70438-9

70438-9

NO. 70438-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA THOMAS,

Appellant.

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

The Honorable Charles R. Snyder, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and denied appellant the constitutional rights of due process, to a jury trial, and to present a defense by erroneously instructing the jury on self-defense. U.S. Const., amends. 6, 14; Const., art. I, secs. 3, 21, 22.

2. Appellant assigns error to the court's failure to instruct the jury in a self-defense case that assault requires the use of "unlawful force."

3. The court's jury instructions relieved the State of its burden to prove the assault was committed by means of a deadly weapon.

4. Appellant assigns error to Instruction No. 11, CP 21, quoted in full below.

5. Appellant assigns error to Instruction No. 13, CP 23, quoted in full below.

6. Appellant was denied effective assistance of counsel when his attorney proposed inaccurate instructions on his theory of self-defense and lesser included offenses.

7. Appellant was denied effective assistance of counsel when his attorney proposed instructions that permitted the jury to conflate two

misdemeanors into a single felony conviction, contrary to the law.

8. The court inaccurately instructed the jury that the charge was "assault in the second degree while armed with a firearm" and did not read all elements of the charge during voir dire.

9. The trial court erred by denying appellant's motion for a new trial.

Issues Relevant to the Assignments of Error

1. In a case of self-defense, where neither the "to-convict" instruction nor the definition of assault includes "with unlawful force," do the instructions relieve the State of the burden of proving an element of the charge?

2. Does a person commit the crime of second degree assault "with" a deadly weapon if he commits both unlawful display of a weapon and fourth-degree assault by an impermissible offensive touching with his hand?

3. Does "with" in RCW 9A.36.021(1)(c) require that the assault be committed by means of the deadly weapon?

4. Given the peculiar facts of this case, did the jury instructions defining assault

adequately distinguish between the misdemeanor and felony assault elements?

5. Did the jury instructions permit the jury to convict of a felony without proof of unlawful force and/or without proof of an assault by means of a deadly weapon?

6. Did the court inaccurately instruct the jury on the charge at the beginning of trial, omitting elements and failing to read the charge itself?

B. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

a. Defense Evidence

Joshua Thomas is a long-haired 64-year-old musician living off Camp 2 Road, a gravel road in the woods of Whatcom County. From age 17 he made his living playing in bars, saloons and nightclubs. Now he moves more slowly, with good and bad days healthwise. He knows most of his neighbors, he is courteous with them, but he does not socialize with them much. A widower, he lives alone with a feral cat he took in. He acknowledges some of his

neighbors may think he's a bit of a "kook." RP 319-22, 347-48.[1]

Camp 2 Road is a county road. Before reaching Mr. Thomas's driveway, it becomes a hardpack road with loose gravel not maintained by the county. The three property owners along that portion are responsible for maintaining the road. Mr. Thomas shovels gravel to fill potholes; Jim Mullen uses his tractor. The neighbors have spent a lot of money on gravel and grading. RP 293-301, 304, 324-26.

A recurring problem has been motorcyclists who ride too fast and spin doughnuts or turn too quickly, causing ruts in the gravel and the roadbed. RP 292-94, 304, 324.

The neighborhood mailboxes are located where the county maintenance ends. In June-July, 2011, a neighbor saw a cougar near the mailboxes. His wife sent an email to the neighbors to alert them. RP 164-65, 328-30. Mr. Thomas owned a very small, five-shot .22 caliber revolver that fit into his

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[1] The Report of Proceedings is paginated sequentially through the trial with the exception of jury selection "RP(VD)" and post-trial hearings, which are indicated by "RP(5/15)" and "RP(8/7)."

jeans coin pocket. Years earlier, he had fired the gun into the ground to scare off a dog that bit him. Although he never expected to shoot a cougar with it, he thought the loud sound might scare it off if he met one at the mailboxes. RP 330-33.

On July 19, 2011, Jache Cocchi rode his motorcycle up and down Camp 2 Road. He was dressed in full matching leather gear. His helmet visor concealed his face. RP 335-36, 345-47.

Carolyn Mullen heard the motorcycle on their portion of the road for at least two hours. She went up her driveway three times to try to stop him from going so fast, but she wasn't able to catch him. RP 307-09. Mr. Thomas could tell from the sound the motorbike was going fast and tearing up the road. As he headed out to the mailboxes, he decided to ask the rider not to tear up the road because he and the neighbors have to maintain it. He had talked to cyclists about it before with no problems. RP 333-34.

Mr. Thomas was having a slower-moving day. He saw the motorcycle stopped next to Kaitlyn Jones, a neighbor girl he hadn't seen for some years. Mr. Thomas turned toward them, raised his hand, and

called two or three times to them to wait. As he got 15-20 feet from the motorcycle, the rider gave Mr. Thomas "the finger," gunned his engine and spun out, spraying Mr. Thomas with gravel as he rode away. RP 335-36.

Mr. Thomas spoke with Kaitlyn for about 3-5 minutes when the motorcycle returned at a high speed. Mr. Thomas motioned with his left hand to slow down. The motorcycle stopped very quickly 30-40 feet away. The rider hunkered down, revved his engine, and looked like he was about to charge directly at Mr. Thomas. Mr. Thomas was afraid for his life. He pulled his gun from his pocket and held it in the air, hoping the rider would see it. RP 338-42.

Mr. Thomas quickly approached the motorcycle, closing the gap so there was no room to charge at him and knock him down. He put his left hand on the rider's shoulder. He had the gun in his right hand, pointed straight up, but kept it as far from the motorcycle as possible. RP 342-44.

Mr. Thomas gave the rider a "skunk eye," meant to convey not to mess with him. He spoke to the rider, explaining how the doughnuts damage the road

the neighbors have to maintain. He thought the rider gave an affirmative response. RP 345-49.

Mr. Thomas never pointed the gun at the rider. He never cocked the gun. He never intended to shoot the gun. He never intended to make the rider think he was going to shoot him. RP 360, 373-76.

The motorcycle took off at high speed again. Mr. Thomas felt threatened for a second, but decided he had done what he could. He went on to the mailboxes, then back home. RP 351-53.

Sheriff's deputies contacted Mr. Thomas later that day. Mr. Thomas talked to them about problems with motorcycles riding dangerously and tearing up the road. This far out in the country, it was rare to get a police response to the problem. RP 324-25, 332-34, 355-57, 379-80.

Mr. Thomas believed the motorcycle rider was in his mid- to late-20s. The deputies told him he was a 14-year-old boy from the neighborhood. Mr. Thomas did not want to accuse a teenager he didn't know of a crime when no one had been hurt. He talked at length about the encounter -- he is prone to talk at length, especially when he gets excited. He told them the teenager sprayed him with gravel,

but he did not emphasize how he felt threatened. RP 357-62, 188-200.

To his surprise and shock, the police then arrested him for felony assault. They did not ask him for a written statement. If they had, he would have given one. RP 358-60.

Mr. Thomas wanted to stop the rider from charging at him. He held the weapon up because the rider didn't stop when he used his voice and hand. He believed showing the weapon was effective. He did not attempt to scare him. He was trying to protect himself. RP 380-82.

b. State's Evidence

Fourteen-year-old Jache Cocchi rode home fast, telling his father someone had tried to shoot him, had tried to kill him. His father didn't believe him until Jache went into his bedroom crying. His father called 911. RP 84-88.

Jache was talking to Kaitlyn Jones when Mr. Thomas approached them. Kaitlyn heard Mr. Thomas call "wait, stop." She told Jache to stay with her, but he said "No way," kind of laughing. When Mr. Thomas was about ten feet away, Jache took off. RP 96-101.

Jache testified he thought Mr. Thomas looked scary, so he took off, kicking up gravel. He couldn't hear any comments from Mr. Thomas through his helmet. He rode up logging roads for what he thought felt like "hours" -- although Kaitlyn and Mr. Thomas agreed it was only 2-5 minutes. RP 36-39, 102-03. Jache rode back to where he'd left Kaitlyn and Mr. Thomas rather than taking alternative roads home. Coming up to them on a turn, he testified he thought Mr. Thomas was holding Kaitlyn hostage in the bushes.[2] He stopped and saw Mr. Thomas walk toward him, one hand holding a gun, one hand up indicating he should stop. Jache thought he was going to die. RP 66-68.

Jache said Mr. Thomas pointed the cocked gun directly into his face through the helmet and said, "Don't move or I'll shoot you, you little bastard." RP 43-44. He claimed Mr. Thomas pulled him off the motorcycle, RP 41; Mr. Thomas testified he was not physically capable of doing that, RP 350; Kaitlyn

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[2] Kaitlyn said no such thing happened. RP 117-19.

testified Jache remained on the bike the entire time, RP 107-09.

Kaitlyn testified she was still talking with Mr. Thomas on the road when Jache stopped about 20 yards away at the top of a hill. Mr. Thomas walked quickly towards Jache. About halfway there, she saw him pull out his gun. RP 103-04. She told the first officer she talked to that she didn't see the gun pointed at Jache. RP 156-60. She testified at trial Mr. Thomas pointed the gun at Jache, although she'd told defense counsel Jache would not have been able to see the gun because it was at the side of his helmet. RP 120-21.

2. PROCEDURAL FACTS

a. Charge

The State charged Mr. Thomas with assault "with a deadly weapon" in the second degree, RCW 9A.36.021(1)(c), and alleged the sentencing enhancement for being armed with a firearm, RCW 9.94A.533. CP 4-7.[3]

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[3] Count II, added in the Amended Information, was later dismissed. CP 42-44.

b. Jury Instructions

At the beginning of jury selection, the judge instructed the jury panel:

> The Defendant Joshua Thomas is charged with a crime of assault in the second degree while armed with a firearm.

RP(VD) 13. He did not elaborate on the charge. He explained that the plea of not guilty

> means that you, the jury, must decide whether the State has proven every **element** of the offense beyond a reasonable doubt. The State has the burden of proving every **element** beyond a reasonable doubt ... .

RP(VD) 14 (emphases added).

At the close of the case, the State proposed a jury instruction with a single definition of "assault" to support its theory of the charge:

> An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Supp. CP [Subno. 89 at 4].[4]

The defense proposed instructions on two lesser offenses: assault in the fourth degree and

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[4] The State originally proposed this instruction without the phrase "with unlawful force." Supp. CP [Subno. 84 at 10].

unlawful display of a firearm.[5] The trial court noted:

> Well, if the jury determined that the firearm was never pointed at Mr. Cocchi; it was only displayed. ... And that they saw him as putting his hand on Mr. Cocchi's shoulder that that's an assault IV and a display of firearm. It's not an assault II.

RP 496. The court gave the defense instructions, including two definitions of assault in a single instruction. RP 463-87, 523-31.

INSTRUCTION NO. 11

> An assault is an intentional touching of another person, **with unlawful force** that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.
>
> An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP 21 (emphases added).

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[5] Discussing instructions, defense counsel said "I hate instructions." He agreed with the court's comment that instructions are "the most confusing thing that humans have devised." RP 486.

INSTRUCTION NO. 13

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 19th day of July, 2011, the defendant assaulted Jache Cocchi, with a deadly weapon; and

(2) That this act occurred in the State of Washington.

If you find from the evidence that **each of these elements** have 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 of **these elements**, then it will be your duty to return a verdict of not guilty.

CP 23 (emphases added).

INSTRUCTION NO. 14

It is a defense to a charge of Assault in the Second Degree, Assault in the Fourth Degree and Unlawful Display of a Weapon that the **force** offered to be used was **lawful** as defined in this instruction.

The offer to use force upon or toward the person of another is lawful when offered 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 person offering to use 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 offered to be 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 24 (emphases added). Neither party took exception to the court's instructions. RP 533-36.

c. Closing Argument

The prosecutor argued Instruction No. 13 was the "most important" instruction for the jury. "[W]e have to prove what is enumerated as two different elements, only two elements." RP 545. The prosecutor talked about the definitions of the terms in Instruction 13, but said nothing about his burden to prove the absence of self-defense or lawful use of force. RP 545-52. He never reviewed Instruction No. 14 with the jury. RP 569-80. Defense counsel argued the state had the burden of proving the absence of self-defense. RP 566-67. In rebuttal, the prosecutor argued if Mr. Thomas wanted Jache to stop, he accomplished it by placing him in fear of bodily harm, which was an assault. RP 569.

d. Motion for New Trial

The jury found Mr. Thomas guilty as charged of second degree assault and the firearm enhancement. CP 38-41.

With new counsel, Mr. Thomas brought a Motion for New Trial for ineffective assistance of counsel and incorrect jury instructions: Instruction No. 11, defining assault, did not require the act be done "with unlawful force" in the second definition; and combining both definitions of assault in one instruction permitted the jury to convict Mr. Thomas of the felony even if they believed he only committed the two misdemeanors. CP 50-62.

Trial counsel testified he failed to review the WPIC comments requiring "with unlawful force" when he proposed Instruction No. 11, and had no strategic purpose for omitting the phrase.

> I believed if the jury found Mr. Thomas pointed the gun, he would be guilty of assault 2. However, if it did not believe he pointed the gun, but only that he displayed or brandished the gun, he was guilty only of unlawful display of a weapon. It would be possible for the jury also to find assault 4 based on an impermissible touching by putting his hand on Mr. Cocci's shoulder.

CP 47.[6] After the verdict the court invited jurors to stay and talk about the case with counsel.

> 11. Juror No. 11, Marcus Leonard, spoke of how the jury was impressed by how easily a person could be charged and convicted with felony assault in this state. He said the jury had to decide how to interpret "with." I asked him what he meant by that.
>
> 12. Mr. Leonard explained that part of the jury believed Mr. Thomas intentionally created an apprehension of harm. Others thought he had touched Mr. Cocci on the shoulder, but he touched him "with" the firearm in his hand, and so the impermissible touching "with" the firearm was an "assault with a deadly weapon," and required a conviction of assault 2°.
>
> 13. I never considered that the jury could use what I thought of as the misdemeanor definition of assault to reach a felony conclusion. I believe it is an inaccurate application of the law. I believe giving these instructions in this form under the specific facts of this case was an error, allowing a jury to convict of the felony based on finding facts that would solely support a misdemeanor conviction or convictions.

CP 48. If counsel had considered this possibility, he would have proposed the definitions of assault in a different format, separating the misdemeanor

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[6] See, e.g., State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995) (distinguishing between pointing the gun and merely displaying it); State v. Cardenas-Muratalla, ___ Wn. App. ___ (No. 68057-9-I, 2/3/2014) (anonymous tip that gun was shown without suggestion of pointing or threat does not justify a Terry stop).

definition from the felony definition. He had no strategic purpose for combining them into a single instruction. CP 45-49. The State conceded it was error to omit "without lawful force" from the definition. RP(5/15) 7.

The court denied the new trial. The judge stated in a case of self-defense, including "without lawful force" would be the "best practice," but concluded Instruction No. 14 resolved the matter. Proposing an erroneous instruction was not ineffective assistance of counsel. The judge also concluded he could not say any error affected the verdict "without something from the jurors specifically stating that that's why they came to this conclusion." Without a "clear indication from the jurors we thought this, and this is the decision that we came to," he could not speculate the instructions misled them. RP(5/15) at 11-17.

The defense moved to reconsider, providing affidavits from two jurors. CP 85-91. One juror concluded Mr. Thomas committed the crime of assault by grabbing Jache by the shoulder and showing a firearm in a way to create fear in an individual.

He specifically did not believe Mr. Thomas held the gun to Jache's head or pulled him off his motorcycle.

> I can only speak for myself as to what I believed and that was that a firearm was displayed and it put Jache in fear. I also believe that Jache was at least touched on the shoulder or grabbed. The facts that Mr. Thomas had a handgun and displayed it and put Jache in fear was what I based my verdict on, that is how I interpreted instruction #11 and why I voted guilty.

CP 86.

The presiding juror believed similar facts:

> [The verdict] was based on the fact that Mr. Thomas showed the kid a loaded revolver as he approached and also attempted to jerk him off the bike and that he touched his shoulder. For me it was a combination of all those pieces not any one in particular.

He added the jury did not conclude one way or the other about whether Mr. Thomas pointed the gun at Jache. CP 88.

The court concluded "with unlawful force" is "not a necessary element of the offense" and its omission could not lead the jury to a wrong decision. It would only apply if one used physical force to commit the assault. RP(8/7) 58-61. It further concluded that if the defendant intended to intimidate and did it with a deadly weapon, that

equalled assault in the second degree. It denied a new trial, choosing to "leave it to some other court." RP(8/7) 62-63.

e. Sentence

Mr. Thomas was sentenced to 39 months in prison, the bottom of the standard range of 3-9 months plus the mandatory 36 months for the firearm enhancement. The court granted an appeal bond. CP 63-72; RP(5/15) at 17-44.

C. SUMMARY OF ARGUMENT

The trial court improperly instructed the jury on the law of self defense and assault. The jury instructions did not make the law manifestly clear and relieved the State of its burden to prove two essential elements of the charge: unlawful use of force, and committing the assault by means of a deadly weapon. The State's closing argument further confused the law rather than clarified it. Defense counsel's proposal of the erroneous instruction was constitutionally deficient performance. The flawed jury instructions were constitutional prejudicial error. Therefore the conviction must be reversed.

D. ARGUMENT

1. THE COURT'S JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ABSENCE OF SELF-DEFENSE.

a. Statutory Provisions

> (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:
>
> ...
>
> (c) Assaults another with a deadly weapon; ... .
>
> (2)(a) ... [A]ssault in the second degree is a class B felony.

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

> (1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.
>
> (2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.36.041.

> (1) It shall be unlawful for any person to carry, exhibit, display, or draw any firearm ... or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.
>
> (2) Any person violating the provisions of subsection (1) above shall be guilty of a gross misdemeanor. ...
>
> (3) Subsection (1) of this section shall not apply to or affect the following:
>
> ...

> (c) Any person acting for the purpose of protecting himself or herself against the use of presently threatened unlawful force by another ... .

RCW 9.41.270.

> 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 ... in preventing or attempting to prevent an offense against his or her person ... in case the force is not more than is necessary; ...

RCW 9A.16.020.

b. Due Process and the Right to Present a Defense Require Accurate Instructions.

Due process, the right to a jury trial, and the right to present a defense require the court to properly instruct the jury on the law applicable to that defense. U.S. Const., amends. 6, 14; Const., art. 1, §§ 3, 21, 22.[7]

"An instruction that relieves the State of its burden to prove every element of a crime requires automatic reversal." State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); State v. Smith, 174

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[7] The constitutional provisions are quoted in full in Appendix A.

Wn. App. 359, 366, 298 P.3d 785, review denied, 178 Wn.2d 1008 (2013).

c. In Cases of Self-Defense, the Absence of Self-Defense or the Use of Unlawful Force is An Element of the Charge.

In this case of self-defense, the trial court erroneously concluded the unlawful use of force was not an essential element of the charge.

> Once the issue of self-defense is properly raised, [] **the absence of self-defense becomes another element of the offense** which the State must prove beyond a reasonable doubt.

State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983) (emphasis added).

The jury instructions in a case of self-defense are particularly crucial in allocating the burden of proof and accurately conveying the law to the jury.

> Jury instructions must more than adequately convey the law of self-defense. The instructions, read as a whole, must make the relevant legal standard "manifestly apparent to the average juror." ... A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.

State v. LeFaber, 128 Wn.2d 896, 899-900, 913 P.2d 369 (1996) (citations omitted); State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); State v.

McCullum, 98 Wn.2d at 487-88; State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

> Additionally, because the State must disprove self-defense when properly raised, as part of its burden to prove beyond a reasonable doubt that the defendant committed the offense charged, a jury instruction on self-defense that misstates the law is an error of constitutional magnitude, ... and this error can be raised for the first time on appeal ....

State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citations omitted).

Inaccurate self-defense instructions and ineffective assistance of counsel are both issues that can be raised for the first time on appeal. Kyllo, 166 Wn.2d at 862. In this case, however, the issues were raised in the motion for new trial below. CP 50-62.

d. The "To Convict" Instruction Did Not Include the Absence of Self-Defense or Use of Unlawful Force.

In State v. Smith, 131 Wn.2d 258, 930 P.2d 917 (1997), the Supreme Court reiterated its longtime holding that the "to convict" instruction must include every element the State is required to prove. It rejected the argument that the "other instructions" are enough to supply elements missing from the "to convict" instruction.

> The Court of Appeals erred in looking to the other instructions to supply the element missing from the "to convict" instruction. We have held on numerous occasions that jurors are not required to supply an omitted element by referring to other jury instructions. In State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953), this court held that a "to convict" instruction must contain all of the elements of the crime because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. The court emphasized that **an instruction purporting to list all of the elements of a crime must in fact do so.** ...
>
> ... **[T]he jury has the right under Emmanuel to regard the "to convict" instruction as a complete statement of the law; when that instruction fails to state the law completely and correctly, a conviction based upon it cannot stand.**

Smith, 131 Wn.2d at 262-63 (emphases added). Accord: State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); State v. Aumick, 126 Wn.2d 422, 894 P.2d 1325 (1995).

Here Instruction 11, the "elements" instruction, told the jury:

> 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 19th day of July, 2011, the defendant assaulted Jache Cocchi, with a deadly weapon; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that **each of these elements** have 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 of **these elements**, then it will be your duty to return a verdict of not guilty.

CP 23 (emphases added).

This "to convict" instruction lists the "elements" of the charge, but does not include the absence of self defense nor the term "with unlawful force." Nonetheless the "to convict" instruction directs the jury that it has a "duty to return a verdict of guilty" if it finds this incomplete list of elements proven beyond a reasonable doubt. CP 23.

e. <u>The Instruction Defining Assault Did Not Require the Absence of Self-Defense or "Unlawful Force."</u>

For cases of assault and self-defense, the WPIC scheme of instructions relies on the term "assault" in the "to convict" instruction to lead the jury to the instruction defining assault. CP 21, 23. Each definition of assault then requires "unlawful use of force." 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC (hereinafter "WPIC") 35.50 (3d Ed.). From there, the jury would turn to the instruction defining the "lawful use of force." CP

24. Thus the jury would combine all three instructions to understand the law of self defense.

Within this scheme, only by defining "assault" to require "with unlawful force" can the jury understand the role of self defense. Without it, there is no connection between the self-defense instruction, CP 24, and the "to convict" instruction, CP 23.

Here the instruction defining assault provided two definitions. Counsel and the court intended one definition for the felony charge (act with intent to create fear), the other for the misdemeanor (intentional offensive touching). This distinction, however, was not conveyed to the jury. Furthermore, the definition intended for the felony omitted the requirement of "unlawful force:"

INSTRUCTION NO. 11

> An assault is an intentional touching of another person, **with unlawful force** that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor

> did not actually intend to inflict bodily injury.
>
> An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

CP 21. This omission violated the pattern instructions' specific directions. The WPIC 35.50 provides the phrase "with unlawful force" as a bracketed option. The Note on Use provides:

> Include the phrase "with unlawful force" if there is a claim of self defense or other lawful use of force.

WPIC 35.50. The Commentary further provides:

> **Unlawful use of force.** The phrase "with unlawful force" has been bracketed in all three paragraphs. The definition of "assault" includes the requirement that it be committed with unlawful force. ... If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term "lawful."

Id. The court here clearly found evidence of self-defense. Thus it was imperative to include this phrase in the definition of assault. Failing to do so relieved the State of its burden to prove this essential element; it permitted the jury to find Mr. Thomas guilty without considering self-defense.

This limitation of the State's burden to prove the "elements" of the charge was reinforced in Instruction No. 3:

> The defendant has entered a plea of not guilty. That plea puts in issue every **element** of the crime charged. The State is the plaintiff and has the burden of proving each **element** of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these **elements**.

CP 13 (emphases added). The prosecutor's argument further emphasized the State's limited burden. He argued Instruction No. 13, the to-convict instruction, was the "most important" for the jury, and it set out "only two elements" the State had to prove. RP 545. The court similarly instructed the jury during voir dire of the State's burden to prove the "elements" of the charge. RP(VD) 14.

Even the judge came to believe this limited definition of "element," finally concluding that the unlawful use of force was not an "element" of the offense, despite the issue of self-defense. RP(8/7) 59-60. Yet the Commentary to WPIC 35.50 and State v. McCullum, supra, clearly state it is an "element."

Here, as in Smith, the "to convict" instruction fell short. It required the jury to find the defendant guilty without regard to the issue of self-defense.

f. Applying the Instructions to the Facts of This Case Requires a Guilty Verdict Without Reference to Self-Defense.

Jury instructions are constitutionally inadequate if they permit a jury to return a guilty verdict as charged even if the jury believes and accepts the defense theory of the case. State v. Byrd, 125 Wn.2d 707, 716, 887 P.2d 396 (1995).

The defense theory of the case was that Mr. Thomas drew and displayed his gun but did not point it at Jache. He also did not intend to make Jache afraid he was about to be shot.

> Assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury. ... A jury may infer specific intent to create fear from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded, but not from mere display.

State v. Eastmond, 129 Wn.2d 497, 500, 919 P.2d 577 (1996), citing Byrd, supra, 125 Wn.2d at 713.

If we follow the jury's use of the instructions, it begins with the "to-convict," the "yardstick" of the charge, the "most important" instruction that the State argued required proof of only two "elements:" (1) that the defendant

assaulted Jache Cocchi "with a deadly weapon," (2) in the State of Washington.

The definition of assault was then satisfied if they found:

> **an act** done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

CP 21 (emphasis added). Combining these two instructions, if the jury found Mr. Thomas drew his gun intending to make Jache afraid, even if it was to stop him from running him down with the motorcycle, it had "a duty to return a verdict of guilty." The prosecutor argued this theory: Mr. Thomas wanted Jache to stop, but he did it by placing him in fear of bodily injury and used a firearm. RP 569. These instructions not only permitted, but required a guilty verdict, based on these findings -- without any regard to self-defense.

The trial court's failure to include "unlawful use of force" in the definition of "assault," or even more appropriately in the "to-convict" instruction itself, relieved the State of the

burden of proving the absence of self-defense. It requires a new trial with proper instructions.

g. The Separate Instruction on Lawful Use of Force Did Not Solve This Error.

The State conceded that it was error to omit "with unlawful force" from the assault instruction. But it argued that Instruction No. 14 solved any problem with this omission. RP(5/15) 7-8.

Instruction No. 14 could not solve this error because, as shown above, Instruction No. 13 imposed on the jury a duty to return a verdict of guilty without regard to self-defense.

Instruction No. 14 defined "lawful use of force." But the jury's verdict, based on Instructions 13 and 11, paragraph 2, did not require it to apply that term. It said the State bore the burden of proving the absence of self-defense beyond a reasonable doubt. But there was no way to reconcile Instruction No. 14 with the mandate of Instruction No. 13. It did not define the absence of self-defense as an "element," the term made so essential in the to-convict instruction and reinforced by Instruction No. 3.

At the very best, Instruction No. 14 created an ambiguity with Instruction No. 13. With no language to connect the self-defense instruction to the to-convict instruction, the two instructions directly contradict each other. One imposes a "duty to convict" if the two listed elements are proven, with no regard to the other, which appears to require a not guilty verdict if self-defense is not disproved.

> Where instructions are inconsistent or contradictory on a given material point, their use is prejudicial because it is impossible to know what effect they may have on the verdict.

Hall v. Corporation of Catholic Archbishop, 80 Wn.2d 797, 804, 498 P.2d 844 (1972); Smith v. Rodene, 69 Wn.2d 482, 486, 418 P.2d 741, 423 P.2d 934 (1967). It is not sufficient for this Court to believe more likely than not that the jury applied the proper legal standard. In State v. Smith, supra, 174 Wn. App. at 368, the elements instruction told the jury if "should" return a verdict of not guilty if it had a reasonable doubt, instead of requiring such a verdict. Unsure the jury applied the correct standard, the court reversed the conviction because the elements

instruction did not "make the relevant legal standard manifestly apparent to the average juror." Id. at 369.

> The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous wording of RCW 9A.16.050 via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction. ... Although a juror **could** read instruction 20 to arrive at the proper law, the offending sentence **lacks** any grammatical signal **compelling that interpretation over the alternative, conflicting, and erroneous reading.**

LeFaber, 128 Wn.2d at 902-03 (emphases added). By this same standard, while the jury could read Instruction 14 to prevail over Instruction 13, the instructions lack any signal compelling that interpretation over the alternative, conflicting, and erroneous reading.

h. Conclusion

The failure to include "unlawful force" as an element in the instructions in a self-defense case required the jury to convict without regard to this essential element. The failure was not solved by the separate instruction defining "lawful use of force." Appellant was therefore denied due process. The conviction must be reversed.

2. THE JURY INSTRUCTION DEFINING ASSAULT RELIEVED THE STATE OF THE BURDEN OF PROVING THE ASSAULT WAS COMMITTED BY MEANS OF A DEADLY WEAPON, REQUIRING A FELONY VERDICT EVEN IF THE JURY FOUND ONLY THE FACTS SUFFICIENT FOR MISDEMEANORS.

The Legislature intends for statutory language defining crimes to "safeguard conduct that is without culpability from condemnation as criminal" and "to differentiate on reasonable grounds between serious and minor offenses." RCW 9A.04.020(1).[8] The court's instructions must be clear enough to permit the jury to apply the law accurately with the same distinctions.

Defense counsel proposed, and the court gave, instructions on assault 4 and unlawful display of a firearm as lesser offenses of assault 2. CP 30-33. The defense theory was that the jury could find Mr. Thomas committed a misdemeanor assault by touching Jache on the shoulder, which would fall under the first definition of "assault;" and find that he showed the gun in a way that warranted concern for one's safety, although he did not point it to commit an assault "with a firearm," as defined in the second paragraph of Instruction No. 11.

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[8] The text of this statute is in App. B.

Under the peculiar facts of this case, however, the instructions failed to distinguish between the assault "with" a deadly weapon required for the felony, and a misdemeanor assault while displaying a deadly weapon, which would be two misdemeanors. As the jurors' comments[9] demonstrate, the jury was able to conclude Mr. Thomas committed an assault "with a firearm" without finding he pointed the gun at Jache. Thus the instructions relieved the State of the burden of proving the assault was committed "with" or by means of a deadly weapon.

a. Assault "With a Deadly Weapon" Requires the Assault Be Committed By Means of the Weapon, Not Merely While Possessing, Displaying, or Being Armed With a Weapon.

Statutory crimes vary according to the use of a deadly weapon. Being "armed with a deadly

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[9] While the jurors' thinking "inheres in the verdict" and so is not alone a basis for challenging the conviction, it nonetheless provides an example of how the instructions were constitutionally inadequate. Thus it is similar to the courts' reliance on jury inquiries. See, e.g., State v. Byrd, 72 Wn. App. 774, 781, 868 P.2d 158 (1994), aff'd, 125 Wn.2d 707, 887 P.2d 396 (1995) (jury's inquiry "probably arose from the failure of the instructions to distinguish clearly between unlawful display and second degree assault when applied to Byrd's version of what happened").

weapon" increases a burglary to the first degree, RCW 9A.52.020; or requires the ISRB to set certain minimum terms, RCW 9.95.040. RCW 9A.44.040(1)(a) increases a rape to the first degree if the offender "uses or threatens to use a deadly weapon or what appears to be a deadly weapon." RCW 9A.56.200(1) increases robbery to the first degree if the offender is "armed with a deadly weapon" or "displays what appears to be a firearm or other deadly weapon."

Assault in the second degree does not require being "armed with" a deadly weapon. And it is not satisfied by "displaying what appears to be a deadly weapon."

> A jury may infer specific intent to create fear from the defendant's pointing a gun at the victim, unless the victim knew the weapon was unloaded, but not from mere display.

State v. Eastmond, supra, 129 Wn.2d at 500. Thus in Eastmond and in Byrd, supra, the jury instructions had to be adequate to distinguish between the State's theory of assault 2, that the defendant pointed the gun at the complaining witness's head, and the defense theory that he

merely displayed the weapon. In both cases, the Supreme Court reversed the felony convictions.[10]

Under the peculiar facts of this case, the instructions did not require the jury to distinguish between the misdemeanor and felony assaults. Combining both definitions of "assault" in a single instruction permitted the jury to conclude an offensive touching while holding a firearm was sufficient to be an assault "with" a firearm.

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[10] Cf: State v. Sakellis, 164 Wn. App. 170, 269 P.3d 1029 (2011) (striking face with handgun and aiming gun at victim both sufficient for assault with a deadly weapon; disputed evidence of aiming and evidence the gun did not actually contact victim's face supported lesser instruction of assault 4); State v. Carlson, 65 Wn. App. 153, 828 P.2d 30, review denied, 119 Wn.2d 1022 (1992) (defendant pointed BB gun at victim, holding barrel inches from his face; all evidence at trial was BB gun was not operable, and so not "deadly weapon"; assault 2 conviction reversed); State v. Taylor, 97 Wn. App. 123, 982 P.2d 687 (1999) (defendant pointed operable BB pistol at each of three boys, holding about one-half inch from one boy's head, threatened to "blow [their] fucking brains out;" held sufficient for assault 2); State v. Winings, 126 Wn. App. 75, 107 P.3d 141 (2005) (defendant swung sword at victim and stabbed him in the foot; assault 2 affirmed).

b. Given the Facts of This Case, "With" Is At Best An Ambiguous Word.

Without an instruction defining "with," the jury was left to apply any common meaning of the word.

Webster's Dictionary defines "with:"

> **with** ... **1.** As a companion of : accompanying <took the dog *with* us> **2.** Next to <Sit *with* them.> **3.** Having as a possession, attribute, or characteristic <people *with* blue eyes> **4.a.** In a manner characterized by <act *with* decision **b.** In the performance, use, or operation of <problems *with* the plan> **5.** In the charge or keeping of <left the kids *with* the boss?> **7.** In support of : on the side of <We're *with* you all the way!> **8.** Of the same opinion or belief as <Were they *with* you on that issue?> **9.** In the same group or mixture as : AMONG <planted onions *with* the carrots> **10.** In the membership or employment of <is *with* a major airline> **11.** By the means or agency of <eat *with* chopsticks> **12.** In spite of <*With* all their wealth, they're still unhappy.> **13.** In the same direction as <swim *with* the current> **14.** At the same time as <arose *with* the birds> **15.** In regard to <I am angry *with* you> **16.** In comparison or contrast to <clothes identical *with* yours> **17.** Having received <*With* your permission> **18.** And : plus <had coffee *with* cake> **19.** In opposition to : AGAINST <competitors vying *with* each other> **20.** As a result or consequence of : under the influence of <stiff *with* cold> **21.** To : onto <Link your arm *with* your partner's> **22.** So as to be free of or separated from <had to part *with* my savings> **23.** In the course of <grows prettier *with* each day> **24.** In proportion to <cheese that improves *with* age> **25.** In relationship to <infatuated *with* a neighbor> **26.** In

> favorable comparison to : AS WELL AS <We can play tennis *with* the best of them> **27.** According to the experience or practice of <*With* me, it's a matter of taste.> **28.** --Used as a function word to indicate close association <*With* the jet plane, travel time was cut dramatically.>

Webster's II New College Dictionary (Houghton Mifflin 2001) at 1267-68. Only the 11th definition gives the meaning intended for "assault *with* a deadly weapon," i.e., by the means or agency of, as eating with chopsticks. Before that definition, there are many in common usage, yet not properly applied to this element of the crime; and there are even more definitions after that one.

Under the peculiar facts of this case, using "with" in the elements instruction, without further definition, permitted this jury to believe the State proved its case by showing an offensive touching "while accompanied by" a deadly weapon. Compare: State v. Smith, supra, 174 Wn. App. at 368, where the court instructed the jury it "should" return a verdict of not guilty if it had a reasonable doubt:

> We suspect that in this case the jury more likely than not understood the court's use of "should" in the elements instruction as mandatory. But we cannot be sure that it did. One of our panel queried the lawyers during oral argument

> with "you *should* eat your vegetables but you don't *have to* eat your vegetables," and "you *should* get more exercise doesn't mean you *shall* get more exercise." Even the State did not disagree.

The Court reversed multiple felony convictions, holding this word was constitutionally inadequate.

In this particular case, the word "with" was ambiguous. The rule of lenity requires that it be interpreted in favor of the defendant. State v. Caton, 174 Wn.2d 239, 242, 273 P.3d 980 (2012).

The jury's misunderstanding is even more likely in this case because of the sentencing enhancement, which required the state to prove Mr. Thomas was "armed with" a firearm -- regardless of whether he used that firearm to commit the assault.

The ambiguity was further reinforced by the court's initial recitation of the charge during jury selection: "assault in the second degree while armed with a firearm." Nothing in the preliminary instruction distinguished this special allegation of being "armed with" a firearm from the element of committing the assault "with" a deadly weapon.

WPIC 1.01 directs the court to instruct the jury on the specific charge and elements prior to jury selection.

> The defendant is charged [in count _____] with the crime of _____. Specifically, this charge alleges that _____.

WPIC 1.01, Advance Oral Instruction--Beginning of Proceedings [paragraph 2].

> Except when the novelty or complexity of the charges make it difficult to do so, the judge should state the elements of the charged crime or crimes with as much specificity as possible. It may be appropriate in describing the crime charged in the second paragraph to give the name of the alleged victim and the time and place in order to provide background for voir dire questioning as to prior knowledge of the incident.

WPIC 1.01, Note on Use.

> **Reading of charges.** Prior to 2005, this instruction was written so that judges would tell jurors the name of the offense(s) charged, without necessarily reading the particular wording of the charges from the information. The Washington State Jury Commission recommended that juries in criminal cases be instructed, before the trial begins, as to the basic elements of the charges and defenses. ...
>
> One way for this to take place is for the jury to hear the detailed allegations contained in **the charging information, which set forth the necessary elements of the charge**. When doing so, the judge may also include other facts that will assist the jurors

> in preparing to answer voir dire questions, including the name of the alleged victim and the time and place of the alleged crime.

WPIC 1.01, Comment (emphasis added). Despite this pattern instruction, the trial court here did not include the essential element of assault "with" a deadly weapon, but merely assault "while armed with a firearm."

As in Smith, Byrd, and Eastmond, the instructions permitted the jury to use an incorrect meaning of an element to relieve the State of its burden to prove assault by means of a deadly weapon. This Court cannot be sure the jury's verdict relied on the correct meaning. It could have defined "with" to find Mr. Thomas guilty when he merely possessed or displayed a deadly weapon -- facts sufficient only for a misdemeanor -- instead of using the weapon to commit the assault. Certainly the instructions did not require the jury to find that he pointed the gun at Jache.

3. COUNSEL'S PROPOSAL OF DEFECTIVE INSTRUCTIONS DENIED MR. THOMAS EFFECTIVE ASSISTANCE OF COUNSEL.

"If instructional error is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review." State v.

Kyllo, supra, 166 Wn.2d at 861, citing State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999); State v. Rodriguez, 121 Wn. App. 180, 183-84, 87 P.3d 1201 (2004).

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967); U. S. Const., amends. 6, 14; Const., art. 1, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

Strickland requires two components to establish ineffective assistance of counsel.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687.

a. Deficient performance

"Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." Strickland, 466 U.S. at 290-91; Kyllo, 166 Wn.2d at 862.

In Kyllo, counsel proposed an instruction that incorrectly stated the "act on appearances" standard for self-defense. He also argued in closing that his client was entitled to act on appearances if he reasonably believed he was in danger of death or great bodily injury. But his client had used non-deadly force: he was entitled to defend himself so long as he believed he was about to be injured at all. The legal standard counsel applied was higher than the law required. Kyllo, supra.

The Supreme Court held counsel's inaccurate instructions were deficient performance.

> Failing to research or apply relevant law was deficient performance here because it fell "below an objective standard of reasonableness based on consideration of all the circumstances."

Kyllo, 166 Wn.2d at 868-69.

i. With unlawful force

Counsel's proposed instruction defining "assault" misstated the law. As in Kyllo, "here there was relevant case law at the time of trial that counsel should have discovered." The mere commentary to WPIC 35.50 clearly stated that in cases of self-defense, each definition of "assault" must include "with unlawful force."

To the extent defense counsel proposed instructions that relieved the State of the burden of proving this essential element of the charge, and so did not accurately or adequately present his theory of the defense, his performance was constitutionally deficient.

ii. Combining two definitions of assault in one instruction

Similarly, offering the lesser included offenses also required accurate instructions. The State had a single theory for the felony charge: that Mr. Thomas intended to place Jache in fear of imminent bodily injury, he intentionally used the gun to do so, and did in fact place him in such fear. The "intentional touching" definition was applicable solely to the lesser offense of assault 4. Counsel and the court understood this

distinction, as shown by their colloquy. They did not, however, instruct the jury on this distinction.

Combining the two definitions of assault into a single instruction allowed the jury improperly to apply the impermissible touching definition to the felony charge. By relying on this instruction, the jury was required to find Mr. Thomas guilty of felony assault by using a different and incorrect definition of "with a deadly weapon." This instruction thus relieved the State of the burden of proving the assault was committed by means of the deadly weapon, not merely while armed with a firearm. It was deficient performance for counsel to propose an instruction that reduced the State's burden of proof. Kyllo, supra.

iii. No strategic or tactical purpose

Defense counsel acknowledged he had no strategic or tactical purpose for proposing erroneous instructions or failing to except to the court's improper instructions. The Supreme Court has held there is no valid tactical or strategic purpose:

> The Court of Appeals said that "there was no strategic or tactical reason for counsel's proposal of an instruction that incorrectly stated the law [and] eased the State of its proper burden of proof on self-defense. ... [T]he court could not conceive of any reason why the defendant's lawyer would propose the defective instructions, since they decreased the State's burden to disprove self-defense. We agree.

Kyllo, 166 Wn.2d at 869.

In Kyllo, self-defense was the defendant's "entire case." Here, self-defense was Mr. Thomas's entire case. Counsel had the basic duty to research the law and propose accurate instructions on his theory of the defense.

b. Prejudice

> The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

Kyllo, 166 Wn.2d at 862; Strickland, 466 U.S. at 687.

The prejudice was that the jury was inadequately instructed on the theory of self-defense, and was able to convict Mr. Thomas of a felony even if it found facts only sufficient to be two misdemeanors.

As in Kyllo, this Court must reverse Mr. Thomas's conviction and remand for a new trial.

E. CONCLUSION

The court inaccurately instructed the jury on the defense theory of self-defense. To the extent defense counsel proposed or failed to take exception to the incorrect instructions, his performance was constitutionally deficient. The result was Mr. Thomas did not receive a fair trial based on legally accurate instructions on this theory of the defense.

This Court should reverse and remand for a new trial.

DATED this 10th day of February, 2014.

LENELL NUSSBAUM, WSBA No. 11140
Attorney for Mr. Thomas

APPENDIX A

CONSTITUTIONAL PROVISIONS

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

Const., art. 1, § 3.

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

U.S. Const., amend. 14.

> "The right of trial by jury shall remain inviolate ... ."

Const., art. I, § 21.

> "In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, ... to have a speedy public trial by an impartial jury ... ."

Const., art. 1, § 22.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..., and to have the Assistance of Counsel for his defence."

U.S. Const., amend. 6.

APPENDIX B

STATUTORY PROVISIONS

> (1) The general purposes of the provisions governing the definition of offenses are:
>
> (a) To forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests;
>
> (b) To safeguard conduct that is without culpability from condemnation as criminal;
>
> (c) To give fair warning of the nature of the conduct declared to constitute an offense;
>
> (d) To differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each.

RCW 9A.04.020(1).

CERTIFICATE OF SERVICE

I certify that on this date I served a copy of this pleading, as well as the United States Mail Service to the following individuals, postage prepaid, addressed as indicated:

Mr. Eric John Richey
Whatcom County Prosecuting Attorney's Office
311 Grand Ave, Ste. 201
Bellingham, Wa 98225

Mr. Joshua Thomas
P O BOX 256
Custer WA 98240

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

2/10/2014 · SEATTLE, WA
Date and Place

Alex Fast
ALEXANDRA FAST