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Supreme Court No. \_\_\_\_\_  
(Court of Appeals No. 70438-9-I)

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

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**STATE OF WASHINGTON, Respondent,**

**v.**

**JOSHUA JEEP THOMAS aka RICHARD EUGENE PILL,  
Appellant.**

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**PETITION FOR REVIEW**

---

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**A. IDENTITY OF PETITIONER**

Petitioner, State of Washington, Respondent below, asks this Court to review the decision of the Court of Appeals, Division One, referred to in section B.

**B. COURT OF APPEALS DECISION**

The State of Washington petitions this Court for review of the Court of Appeals opinion in State v. Thomas, #70438-9 (unpublished consolidated with 70795-7) which was filed June 22<sup>nd</sup> 2015. A copy of the opinion is attached as Appendix A. Reconsideration was denied on July 22<sup>nd</sup> 2015; denial is attached hereto as Appendix B.

**C. ISSUE PRESENTED FOR REVIEW**

1. Whether the court of appeals decision abrogates the standard of prejudice required to reverse a conviction for ineffective assistance of counsel of an error invited by Thomas, by concluding Thomas' attorney was constitutionally deficient in proposing an *accurate* assault definition instruction that 'may' have led jurors to find Thomas guilty of felony assault predicated on misdemeanor conduct even though the jury found Thomas assaulted Jache *with* a deadly weapon.
2. Whether, in reaching this conclusion, the court of appeals impermissibly considered juror affidavits that inhere in the verdict to 'illustrate' the alleged error in support the court's conclusion and to impeach the verdict.

**D. STATEMENT OF THE CASE**

Thomas was charged with assault in the second degree with a deadly weapon. RCW 9A.36.021(1)(c). CP 4-7. Over the state's objection, the trial court permitted Thomas to assert self-defense and give additional instructions on assault in the fourth degree and unlawful display of a weapon. Thomas also requested and proposed the court give a general definitional instruction on assault instead of the definition provided by the state, in addition to a 'to convict' instruction for assault in the fourth degree and unlawful display of a weapon. Following a jury trial, Thomas was convicted of felony assault in the second degree with a deadly weapon. The jury also found, by special verdict that Thomas was armed with a firearm during the commission of the crime. CP 63-72.

On appeal, the court of appeals determined Thomas' attorney was ineffective for proposing a definitional instruction, that while accurate, gave two common law definitions of assault, one that applied to the felony assault allegation and the other that applied to the lesser included misdemeanor assault allegation. The court, using juror affidavits to illustrate their concerns, concluded this definitional instruction 'may' have permitted the jury to convict Thomas of felony assault for committing a simple assault whilst simply holding a firearm even though the second

degree assault to convict instruction required the jury to find beyond a reasonable doubt Thomas assaulted Jache *with* a deadly weapon and the state consistently argued that Thomas pointed his weapon at Jache and used his weapon in a manner that created an apprehension of the requisite harm for felony assault.

### Substantive facts

On July 19<sup>th</sup>, 2011 15 year old Jache was riding his dirt bike, a motorcycle, down Camp 2 in Whatcom County. Camp 2 road is a privately maintained gravel road, in a rural area along the border of Whatcom and Skagit Counties. RP 31, 73. Jache was headed to some off trails that lie above Camp 2 road wearing a helmet, goggles and a chest protector. RP 31-2. While on his way to the trails, Jache stopped to talk to his childhood friend, 14 year old Kaitlyn who happened to be biking to her grandmother's house. RP 35, 36.

While talking to Kaitlyn for a few minutes, Thomas stepped out of a wooded area behind Jache wanting to talk to Jache. RP 100. Kaitlyn, feeling uncomfortable asked Jache to stay with her but instead Jache laughed, said no way and took off. RP 102. Jache thought Thomas looked scary. RP 36. Thomas was then about 10 feet behind Jache and while he

took off normally, Jache's motorcycle sprayed gravel in Thomas' direction. RP 38. Thomas testified that when Jache left he gave Thomas the one finger salute. RP 335.

Kaitlyn testified when Jache left, Thomas got angry and started yelling and cursing telling her he wanted to talk to Jache and that next time Jache rode by he would shoot his tires out and if he crashes, not call for help. RP 102-3. Kaitlyn just tried to stay calm as she waited with Thomas because he also told her he was armed. Id.

Jache road the trails above camp 2 road and eventually came back down Camp 2 road. RP 57. (Jache initially testified he thought he rode the trails for a long time but upon reflection acknowledged it could have been a few minutes. RP 57.) Jache was intending to wait until Thomas was gone. Id.

As Jache came up Mullen hill on Camp 2 road he saw Thomas and Kaitlyn step out from the brush. Jache motorcycle stalled as he tried to stop his bike 50-60 feet away from Thomas. RP 103. Upon seeing Jache, Thomas walked quickly toward Jache, pulled a gun out his pocket and pointed it at him while yelling and cursing at Jache. RP 106-107. Kaitlyn testified Thomas held the gun to Jache's helmet and at one point, waived the gun in her direction. RP 107. Scared, Kaitlyn hopped on her bike, rode

home and immediately told her mom she was worried Thomas was going to shoot Jache. RP 106.

When Jache tried to re-start his bike, Thomas got into his face, grabbed him by the helmet and removed him from his bike telling Jache “don’t move or I will shoot you you little bastard. RP 107, 39, 43. Jache saw Thomas cock the hammer of a small silver handgun into the ready to fire position. RP 44. Jache just remembered Thomas was saying fuck this and fuck that, that he didn’t like motorcycles. RP 44. Jache was afraid he was going to be shot. Id. After pulling Jache off his motorcycle, yelling at him and dragging him about 10-15 feet away whilst waiving his gun, Thomas uncocked his handgun and let Jache go. RP 45.

Thomas told officers that, as a former bar tender he used to ‘act crazy’ to intimidate people and that he was irritated and angry with the motorcycles because they were loud. RP 407. He then admitted he confronted Jache but claimed he was calm during the encounter even though he pulled out his firearm to get Jache to stop and grabbed Jache by his shirt collar. RP 233, 234. Thomas denied pulling Jache off his bike but did acknowledge Jache’s motorbike may have fallen over. RP 266. When confronted with whether Thomas had pointed his gun at Jache, Thomas

didn't respond instead insisting that Thomas didn't yell or swear at Jache when he confronted him. RP 239.

Investigators found a silver single action handgun, capable of firing, on Thomas' person. RP 288. They also found an oil or gas spill on an area of Camp 2 road where Jache and Kaitlyn reported the incident took place. RP 249.

For the first time at trial, Thomas claimed he pulled out his weapon and held it over his head in the air but not at his side or pointed at Jache because he alleged he was afraid for his life. RP 342. Thomas said when Jache was stopped about 50-60 feet away he was hunkered down like he was going to drive into him. RP 343. Thomas alleged he decided to take the offensive by taking his gun out and holding it straight in the air while he quickly approached Jache and put his other arm on Jache shoulder to stop him. RP 344. Thomas said he wasn't mad, didn't yell or swear but that he did do what he described as "the mad dog act" testifying at one point "maybe I scared the hell out of him". RP 34-6. Thomas acknowledged at trial he believed he thought he had the right to use minimal force to detain Jache in light of alleged neighborhood concerns of noise and possible damage to the roadway from motorcycles. RP 388, see

also RP 222, 346. Following a jury trial, Thomas was convicted of felony assault in the second degree.

**E. REASONS WHY REVIEW SHOULD BE ACCEPTED**

The state petitions for review because the court of appeals erred relying on juror affidavits to give credibility to Thomas' argument where the instructions, facts and arguments made to the jury otherwise demonstrate the jury convicted Thomas because he *used* his firearm to assault another as proscribed by felony assault statute. While court of appeals concluded there was a 'reasonable probability' the 'result of the proceeding would have been different' but for Thomas' attorneys alleged error, they predicated this conclusion on their determination that the accurate definition instruction proposed by Thomas' attorney 'may' have misled jurors as 'illustrated' by juror affidavits that inhere in the verdict. Such analysis abrogates the standard prejudice required to warrant reversal for an ineffective assistance of counsel claim and improperly relies on juror affidavits that inhere in the verdict to impeach Thomas' conviction.

The public has a substantial interest in ensuring appellate courts apply consistent standards in reviewing the merits of ineffective assistance of counsel claims that result in new trials; particularly where the defendant

invites such error by proposing a correct instruction. See, State v. Studd, 137 Wash. 2d 533, 973 P.2d 1049 (1999), as amended (July 2, 1999)(its is not deficient conduct to propose a correct jury instruction.), State v. Winings, 126 Wash. App. 75, 89, 107 P.3d 141, 143 (2005)(the assault definition instruction does not create alternative means that require unanimity or substantial evidence as to each common law assault definition provided.) The decision in this case also undermines the important policy in ensuring the jurors deliberation process continues to inhere in the verdict as set forth by this court in State v. Ng, 110 Wash. 2d 32, 750 P.2d 632 (1988). Further review is warranted. See, RAP 13.4.

## **F. ARGUMENT**

To obtain relief based on alleged ineffective assistance of counsel for the first time on appeal, Thomas must show from the record that his attorney's conduct fell below an objective standard of reasonableness and that the deficient conduct prejudiced Thomas. State v. McFarland, 127 Wash. 2d 322, 335, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995), To demonstrate prejudice, Thomas must demonstrate from the record "there is a reasonable probability that, except for counsel's unprofessional

errors, the result of the proceeding would have been different.” McFarland, 127 Wash. 2d 335. It is not the result of the proceeding the court must consider but whether Thomas can demonstrate his trial attorney’s error was so serious as to deprive him of a fair trial. Id.

- 1. The court of appeals analysis does not support its conclusion that Thomas’ attorney’s conduct was constitutionally deficient or their conclusion that the correct definition instruction proposed by Thomas below precluded Thomas from obtaining a fair trial.**

The court of appeals reversed Thomas’ conviction because his attorney proposed an accurate assault definition the court determined was ‘misleading’ because they alleged it ‘may’ have led the jury to convict Thomas of assault in the second degree, a felony, predicated on misdemeanor behavior. It is not constitutionally deficient conduct for Thomas’ attorney to propose a definition instruction that is accurate. Studd, 137 Wash. 2d, 551, Winings, 126 Wash. App., 89. Additionally, the prejudice required to support reversing a conviction for ineffective assistance of counsel requires more than a showing that the instruction ‘may’ have misled a jury. As such, the court’s analysis does not support its conclusion that there is a reasonable probability this alleged error prejudiced Thomas’ ability to obtain a fair trial.

The analysis in the court of appeals decision reflects the court misapprehended the way the definitions of assault interfaces with the “to convict” instructions, the arguments and impermissibly relied on juror affidavits that inhere in the verdict to support their conclusion and impeach the verdict. Inst. 13. Further review is warranted.

The definition instruction proposed by Thomas’ trial attorney was accurate. The definition instruction in this case accurately provided two of the common law definitions of assault; actual battery and an act done with intent to create in another apprehension and fear of bodily injury. Inst. 11. Proposing an accurate definitional instruction is not constitutionally deficient conduct. Studd, 137 Wash. 2d at 551, see also, Winings, 126 Wash. App. 75.

A definition instruction defining the different ways assault may be committed does not create alternative means of committing an offense such that unanimity or substantial evidence for each mean is required to support a conviction. State v. Smith, 159 Wash. 2d 778, 154 P.3d 873, 873 (2007), State v. Linehan, 147 Wash. 2d 638, 56 P.3d 542 (2002).

As noted in Smith, “the common law assault definitions merely elaborate upon and clarify the terms “assault or “assaults” which are used throughout chapter RCW 9A.36.” Providing an accurate definition

instruction and then arguing the instruction is misleading because Thomas was charged with felony assault and misdemeanor assault ignores that these definitions are not alternative means and that the ‘to convict’ instruction specifically required the jury to find that Thomas committed his intentional assault ‘*with*’ a deadly weapon to convict Thomas of felony assault. See also, RP 551, where prosecutor explains to the jury it’s the state’s burden to prove Thomas assaulted Jache *with* a deadly weapon. A jury is presumed to follow the instructions. State v. Allen, 89 Wash. 2d 651, 574 P.2d 1182 (1978).

It also conflicts with the invited error doctrine which precludes a party from setting up the error and then complaining about it on appeal without demonstrating the issue is of sufficient constitutional magnitude to warrant further review. State v. Kylo, 166 Wash. 2d 856, 215 P.3d 177 (2009), Winings, 126 Wash. App. 75.

Thus, the concern Thomas alleged on appeal, that he could have been convicted for simply displaying a weapon and separately committing an intentional assault of based on the accurate definitional instruction, was not possible. *Assaulting another with a deadly weapon* is not the same as simply displaying a weapon under circumstances that warrants alarm for the safety of others. State v. Karp, 69 Wash. App. 369, 848 P.2d 1304,

1304 (1993). It is the *use* of the firearm to commit the assault that elevates the behavior from a misdemeanor to felony assault whether the firearm is pointed at someone or used in a manner to create the required apprehension of harm.

The court of appeals decision relied on the misapprehension that the State's theory was predicated solely on the argument that Thomas pointed a gun at Jache. "The State's theory of second degree assault *depended* upon the jury finding that Thomas pointed the gun at JC to frighten him." Slip Op. at 4 *emphasis added*. See also, Slip Op. at 7. (the "primary fact in dispute was whether he pointed the gun at J.C.")

The record reflects however, the state argued Thomas was guilty of assault in the second degree for pointing his firearm at Jache *or using his firearm in a manner intended to create apprehension of the requisite harm in Jache*. Either of which constitutes felony assault. Karp, 69 Wash. App. 369. While the State focused on the fact that both Jache and Kaitlynn maintained Thomas pointed the gun at 15 year old Jache, the State also argued alternatively, that Mr. Thomas used a firearm to frighten Jache, even if he didn't point the gun at Jache. RP 550 and 551. The State argued:

. . . but as a mad dog approach to try and scare them, and he said that, what he did to Jache. I want you to think about that, a mad

dog approach with a firearm. He had intent to frighten Jache using a firearm. Look at the definition of assault in the second degree. It's assault creating apprehension of fear as we talked about, with a firearm. That in and of itself is evidence. It's beyond a reasonable doubt that, of, for assault in the second degree, that evidence alone by what he said.

And he did create a reasonable apprehension of fear. We heard about that. We heard how this impacted Jache. We heard about how it impacted Kaitlyn. Jache went to his bedroom and cried.

RP 550-551. These facts were supported by Mr. Thomas' own admissions that he went out there to frighten the child with a "mad dog act." RP 367-71.

The State's theory of the case therefore did not depend on the jury only finding that Mr. Thomas pointed the gun at Jache. See, RP 551, 580. The prosecutor explained it was Thomas' pointing of the firearm or use of the firearm to create a apprehension of the requisite fear in Jache that supported convicting Thomas of felony assault. The prosecutor also explained in closing *which* definition of assault applied to the felony allegation and the distinction between convicting Thomas of assault in the second degree versus a misdemeanor stating the difference between simply displaying the weapon and assaulting Jache with the weapon was in Thomas' intent. Whether Thomas intended to create apprehension of fear in Jache. RP 580.

Consistent with the instructions and the state's argument, Thomas' attorney argued Thomas acted in self-defense and at worst, only committed misdemeanor assault and display of a weapon arguing "Thomas displayed this little pistol, not to frighten" "but because he was going to be run down by a motorcycle..." RP 552. He then argued Thomas didn't intend to make Jache think he was going to shoot him. Thomas "didn't assault Jache with the pistol. At most, he displayed it. RP 553. Later, Thomas' attorney argued "the evidence does not show beyond a reasonable doubt that Joshua intended to place Jache in fear of bodily harm." RP 564.

The jury instructions when taken as a whole were accurate and when viewed in context to the arguments made below, demonstrate the jury did *not* convict Thomas of assault in the second degree for merely grabbing Jache while *holding* and *displaying* a weapon. See, State v. Long, 19 Wash. App. 900, 902, 578 P.2d 871 (1978). ( No error when instructions viewed as whole properly informed the jury of the applicable law, were not misleading and permitted the defendant to argue his theory of the case.)

Thus, the court of appeals analysis in this case is flawed, conflicts with precedent and does not reflect the requisite deficient conduct or

prejudice to warrant reversing Thomas' conviction based on his attorneys request to give an accurate definition instruction. Further review is warranted.

**2. The court of appeals erred relying on juror affidavits which inhere in the verdict to 'illustrate' the alleged prejudice the court concluded warranted reversal.**

Following the trial below, Thomas' attorney's investigator sought and obtained jurors affidavits which, over the state's objection the appellate court considered in their analysis of whether Thomas' trial attorney's proposed jury instruction correctly defining assault 'may' have 'misled' the jury to convicting Thomas of assault in the second degree predicated on misdemeanor conduct. Slip Op. at 6.

Juror deliberations inhere in the verdict. Ayers By & Through Ayers v. Johnson & Johnson Baby Products Co., a Subsidiary of Johnson & Johnson Co., 117 Wash. 2d 747, 818 P.2d 1337 (1991). A juror, in providing an affidavit attacking the credibility of the verdict, may only attest to matters which do not inhere in the verdict itself, such as misconduct or the atmosphere surrounding the jury decision. Yet, the court of appeals essentially used juror affidavits that detailed the thought process of jurors in reaching their verdict to impeach and reverse Thomas guilty verdict. Jurors attested the guilty verdict was based on "showing a

firearm in a way to create fear in an individual.” Another juror stated jurors felt the gun was used “to intimidate” Jache and put him in fear even if the gun was not pointed at time. Slip. Op. at 6.

These affidavits, according to the court of appeals, were not considered as evidence of the deliberation thought process but to ‘illustrate’ the problem the court had with the definition instruction Thomas proposed and then complained of for the first time on appeal. This characterization creates a distinction without meaningful a difference for the purpose of essentially circumventing the rule. The law is clear. Juror affidavits cannot be used to attest to the mental process by which individual jurors have reached their respective conclusions including what effect evidence may have had on jurors, or the weight given to evidence during deliberations. Id. These are all matters that inhere in the jury’s process of arriving at its verdict and therefore inhere in the verdict such that this information cannot subsequently be used to impeach the verdict.

Thus a verdict may not be affected by circumstances of how some jurors misunderstood or alternatively, understood the judge’s instructions. Ayers By & Through Ayers, 117 Wash. 2d 747, *citing Gardner v. Malone*, 60 Wash. 2d 836, 841, 376 P.2d 651 (1962) amended, 60 Wash. 2d 836, 379 P.2d 918 (1963). Ironically, the juror’s statements arguably

demonstrate the jury convicted Thomas of felony assault *precisely* because they agreed with the state's theory and argument based on the law, that Thomas used his firearm in a manner to create the requisite apprehension of harm in Jache. Regardless, reliance on juror affidavits in this case to support the courts conclusion to impeach the verdict was improper.

Further review is warranted to ensure the deliberation process continues to inhere in the verdict and juror affidavits are not be misused by parties or appellate to illustrate potential problems created by alleged errors within jurors thought processes. The Court of Appeals analysis is problematic, conflicts with Ng, 110 Wash. 2d 32 and the long line of cases that ensure jury deliberations are not improperly relied on to impeach the jury verdict.

The credibility of Thomas' ineffective assistance of counsel argument should only be considered based on the facts and the law as given and argued by the parties below prior to and during trial and based on the strict standard of review required in reviewing a ineffective assistance of counsel claim for the first time on appeal. Further review is warranted.

## CONCLUSION

The jury instructions given below were accurate and permitted Thomas to argue his theory of the case. Moreover, the instructions given in conjunction with closing arguments, ensured the jury predicated its verdict on Thomas' intimidating use of his firearm to "scare the hell" out of Jache. These facts underscore why further review is warranted to ensure this case is reviewed based on the facts and law considered below, not juror affidavits that inhere in the verdict and to determine if Thomas' attorneys alleged deficient conduct was in fact deficient or resulted in sufficient prejudice to warrant a new trial pursuant to a constitutional ineffective assistance of counsel claim where his alleged misconduct was to propose an accurate definition jury instruction.

For the reasons set forth above, Petitioner, State of Washington, respectfully requests that this Court accept discretionary review, reverse the court of appeals decision and, affirm the jury finding Thomas guilty of assault in the second degree with a deadly weapon.

Respectfully submitted this  day of August, 2015.

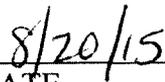
  
KIMBERLY THULIN, WSBA No. 21210  
Appellate Deputy Prosecutor  
Whatcom County Prosecuting Attorney

**CERTIFICATE**

I CERTIFY that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this Certificate is attached to this Court and appellant's counsel, Lenell Rae Nussbaum, addressed as follows:

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\_\_\_\_\_  
LEGAL ASSISTANT

  
\_\_\_\_\_  
DATE

# APPENDIX

## A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 70438-9-1
Respondent,	)	(consolidated w/70795-7)
	)	
v.	)	DIVISION ONE
	)	
JOSHUA JEEP THOMAS, a/k/a	)	
RICHARD EUGENE PILL,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 22, 2015

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BECKER, J. — This is an appeal of a conviction for second degree assault. Taken as a whole, the instructions did not relieve the State of its burden to disprove self-defense. But the instruction defining assault permitted the jury to convict the defendant of a felony based on facts that would prove only misdemeanors. The misleading instruction was proposed by defense counsel. We conclude appellant is entitled to a new trial due to ineffective assistance of counsel.

Appellant Joshua Thomas, a man in his sixties, lives in a rural part of southern Whatcom County near Camp 2 Road, a hard-pack road covered by loose gravel. Camp 2 Road is not maintained by the county. Thomas and other adjacent property owners are responsible for its upkeep. Speeders have caused recurring problems for the residents because they tear up the road.

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On July 19, 2011, a 15-year-old boy, JC, was heard by neighbors speeding with his motorcycle up and down Camp 2 Road. Thomas came out to the road and confronted him. JC sped off up a logging road but returned a short time later. He was again confronted by Thomas, who pulled out a gun and started cursing. According to JC, Thomas pointed the gun at his head. The State charged Thomas with second degree assault in violation of RCW 9A.36.021(1)(c), assault with a deadly weapon.

A trial was held in April 2013. JC testified about what happened when he rode back down to where he first encountered Thomas:

And when I got close enough, he came out of the bushes holding a gun out to me saying stop. So my bike died, and I restarted it and tried to turn around. By that time, he was right next to me and then pulled me off my bike and held a gun to my head and started yelling at me.

JC testified that Thomas cocked his gun and said, "don't move or I'll shoot you, you little bastard," while pulling him off the motorcycle. Then Thomas "let go of me and told me to leave. He uncocked his gun, and then I went, picked up my bike and started it and left."

According to Thomas, he held the gun in the air but never pointed the gun at JC. Thomas testified that he was annoyed when he heard the sound of a motorcycle exhaust system that day and he decided to try to contact the rider. Thomas testified that when he was about 15 feet away, the rider gave him the "one-finger salute," gunned his engine, and spun out, causing gravel to fly up and hit Thomas. The rider came back a few minutes later, still traveling at high speed. The rider then stopped abruptly about 40 feet away, hunkered down, and

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revved his engine. Thomas said he was afraid the rider was about to charge at him, so he walked toward the motorcycle to give the rider less room to gain speed. Thomas said he pulled out a small pistol and pointed it upwards so the rider would see it and stand down. He testified that he put his left hand on the rider's shoulder, glared at him, and told him to slow down because speeding damages the road.

The jury convicted Thomas of second degree assault and returned a special verdict finding that Thomas was armed with a firearm.

Thomas moved for a new trial through new counsel. He argued that trial counsel was ineffective for proposing a misleading definition of assault that became instruction 11. The trial court denied the motion. Thomas appeals.

Where instructional error is the result of alleged ineffective assistance of counsel, the doctrine of invited error does not preclude review. State v. Kylo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009). A claim of ineffective assistance of counsel is reviewed on appeal de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, Thomas must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thomas must overcome a strong presumption that his counsel's representation was adequate and effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). And to show prejudice, he must establish "there is a reasonable probability that, except for counsel's

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unprofessional errors, the result of the proceeding would have been different.”

McFarland, 127 Wn.2d at 335.

The State built its case around instruction 13, the to-convict instruction for second degree assault:

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 19<sup>th</sup> day of July, 2011, the defendant assaulted [JC] 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.

#### TWO DEFINITIONS OF ASSAULT

The State's theory of second degree assault depended on the jury finding that Thomas pointed the gun at JC to frighten him.

The defense theory was twofold: Thomas either acted in self-defense or, at most, committed the misdemeanors of fourth degree assault and unlawful display of a weapon. The defense theory of fourth degree assault depended on the jury finding that Thomas laid his hand on JC's shoulder while he held the gun.

Because of the two different theories about what conduct may have amounted to an assault, the court accepted defense counsel's proposal to give the jury two different definitions of "assault." Both definitions were included in instruction 11:

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.

Trial counsel for Thomas testified in support of the motion for a new trial.

He explained that he drafted the instruction to give the jurors the option of a misdemeanor conviction if they did not believe Thomas actually pointed the gun:

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 [JC]'s shoulder.

Thomas claims that in the unique circumstances of this case, combining the two definitions of assault in a single instruction rendered the instruction misleading. Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

The first paragraph of instruction 11, defining assault as an offensive intentional touching, reflected the defense theory. The second paragraph, defining assault as an act that is intended to and does in fact cause fear of bodily injury, reflected the State's theory. While both were correct definitions of assault, instruction 11 did not explain which definition was meant to go with which theory.

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As a result, Thomas argues, the jury was allowed to rely on the first paragraph's definition of fourth degree assault to determine the meaning of "assault" as used in instruction 13, the to-convict instruction for second degree assault.

When Thomas made this argument at the hearing on the motion for a new trial, the trial court denied the motion in part because it was only speculation that the jurors might have applied instruction 11 incorrectly. Thomas moved for reconsideration supported by declarations from two jurors. One of the declarants said the guilty verdict was decided based on the law on "showing a firearm in a way to create fear in an individual,"<sup>1</sup> along with the fact that Thomas grabbed JC by the shoulder. This declarant said he did not believe JC's testimony about the gun being held to his head. The other declarant said the jurors felt the gun was used "to intimidate" JC and put him in fear "even if it wasn't pointed at him." This declarant said that for him, the act of assault was a combination of "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."

The State correctly points out that the jurors' deliberations inhere in the verdict and their declarations may not be used to impeach the verdict. State v. Forsyth, 13 Wn. App. 133, 138, 533 P.2d 847 (1975). But Thomas did not offer the declarations to impeach the verdict. He offered them "to illustrate" how the two definitions could be misleading. The trial court agreed that its previous ruling

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<sup>1</sup> Instruction 22 stated as follows: "A person commits the crime of unlawfully displaying a weapon when he or she carries, exhibits, displays or draws a firearm in a manner, under circumstances, and at a time or place that warrants alarm for the safety of other persons."

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“invited you to bring affidavits, and you’ve done that.” Like the trial court, we have considered the declarations not as evidence of the deliberations but to illustrate the problem with instruction 11.

Instruction 13 states that second degree assault is assault “with a deadly weapon.” The first paragraph of instruction 11 states that “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.” It was undisputed that Thomas, while holding a firearm, took hold of JC’s shoulder. The primary fact in dispute was whether he pointed the gun at JC. Using the definition in the first paragraph, a juror could find that Thomas committed an “assault” of JC by grabbing his shoulder and could then conclude that the assault was “with a deadly weapon” because Thomas was holding his gun at the time. A juror reasoning in this fashion would not need to resolve the dispute about whether the gun was pointed at JC. The facts a juror found to support such reasoning would constitute fourth degree assault, or possibly fourth degree assault and unlawful display of a weapon—both of which are misdemeanors.

We therefore agree with Thomas that instruction 11 was misleading and trial counsel performed deficiently by offering it. Given the two definitions of assault, a juror may have understood that Thomas was guilty of committing “assault” with a deadly weapon, even if the juror did not find that Thomas intended to put JC in fear and apprehension that he was about to be shot. See State v. Byrd, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

The State contends the special verdict demonstrates that the jurors did not predicate their finding of assault on conduct constituting unlawful display of a weapon. But the special verdict only establishes that when Thomas assaulted JC, he was *armed* with a firearm. It does not demonstrate that the assault he committed was by pointing the firearm at JC or otherwise intentionally putting him in fear of bodily injury.

We conclude there is a reasonable possibility that the outcome of the trial would have been different if counsel had drafted instruction 11 in a way that restricted the offensive touching definition of assault to the misdemeanor charge of fourth degree assault.

#### SELF-DEFENSE

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).

Jury instructions on self-defense must more than adequately convey the law. Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror. Kyllo, 166 Wn.2d at 864. “The jury should be informed in some unambiguous way that the State must prove absence of self-defense beyond a reasonable doubt.” State v. Acosta, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984).

Thomas contends the instructions taken as a whole failed to meet these standards in two ways: first, because instruction 13, the to-convict instruction,

did not set forth the State's obligation to prove the absence of self-defense along with the other elements of second degree assault; and second, because the phrase "with unlawful force" was included in one definition of assault in instruction 11 but not the other.

1. State's Burden To Disprove Self-Defense

The to-convict instruction for the charge of second degree assault was instruction 13, quoted above. It stated there were two elements of the crime that had to be proved beyond a reasonable doubt: that the defendant assaulted JC with a deadly weapon on the date in question and that the act occurred in Washington. It further stated, "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."

Because the jury has the right to regard the to-convict instruction as a complete statement of the law, it should state all elements the State is required to prove. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). Thomas contends that under this rule, the State's burden to disprove self-defense belongs in the to-convict instruction. He argues that omitting any reference to this burden in instruction 13 unconstitutionally relieved the State of its burden to prove every element of second degree assault. The prejudicial nature of the omission, Thomas argues, was demonstrated in closing argument when the prosecutor used instruction 13 to assert that there were "only two elements" on which the State had the burden of proof: "We have the burden here, and we have to prove what is enumerated as two different elements, only two elements." The

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prosecutor was able to track instruction 13 in argument without acknowledging the State's burden of disproving the absence of self-defense. In discussing the claim of self-defense, the prosecutor simply argued that Thomas used more force than was necessary.

Thomas did not object to instruction 13 below, and his motion for a new trial did not allege that trial counsel was ineffective for failing to object to it. We determine on a case-by-case basis whether an unpreserved claim of error regarding a self-defense jury instruction constitutes a manifest constitutional error that can be raised for the first time on appeal. State v. O'Hara, 167 Wn.2d 91, 101, 217 P.3d 756 (2009) (as amended by order dated Jan. 21, 2010).

Including the State's burden to disprove self-defense in the to-convict instruction may well be a preferred practice. On its face, instruction 13 imposed upon the jury a duty to render a verdict of guilty if the State proved an assault with a deadly weapon occurred in Washington. Because there was a claim of self-defense, instruction 13 standing alone would likely constitute manifest constitutional error. See Acosta, 101 Wn.2d at 615 (reversible error where no instruction informed the jury whether petitioner or the State bore the burden of proving or disproving self-defense).

But instruction 13 did not stand alone. If a separate instruction is used to state the State's obligation to prove the absence of self-defense, omitting similar language from the to-convict instruction is not reversible error. State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991). In this case, the court did give a

separate instruction, instruction 14, modeled on Washington Pattern Jury Instructions: Criminal § 17.02 (2008) (WPIC).

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 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.

Instruction 14 informed the jury that the State had the burden of proving the absence of self-defense beyond a reasonable doubt. It also instructed the jury to return a verdict of not guilty if the State did not meet that burden.

In view of instruction 14's correct statement of the State's burden to prove the absence of self-defense, we conclude Thomas has not shown manifest constitutional error in the omission of the same language from instruction 13.

## 2. "With Unlawful Force" Omitted

One of the definitions of assault in instruction 11 did not include the phrase "with unlawful force." Thomas contends this phrase was necessary to adequately state the law of self-defense. Thomas preserved this argument for appeal by including it in the claim of ineffective assistance of counsel raised below in the motion for a new trial.

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A person acting in self-defense acts lawfully. Acosta, 101 Wn.2d at 617. Accordingly, when there is a claim of self-defense in an assault case, the definition of "assault" should include the requirement that it be committed with unlawful force. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 note on use at 164-65 (3d ed. Supp. 2014).

Here, the first paragraph of instruction 11 defines assault as an intentional offensive touching "with unlawful force." However, the second paragraph, defining assault as an act intended to create fear of bodily injury, does *not* say that the act must be done "with unlawful force."

At the hearing on the motion for a new trial, Thomas' former defense counsel admitted that when preparing instruction 11, he did not review the notes following WPIC 35.50 or case law. He testified that he had no strategic reason for putting the phrase "with unlawful force" in the first paragraph but not in the second.

The State conceded, and the court agreed, that defense counsel should have included the phrase "with unlawful force" in both paragraphs of instruction 11. But the court also agreed with the State's argument that the omission did not warrant a new trial. With respect to both the charge of second degree assault and the lesser degree crimes, instruction 14 stated, "The State has the burden of proving beyond a reasonable doubt that the force offered to be used by the defendant was not lawful." The trial court concluded this statement sufficiently informed the jury that the State did not prove Thomas committed an act

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amounting to second degree assault unless it proved that he acted with unlawful force.

Thomas disagrees with the trial court's determination that instruction 14 solved the problem. He contends the phrase "with lawful force" must be included in an instruction defining assault in order to lead the jury to the definition of lawful force found in the instruction on self-defense—which in this case was instruction 14. WPIC 35.50 cmt. at 167 (Unlawful use of 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'").

The inclusion of the phrase "with unlawful force" in one definition of assault but not the other does have the potential to be confusing and misleading when looked at in isolation from the other instructions. It is also problematic that the phrase was omitted from the very definition of assault the State was relying on to obtain the conviction. Nevertheless, instructions must be read as a whole. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). We agree with the trial court that instruction 14 adequately conveyed to the jury that Thomas could not be found guilty of any crime unless the State proved he acted with unlawful force.

In summary, Thomas is entitled to a new trial due to ineffective assistance of counsel. Our confidence in the result of the trial is undermined by the misleading nature of the definitions of assault contained in instruction 11, though

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not by the irregularities in conveying the State's burden to prove absence of self-defense.<sup>2</sup>

Reversed.

Becker, J.  
\_\_\_\_\_

WE CONCUR:

Speers, C.J.  
\_\_\_\_\_

Jan, J.  
\_\_\_\_\_

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<sup>2</sup> A short statement of additional grounds for review submitted by Thomas under RAP 10.10 does not provide any other viable basis for appellate scrutiny of the proceedings below.

# **APPENDIX**

## **B**

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

STATE OF WASHINGTON,	)	
	)	No. 70438-9-1
Respondent,	)	(consolidated w/70795-7)
	)	
v.	)	ORDER DENYING MOTION
	)	FOR RECONSIDERATION
JOSHUA JEEP THOMAS, a/k/a	)	
RICHARD EUGENE PILL,	)	
	)	
Appellant.	)	

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Respondent, State of Washington, has filed a motion for reconsideration of the opinion filed on June 22, 2015. The court has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that respondent's motion for reconsideration is denied.

DATED this 22nd day of July, 2015.

FOR THE COURT:

Becker, J.  
Judge

2015 JUL 22 AM 10:51  
COURT OF APPEALS  
STATE OF WASHINGTON

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