both incorrect and harmful. See In re Stranger Creek, supra. The defendant has failed to make any new arguments sufficient to meet this burden.

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 6 day of November, 2012.

Respectfully submitted,

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By: _____
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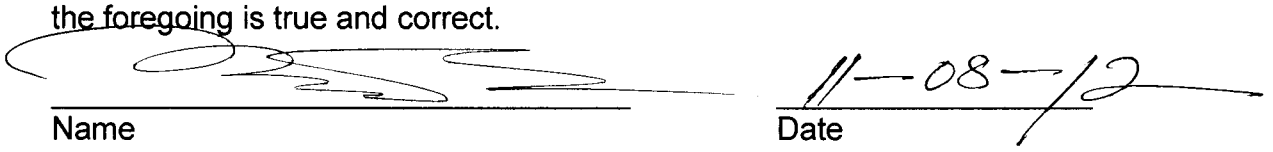
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Ave, Suite 330, Seattle, WA 98121, containing a copy of the Brief of Respondent, in STATE V. MILLER, Cause No. 68574-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name

11-08-12

Date

Done in Seattle, Washington