No. 47377-1

IN THE STATE OF WASHINGTON

COURT OF APPEALS DIVISION II

STATE OF WASHINGTON, Respondent

v.

JEREMY ROSE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

THE HONORABLE JOHN R. HICKMAN

BRIEF OF APPELLANT

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II. STATEMENT OF FACTS

Eighteen-year-old Jeremy Rose spent his childhood raised by relatives and in the foster care system. (RP 638). At age sixteen he entered and graduated from the Job Corps program in Kentucky as a computer tech. (Id). Although he wanted to attend college, he could not afford it and, at age seventeen returned to Washington State. (RP 639). He obtained employment as a sign holder for 5 hours a day on the street, and began training to work on a fishing boat. (RP 645).

He lived with his grandmother until November 2013, when he turned eighteen. At that time, the landlord evicted him from the premises because he was not paying rent. (RP 669). Mr. Rose became homeless. (RP 639). Although he located a community shelter, because of the environment, he did not want to stay there. (RP 640).

During that latter part of November, he discovered an abandoned building on South Fawcett in Tacoma. (RP 642;692). It did not have running water or electricity. The doorways to the building were not locked or secured. (RP 642-43; 692). The top floor of the building was described as "disgusting": the space was littered with trash, discarded clothing, and used needles. The bathroom area was filled with blood and urine, with previous squatters having used the bathtub as a toilet. (RP 244; 327-328). The basement floor apartment was also filthy, filled with cans containing various chemicals, and it smelled like dead rats. (RP 409).

Mr. Rose easily gained access through the unlocked doors and began living in an apartment on the second floor. That apartment had a couch, a table and desk. (RP 642). He kept the area tidy. (RP 409). On especially cold nights, however, he stayed at the nearby shelter because it was a heated facility. (RP 650).

Shortly after he moved in, Mr. Rose encountered Michael Runyon sitting on the building stairs. Mr. Runyon had been at the building the day earlier and also found the entrance unlocked. (RP 462). Mr. Rose invited Runyon to live on either the top or bottom floor. (RP 463; 645). During the first or second week in December, Runyon then invited a homeless

couple, Susan and Stephen Ortloff, to stay in the third floor apartment. (RP 647-48). Both Ortloffs were unemployed, long time homeless individuals, and Mr. Rose recognized them from the shelter. (RP 212;215; 325; 648).

Mr. Ortloff testified he had heard about the abandoned building as a place to live, and one could enter through the back door or front basement door, noting that it was not boarded up or locked. (RP 216;223-23). The Ortloffs initially lived in the walk-in closet on the third floor, but because of the smell, moved down to the first floor. (RP 224;649). Mr. Ortloff testified they lived in the basement apartment for a week to ten days. (RP 245). At some point in December, they became aware that Mr. Rose had been absent from the 2nd floor apartment, so he and his wife moved into that space. (RP 245).

Mr. Ortloff said that Mr. Rose returned about two days after they had moved in, and the three of them lived in the 2nd floor apartment from before Christmas until January 1, 2014. (RP 246). Susan Ortloff said the apartment Mr. Rose lived in was the cleanest and she wanted to live there. (CP 336). Although her memory was admittedly very fuzzy, she thought they lived in the apartment with him for a week or two. (RP 337).

By contrast, Mr. Rose testified he lived alone in the apartment and never shared the space with the Ortloffs. He spent the Christmas holidays

in Seattle with his brother and did not return until midday January 1. (RP 651-52). Mr. Suzler, another transient using the building, reported that Mr. Rose was not at the building at least between December 28 and January 1. (RP 551).

When Mr. Rose returned to the apartment, he saw food and clothing thrown around the room. He first thought someone had entered and stolen his things, but then he observed someone else's possessions in the bedroom. (RP 652). Mr. Rose blocked the outside door to the building with 2x4s, so that no one else could get into the building. He also locked his apartment door, as was his custom, and put a couch in front of it. (RP 653;690).

Around 7 p.m., he heard someone banging on the outside door. (Id). He heard the door splinter and individuals coming up the stairs, threatening to kill him. (RP 654). They yelled that it was not his apartment, threatened to kill him and told him they were going to take his things. (Id). Mr. Rose said he did not respond, and remained hiding inside, hoping they would leave. (RP 655). Another homeless individual, Mr. Shannon, was in the building that evening. (RP 518). He heard the

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1 Mr. Rose's brother was also homeless, but they stayed in shelters or his brother's car over the holiday week. (RP 696).

Ortloffs banging on Mr. Rose's door and testified that Mr. Rose did not answer them. (RP 534).

Mr. Rose heard the Ortloffs go back downstairs. (RP 655). Mr. Ortloff testified he went down to retrieve a pick axe. (RP 260;299). When he returned, Mr. Rose heard and saw wood splintering around the locks on the apartment door. (RP 655). Mr. Ortloff testified he used the pick axe to knock the locks off the door and push it open. (RP 260;299).

Ms. Ortloff testified that she slipped through the open apartment door with grocery bags in her hands. She remembered yelling at Mr. Rose, as she walked toward the bedroom, telling him that had to leave the apartment. (RP 351). Her recollection was that Mr. Rose stabbed her in the neck. She screamed for Mr. Ortloff, who came in from the hallway and began beating Mr. Rose. (RP 358).

By contrast, Mr. Ortloff testified that he entered the room first. (RP 263). He did not know what happened to his pick axe, and stated that he instead grabbed a stick and walked by Mr. Rose as he carried groceries to the backroom. He recollected that Ms. Ortloff entered next, and when he saw her, she said she had been stabbed. He reportedly dropped the groceries and attacked Mr. Rose. (RP 264).

Mr. Rose said Ms. Ortloff entered the room first and yelled at him to leave. She moved toward him and as he backed up, she lunged at him

with a knife. (RP 657). They fought, he shoved her against the door, and she released the knife. Mr. Rose was afraid and he stabbed her once. (RP 658). According to Mr. Rose, she fell to the floor and yelled, "He stabbed me." Mr. Ortloff ran into the room, and choked and punched Mr. Rose. (RP 659). Mr. Rose reached for the knife and cut Mr. Ortloff across the forehead and on the arm before Mr. Ortloff knocked him out. (RP 660). When he regained consciousness, the Ortloffs were gone, as were the pick axe and knife. (RP 164;203; 660-61). He went to St. Joseph's hospital and was treated for bruises around his eye sockets and a concussion. (RP 661).

Both the Ortloffs fled the apartment, reportedly leaving their grocery bags both inside of and outside of the apartment. (RP 359). Later, officers only found grocery bags outside the apartment door, not inside. (RP 199;273).

A few days later Mr. Rose was arrested and charged with two counts of assault in the first degree with a deadly weapon, and resisting arrest. (CP 7-8). Before the jury trial, defense counsel gave notice that Mr. Rose was asserting the affirmative defense of self-defense in answer to the assault charges. (CP 18).

In proposing jury instructions, defense counsel objected to the State's proposed non-WPIC instructions on defense of property: first, Mr.

Rose never offered defense of property as a defense; second, the cases cited to by the State did not match the facts of the current case; and third, 'deadly force' is not an element of assault in the first degree. (RP 710-717). Over defense objection, the trial court reasoned that he did not want the jury to believe that Mr. Rose had any right to protect the apartment space. (RP 713). The court gave jury instruction no. 21:

> An individual's use of force upon or toward another person is not lawful when it is used in preventing or attempting to prevent a malicious trespass or other malicious interference with real property or personal property that is not lawfully in the individual's possession. Real property means the land itself and all buildings, structures, or improvements thereon.
>
> An individual is not lawfully in possession of real or personal property when he is not licensed, invited, or otherwise privileged to possess the property.

(CP 114).

And instruction no. 22:

> The use of deadly force or a deadly weapon is not lawful when it is used in preventing or attempting to prevent a malicious trespass or other malicious interference with real property or personal property. Deadly force is the intentional application of force through any means reasonably likely to cause death or serious physical injury.

(CP 115).

The jury convicted Mr. Rose of the lesser offense of second-degree assault of Ms. Ortloff with a special verdict of being armed with a deadly weapon. (CP 131-132). He was found not guilty of all other charges. (RP 802-03). Mr. Rose filed a motion for relief of judgment under CrR

7.8 citing to the incorrect and misleading jury instructions, also contending the non-WPIC instructions amounted to a judicial comment on the evidence. (Supp. CP. 186-87). The court denied the motion. (CP 179). Mr. Rose makes this timely appeal. (CP 166-178).

III. ARGUMENT

A. The Court Committed Reversible Error When It Gave Non-WPIC Jury Instructions That Were Incorrect Law, And Unsupported By The Facts and Law.

The appellate court reviews jury instructions for errors of law de novo. *State v. Hayward,* 152 Wn.App. 632, 641, 217 P.3d 354 (2009). The court may give jury instructions only when there is substantial evidence to support them. *Tennant v. Roys,* 44 Wn.App. 305, 309, 722 P.2d 848 (1986). Jury instructions are sufficient "when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *State v. Douglas,* 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). (Internal citations omitted). Simply put, a court is not required, nor should it, give an instruction which is improper under the facts of the case, or which is misleading, or that does not inform the jurors of the applicable law. In this case, the contested jury instructions were improper under the facts, were misleading, and an incorrect statement of the law.

1. Mr. Rose Was Not Unlawfully In The Apartment.

The State did not charge Mr. Rose with criminal trespass. Yet, the State's theory was that Mr. Rose and the others were unlawfully trespassing in the empty building. In questioning Steven Ortloff, the prosecutor asked: "Now, in terms of your own right to be in there, did you have – were you trespassing in living inside that apartment building? Was everybody else likewise doing so? (RP 223-24). Questioning Susan Ortloff: "At any time did you pay rent to anybody? Did you and Stephen at any time sign a lease for anybody? Did anyone ask you to pay them rent as a result of being an occupant of this building?" (RP 439-40). State's Closing Argument: "They're *all trespassing*, all committing a minor crime by being inside that building, doing the damage that's inside that building…But these folks are all in the building occupying space that does not belong to them, and *that is a key feature of the facts in this case.* And it's undisputed. There is no dispute about that." (RP 729)(Emphasis added).

Based on that theory, the foundation of jury instruction 21 was the conclusion that entry and use of the apartment building was unlawful. The State crafted and the trial court gave instruction number 21:

> "An individual's use of force upon or toward another person is not lawful when it is used in preventing or attempting to prevent a

> malicious trespass or other malicious interference with real property or personal property *that is not lawfully in the individual's possession*....An individual is *not lawfully in possession* of real or personal property when he is not licensed, invited, or otherwise privileged *to possess* the property." (CP 49;114) (Emphasis added).

The instruction was a jumble of the WPIC instruction for criminal trespass (WPIC 60.15; 65.02) and the WPIC instruction on the use of lawful force (WPIC 17.02). The instruction married the criminal trespass definition of "unlawful entry or remaining" to the element of "possession" found in the lawful force defense of property. There is no statute that provides "an individual is not lawfully in *possession* of real or personal property when he is not licensed, invited, or otherwise privileged to *possess* the property." It is just wrong. The State based the combination on *State v. Mierz,* 127 Wn.2d 460, 901 P.2d 286 (1995)[2].

Under Washington law, a criminal trespass occurs when one "enters or remains unlawfully" in or upon premises when he is not licensed, invited, or otherwise privileged to enter or remain. RCW 9A.52.010(4). "Premises" includes any building, dwelling, structure used for commercial aquaculture, or any real property. RCW 9A.52.010(6).

At Mr. Rose's trial, witnesses described the unlocked apartment building: it was filthy, contained human waste and blood, held various

[2] As argued below, the *Mierz* case was not applicable to the facts of this case.

noxious smelling chemicals and dead rodents, the floor was littered with used needles, and it was without electricity or running water. The building was in that condition prior to the arrival of Mr. Rose. Moreover, the State produced no evidence of an owner or building manager who laid claim to, oversaw the property, or paid taxes on it.

The term "abandoned" is not defined by statute in Washington. *See* RCW 9A.52.010, .070. However, undefined statutory terms are given their usual and ordinary dictionary meaning. *State v. Sunich,* 76 Wn.App. 292, 296, 884 P.2d 1 (1994). 'Abandon' is defined as 'to cease to assert or exercise an interest, right, or title to especially with the intent of never again resuming or reasserting it: and "to give up …by leaving, withdrawing, ceasing to inhabit, to keep or to operate …". *State v. J.P.*, 130 Wn.App. 887, 895-96, 125 P.3d 215 (2005) (internal citation omitted). The apartment building as described by Mr. Rose and other witnesses fit well within the definition of "abandoned."

RCW 9A.52.090(1) provides a statutory defense to criminal trespass: In any prosecution for criminal trespass, it is a defense that a building involved in the trespass was abandoned. The defense negates the unlawfulness. Thus, as a matter of law, one who enters or remains, as Mr. Rose did, in an abandoned building is not unlawfully present.

The term "possession" was not defined, but a common sense reading of the non-WPIC instruction instructed the jury that because Mr. Rose did not pay rent, he was unlawfully in the building as a matter of law. This was both incorrect and misleading.

Mr. Rose also contends that the instructions, with the given facts of the case, unnecessarily and prejudicially emphasized the State's legal theory. The instruction underscored the State's belief that Mr. Rose was unlawfully in the apartment, despite that he was not charged with criminal trespass. The instruction also assumed that the jury might acquit on a claim of defense of property, which the State actively urged the jury to reject. (RP 718).

Moreover, the instruction given was inverted. WPIC 17.02 outlines the circumstances under which defense of property *is* lawful, requiring only that the force be not more than is necessary, and it *may be used* to prevent or attempt to prevent a malicious trespass or malicious interference with property lawfully in that person's possession.

By inverting the instruction, it reads in the negative: the use of force is *not* lawful when used to prevent a trespass onto property that is *not* lawfully in the individual's possession. This is combined with a not before seen definition: "An individual is *not lawfully in possession* of real

or personal property when he is *not licensed, invited, or otherwise privileged* to possess the property."

Without conceding the argument that the building was abandoned, and his remaining in it was not unlawful, under Washington law, an individual can make a claim of adverse possession if over a ten-year period his possession of the property is open and notorious, actual and uninterrupted, exclusive and hostile. *ITT Rayonier, Inc. v. Bell,* 112 Wn.2d 754, 757, 774 P.2d 6 (1989). Thus, one can be in possession of property, treating the property as would an owner, excluding others, without being privileged, invited or licensed, and it is not an unlawful possession. The instruction is flawed.

2. The *Mierz* Holding Is Not Applicable In This Case.

The second facet of non-WPIC instruction 21 relied on the holding in *Mierz*, which also contributed to the misleading instruction. As stated above, there is no statute that states unless an individual is licensed, invited, or otherwise privileged to possess property, he is in unlawful possession.

In *Mierz,* the defendant housed two coyotes on his property. *Mierz,* 127 Wn.2d at 476. He learned that possession of the coyotes without the appropriate permit was unlawful. The Department of Wildlife

denied him a permit and made a finding that he unlawfully possessed the animals. *Mierz,* 127 Wn.2d at 464.

Wildlife agents entered the property to seize the coyotes. *Mierz,* 127 Wn.2d at 463. Mierz told them to leave and commanded his dogs to attack the agents. *Mierz,* at 465. One dog bit an agent, and after Mierz was arrested, he himself, also bit an agent. *Mierz*, at 468. Mierz was charged with unlawful possession of wildlife and two counts of third degree assault. *Mierz,* at 466.

Mierz made it clear that he relied only on defense of property (the coyotes) and not on a defense of self against bodily harm. *Mierz,* at 466;470. In its rulings, the trial court found that Mierz had no right to defend the coyotes, because he had no lawful right to possess them. *Mierz,* at 466.

Unlike Mierz, Mr. Rose was never charged with unlawful possession, and in so far as the building was abandoned, he had a complete defense against a charge of unlawfully remaining in the building. *State v. Olson,* 182 Wn.App. 362, 375-76, 329 P.3d 121 (2014). The State did not prove that Mr. Rose lacked license to enter or remain there. Further, despite the State's numerous attempts to paint a picture that Mr.

Rose used force to defend his possession of the apartment, unlike Mierz, Mr. Rose never claimed such. [3]

3. Instruction 21 Is Reversible Error.

Instruction 21 amounts to reversible error, because it was misleading, permitting an interpretation that was arguably a correct, though jumbled, statement of the law, that is, when force is lawful; and an incorrect statement of the law, that is, one is not in lawful possession of property which one is not licensed, privileged or invited to possess.

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[3] Q. You pulled a knife and went after Susan Ortloff in the hope that they would give up the apartment to you…that you had it and you were defending it with force?
A. No.
Q. You were defending it with a knife.
A. No.
Q. You were defending it with force that included using the knife on the woman's neck?
A. No.
Q. It was your apartment and you were doing what you felt you had to do to keep them out of your apartment, get them to move off. That's what happened, isn't it?
A. No. (RP 688).
Q. What you did on January 1st ---you'll admit this I believe. What you did on January 1st was because you were protecting your space?
A. No.
Q. You were keeping them out by barring the outside door, keeping them out by barring the inside door, right?
A. The outside door.
Q. Because you were protecting your space?
A. No.
Q. You stabbed Susan Ortloff because you were protecting your space?
Defense Counsel: Your Honor, that's been asked and answered a number of times.
THE COURT: I'll sustain the objection.
(RP 697).

Moreover, even though Mr. Rose never raised the issue of defense of property, the State used its questioning and closing argument to point out the incorrect statement of law (regarding lawful possession). Giving the jury the instruction allowed it to rely on an incorrect statement of the law, and an argument about defense of property, which was not raised, resulted in prejudice to Mr. Rose and requires reversal. *See Anifinson v. FedEx Ground Package System, Inc.* 174 Wn.2d 851, 876, 281 P.3d 289 (2012).

4. Instruction No. 22 Is Flawed, Prejudicial And Requires Reversal.

Instruction number 22:

> The use of *deadly force or a deadly weapon* is *not lawful* when it is used in preventing or attempting to prevent a malicious trespass or other malicious interference with real property or personal property.
>
> Deadly force is the intentional application of force through any means reasonably likely to cause death or serious physical injury.

(CP 115).(emphasis added).

This instruction is again a melding of the statute definition of "deadly force" (RCW 9A.16.010(2)), the statutory lawful use of force provision in RCW 9A.16.020(3), a partial statutory definition of assault in the first degree, (RCW 9A.36.011) and WPIC 17.02 instruction on lawful use of force in defense of self, others, and property. The State cited numerous cases to substantiate the instruction, which are incorrect. (CP 50).

Again, Mr. Rose did not raise the defense of defense of property. Nevertheless, Washington law holds one may use the necessary force under predefined circumstances. RCW 9A.16.010 provides that "necessary means that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to effect the lawful purpose intended." RCW 9A.16.020 provides that use of force toward another is not unlawful in the circumstance when a party is about to be injured, or in preventing a malicious trespass or malicious interference with real or personal property lawfully in his possession, *in case the force is not more than is necessary.* RCW 9A.16.020 does not include the words "deadly weapon" or "deadly force" but rather, the term "necessary". The instruction is just wrong.

In *Brightman*[4], the issue was whether Brightman was entitled to a jury instruction on justifiable homicide. *State v. Brightman,* 155 Wn.2d 506, 122 P. 3d 150 (2005). Brightman claimed that because he presented evidence that he was being robbed at the time he acted in self defense, he did not need to show that he feared death or great bodily harm to justify his use of deadly force. *Id.* at 521. The Court disagreed and instead, focused its analysis on the principle that the self defense, and defense of property laws were rooted in the concept of necessity. *Id.* What the Court

[4] A case used by the State to substantiate instruction 22 (CP 50).

did *not* say was that deadly force was per se reasonable or unreasonable, but rather, that under that statute, the use of deadly force must be individually determined. *Id.* at 524.

In *Madry,* another case relied on by the State here, the Court held that generally the question of whether the amount of force used was unreasonable is a matter for the jury. *State v. Madry,* 12 Wn.App. 178, 529 P.2d 463 (1974). The Court cited to a holding in an earlier case where a property owner waved his gun threateningly at environmental control agents who were inspecting the premises of his construction business: "Under the statute (RCW 9.11.040) [RCW 9A.16.020], or under the common law, the use of a deadly weapon by a private party to eject a mere *nonviolent, nonboisterous trespasser,* who at most can be understood to be interfering with a private party's intangible proprietorial interest,is, as a matter of law, not a justifiable use of force." *Id.* at 181. (Emphasis added).

In contrast to the instruction here, what the Court did *not* say was that the use of *deadly force or a deadly weapon* is not lawful when it is used in preventing or attempting to prevent a *malicious trespass* or other *malicious interference* with real property or personal property. (emphasis added). Again, even though Mr. Rose did not raise defense of property, the jury was misled to conclude that he was guilty because the law did not

allow the use of deadly force or a deadly weapon to prevent a malicious trespass to property. The law is centered on the principle of necessity.

The instruction misstated the law and misled the jury. Prejudice resulted to Mr. Rose because the jury could have rendered its conviction of second-degree assault based on the flawed instruction, rather than whether he was justified in defending his person. This requires reversal.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Rose respectfully asks this Court to remand for a new trial on the single charge of second degree assault, and the special verdict of being armed with a deadly weapon, as the jury has already found him not guilty of the greater offenses of first degree assault and not guilty of resisting arrest.

Respectfully submitted this 3rd day of June 2015.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on June 3, 2015, I served a true and correct copy of Appellant's Brief by first class, USPS mail, postage prepaid, or by electronic service by prior agreement between the parties to the following:

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