SUPREME COURT NO. 93129-1

COURT OF APPEALS NO. 47377-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington, Petitioner

v

Jeremy Trenton Rose, Respondent

PETITION FOR REVIEW

MARIE J. TROMBLEY, WSBA 41410
Attorney for Petitioner
PO Box 829
Graham, WA
253-445-7920
marietrombley@comcast.net

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A. IDENTITY OF PETITIONER

Jeremy Rose, defendant and appellant below, asks this Court to review the decision by the Court of Appeals, Division II, referred to in Section II. .

B. RELIEF REQUESTED

Mr. Rose seeks review of the Court of Appeals decision filed April 5, 2016. A copy of the Court's unpublished opinion is attached as Appendix A. This petition for review is timely made.

C. ISSUES PRESENTED FOR REVIEW

The Court of Appeals held the trial court's non-WPIC instructions, which instructed the jury on defense of property, was error because Mr. Rose neither asserted the defense nor argued it, concluding it was harmless error. The record shows that Mr. Rose objected to the non-WPIC instructions not only because he did not raise or argue the defense, but also, the instruction was unnecessary, confusing, misleading, and included the incorrect element of "deadly force".

Is it reversible error for a court to give incorrect, misleading and confusing jury instructions that are unsupported by the facts and the law?

D. STATEMENT OF THE CASE

Eighteen-year-old Jeremy Rose spent his childhood raised by relatives and 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, leaving Mr. Rose homeless. (RP 639;669). He located a community shelter, but 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. The bathtub had been used 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

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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).

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 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 to retrieve a pick axe. (RP 260;299). When he returned, Mr. Rose heard and saw wood splintering around the deadbolt 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 having left their outside of the apartment. (RP 359). Officers later noted they only found grocery bags outside the apartment, 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, the instructions were confusing and misleading. Defense counsel also objected as the element involved in first degree assault is "great bodily harm" and use of a deadly weapon. (RP 715). Counsel objected to the introduction of a new definition: "deadly force is the intentional application of force through any means reasonably likely to cause death or serious physical injury." (RP 710-717). Over defense objection, the trial court reasoned that it 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).

During closing argument, the prosecutor argued:

> " From start to finish, what the defendant was doing that night was keeping them out of the apartment, out of the apartment building, and out of the apartment.
> And why is that?
> Because he believed that it was his. He believed that he had the right to defend that apartment. And under the law, he just didn't. He didn't have any right to defend real or personal property that didn't belong to him. He certainly had no right to use deadly force to defend property that didn't belong to him."

(RP 727-28).

> "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.*"

(RP 729).

"Now, what is it that is going through the defendants mind as he's attacking Susan Ortloff? Well, the likeliest thing is she's the first one through the door. *He's driving home the message that, no, this is my apartment. I'm keeping it. You're not coming in here. This is mine, get out. He'd been telling them to stay out, and he was driving home the point that they needed to stay out. In doing so, he had the knife and he stabbed her in the neck. That's what the defendant's plan was or intent was from start to finish.*"

RP 730.

"And that is that the defendant decided to resist their entry into the apartment with a deadly weapon..."

RP 731.

"...[a]n individual's use of force is not lawful, that's not lawful.... (*Referring to instruction no. 21*): You can't use force to defend property that doesn't belong to you, essentially what that says. And the one beyond that is you can't use deadly force to protect property either."

RP 737.

"You can't use force to defend that apartment. It didn't belong to him."

RP 752.

"What this case truly is about is the defendant resisting that by the application of force which, according to these two instructions, which I put up on the overhead, Instruction No. 21 and 22, is not lawful."

RP 775.

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 made a timely appeal. (CP 166-178).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this Court should accept review of this issue because the decision of the Court of Appeals conflicts with decisions of this Court and other Courts of Appeal.

This Court has held that jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when viewed as a whole properly inform the trier of fact of the applicable law. *Bodin v. City of Stanwood,* 130 Wn.2d 726, 732, 927 P.2d 240 (1996). A challenge to the sufficiency is reviewed *de novo*, with the Court examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portions in the context of all the instructions given. *State v. Pirtle,* 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert.denied,* 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). A court is not required to, nor should it, give an

instruction which is improper under the facts of the case, is misleading, and contains an incorrect statement of the law.

1. The Instructions Were Improper Under The Facts Of This Case And Did Not Properly Inform The Jury Of The Applicable Law.

The foundation of jury instruction 21 and the prosecutor's theory and argument was the conclusion that entry and use of the apartment building was unlawful. Based on *State v. Mierz,* 127 Wn.2d 460, 901 P.2d 286 (1995), the instruction married the WPIC instruction for criminal trespass (WPIC 60.15; 65.02) with the WPIC instruction on the use of lawful force (WPIC 17.02). It was a novel and unprecedented instruction.

Not only was Mr. Rose never charged with criminal trespass, but it was clear from testimony that the building had been legally abandoned[2] by its owner. It had noxious chemicals, the floor was littered with used needles, it was without electricity or running water, and there was no evidence produced by the State of an owner or building manager who laid claim to oversaw the property, or paid taxes on it.

It is a defense to criminal trespass that a building involved in the trespass was abandoned. RCW 9A.52.090(1). The defense negates the unlawfulness. Thus, as a matter of law, one who enters or remains, as Mr.

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[2] Although 'abandoned' is to defined by statute in Washington, undefined statutory terms are given their usual and ordinary dictionary meaning. *State v. Sunich,* 76 Wn.App. 292, 296, 84 P.2d 1 (1994).

Rose did, in an abandoned building is not unlawfully present or in possession of the apartment. The term "possession" in the non-WPIC instruction informed the jury that because Mr. Rose did not pay rent, he was unlawfully in the building as a matter of law. There is no statute that provides that unless an individual is licensed, invited or otherwise privileged to possess property he is in unlawful possession.

Given the facts of the case, the instruction unnecessarily and prejudicially emphasized the State's legal theory that Mr. Rose was protecting the apartment space rather than his person, and further, that he had no right to protect the apartment space. The instruction was incorrect and misleading.

2. The *Jury Instruction No. 21* Reduced The State's Burden To Prove Lack of Self-Defense By Creating The Legal Assumption That Mr. Rose Was Unlawfully In Possession of The Apartment.

The second facet of instruction 21 relied on the holding in *Mierz* to create the legal assumption that Mr. Rose was unlawfully in possession of the apartment. In *Mierz,* the defendant housed coyotes on his property. *Mierz,* 127 Wn.2d at 476. He was required to but did not obtain a permit to possess them. *Id.* at 464. When wildlife agents attempted to seize the animals, Mierz ordered his dogs to attack the agents and, he himself, also bit an agent. *Id.* at 468. He was charged with unlawful possession of wildlife and two counts of third degree assault. He relied only on a

defense of the property. The Count held 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 if he were charged with criminal trespass, had a complete defense as the building was abandoned. *State v. Olson,* 182 Wn.App. 362, 375-76, 329 P.3d 121 (2014). The State never proved he lacked license to enter or remain there. The jury instruction was misleading, and an incorrect statement of the law.

The jury instruction created an incorrect legal assumption that Mr. Rose had no right to be on the property. With that assumption, the State then merely had to prove that he was protecting the apartment, rather than himself. This instruction and argument were misleading and lowered the State's burden to disprove defense of self.

3. Jury Instruction No. 22 is Flawed, Prejudicial, and Requires Reversal.

Instruction No. 22 melds the statute definition of "deadly force" (RCW 9A.16.010(2)), the statutory lawful use of force 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 instruction is confusing,

misleading, and the cases cited to by the State to substantiate the instructions are inapplicable to this case. (CP 50).

Significantly, Mr. Rose did not raise the defense of defense of property and the instruction on the limits of use of "deadly force" or a "deadly weapon" to protect property was inapplicable. Nevertheless, Washington law holds that 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 concept of necessity was affirmed in this Court's holding in *State v. Brightman,* 155 Wn.2d 506, 524, 122 P.3d 150 (2005). The Court of Appeals held in *State v. Madry*, it was a matter for the trier of fact to determine whether the amount of force used was "unreasonable." *State v.*

Madry, 12 Wn. App. 178, 181, 529 P.2d 463 (1974)[3]. The Court there went on to quote: "The use, attempt or offer to use force upon or toward the person of another shall not be unlawful in the following cases: (3) Whenever used by a party about to be injured, or by another lawfully aiding him, in preventing or attempting to prevent an offense against his person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his possession in case the force is not more than shall be necessary" *Madry,* 12 Wn.App. at 181. The Court pointed out "the statute says that force is not unlawful in the enumerated situations, but does not state that it is unlawful in all other situations." *Id.*

Here, the jury here was misled to conclude that Mr. Rose was guilty because the law did not allow the use of "deadly force" or a "deadly weapon." The holdings of this Court and other Courts of Appeal are centered on the principle of necessity. Again, Mr. Rose did not raise a defense of property and the instruction misstated the law and misled the jury.

4. The Jury Instructions Were Not Harmless Error.

In its opinion, the Court of Appeals held the trial court erred by giving the two jury instructions, but found any error was harmless. (Slip Op. at 8). Whether flawed jury instructions are harmless errors depends on the

facts of the case; to find an error harmless, *beyond a reasonable doubt,* an appellate court must find that the alleged instruction did not contribute to the verdict. *State v. Grimes,* 165 Wn.App. 172, 187-88, 267 P.3d 454 (2011).

The errors here were not trivial, merely academic or a formality. *State v. Wanrow,* 88 Wn.2d 221, 237, 559 P.2d 548 (1977). The court's incorrect and misleading instructions could have served as a deciding factor in this credibility case.

If one were to believe Mr. Rose, he never shared the apartment with the Ortloffs. He boarded up the doors to keep the Ortloff's out. The Ortloff's were angry. Mr. Ortloff used a pick axe with sufficient force to break through the locked door. Ms. Ortloff entered yelling at him and then attacked him with a knife. Mr. Rose believed himself to be threatened with injury and fought to protect his life. The Ortloff's claimed that after their yelling, threatening, and breaking down the door, they casually entered the apartment to put away their groceries, when set upon by Mr. Rose.

The jury was required to determine the credibility of the witnesses. The numerous misstatements of the law in the disputed jury instructions per se misled the jury, raised a defense that Mr. Rose never asserted, and based on the facts of this case were unwarranted. The cases relied on by

the State for the jury instructions are readily distinguishable from the facts of this case. The jurors were to consider all the instructions and it cannot be said the erroneous instructions did not contribute to the verdict beyond a reasonable doubt.

F. CONCLUSION

Based on the foregoing facts and authorities, the erroneous jury instructions were not harmless, and Mr. Rose respectfully asks this Court to accept review of his petition.

Respectfully submitted this 5th day of May, 2016.

Marie Trombley, WSBA 41410
PO Box 829
Graham, WA 98338
253-445-7920
marietrombley@comcast.net

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

April 5, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY TRENTON ROSE, Appellant.	No. 47377-1-II UNPUBLISHED OPINION

MELNICK, J. — Jeremy Rose appeals his conviction of assault in the second degree with a deadly weapon enhancement. We hold that the trial court erred in instructing the jury on defense of property but the error was harmless; Rose invited the error on the deadly weapon enhancement instruction; and the trial court did not err by failing to instruct the jury on an inferior degree crime. We affirm Rose's conviction.

FACTS

The State charged Rose with two counts of assault in the first degree, both with deadly weapon enhancements, and resisting arrest. The jury found him guilty of one count of assault in the second degree,[1] while armed with a deadly weapon. It acquitted him of all other charges.

[1] Assault in the second degree is an inferior degree crime of assault in the first degree. RCW 10.61.003.

I. TRIAL TESTIMONY

Stephen and Susan Ortloff lived in Tacoma, but they had no residence.[2] In December 2013, they learned about a three-story abandoned building where other homeless people lived. The Ortloffs moved into the top floor of the building and lived with another couple. Rose and Michael Runyon also lived in the building.

Rose had recently turned 18 years old. He became homeless after he aged out of the foster care system and his grandmother's landlord evicted him from her home. In the first week of November 2013, he found the abandoned building and began to live there. Rose lived in the second floor apartment because it was cleaner than the rest of the building.

Although Stephen testified that at some point the Ortloffs moved into the second floor apartment and shared the space with Rose, Rose denied it. Sometime near the end of December, Rose left the building and traveled to Seattle to visit his brother. Susan testified that during this period, the Ortloffs moved into the second floor apartment without Rose's permission. Rose did not return until January 1, 2014.

On January 1, 2014, the Ortloffs returned from grocery shopping and found the entrances to the building barricaded shut. After they broke through the barricades and entered the building, they found the door to the second floor apartment locked. Stephen left, grabbed a pick axe, and broke the locks on the door. The Ortloffs pushed through the door and entered the apartment.

What happened next is in dispute. According to Stephen, the Ortloffs entered the apartment and Rose stood inside with a stick. Stephen went into the back room to put the grocery bags away. He returned from the back bedroom to hear Susan yelling that she had been stabbed. Stephen did

[2] To avoid confusion, we will refer to the Ortloffs by their first names. We intend no disrespect.

not see Rose stab Susan. Stephen attacked Rose, and after he realized that Rose stabbed him, the Ortloffs ran out of the building. Stephen did not see a weapon during the altercation.

According to Susan, the Ortloffs exchanged some intense words with Rose through the door before Stephen broke the locks and they entered the apartment. Rose yelled that he would throw Susan out the second story window if she entered the room. Stephen broke through the door and Susan entered the room with her bags. Susan turned around and saw something in Rose's hand that he used to stab her in the neck. She did not know what Rose used to stab her, but she thought it was a pen. She denied having a weapon in her possession. She testified that Stephen attacked Rose after Rose stabbed her.

According to Rose, when he returned to the building from visiting his brother, his possessions were strewn about the apartment. Rose decided to lock the door and block it with a couch. He heard the Ortloffs banging on the door and yelling. Rose was afraid, so he stayed quiet, hoping they would leave. The Ortloffs threatened to kill Rose and take all of his belongings. The Ortloffs broke through the door, Susan attacked Rose with a knife and he struggled to get it away from her. He admitted taking the knife out of Susan's hand and stabbing her once. Rose also admitted that he intended to stab Susan. Stephen charged in and tackled Rose. Stephen began to choke and punch Rose. Rose testified that he "let go of the knife after he attacked me, and I ended up finding it on the floor, so I stabbed him or cut him in the arm." 7 Report of Proceedings (RP) at 660. Rose testified that he cut Stephen across the forehead. Stephen then punched Rose and knocked him unconscious. When Rose awoke, the Ortloffs were gone. Rose went to the hospital to take care of his injuries.

Susan also went to the hospital for her injuries. Dr. Thomas Ferrer attended to Susan in the emergency room. He diagnosed Susan with a stab wound and a "small amount of collapse" of the lung. 5 RP at 379.

On January 3, 2014, Officer James Land arrested Rose. Land did not find a weapon on Rose or in his belongings. Land testified that Rose had a black eye when he was arrested.

II. JURY INSTRUCTIONS

At trial, both Rose and the State proposed similar deadly weapon jury instructions, but Rose's instruction included an extra concluding sentence. The trial court used Rose's proposed instruction that reads as follows.

> For purposes of a special verdict the State must prove beyond a reasonable doubt that the defendant was armed with a deadly weapon at the time of the commission of the crime charged in Counts One and Two and the lesser included crimes for those counts.
>
> A person is armed with a deadly weapon if, at the time of the commission of the crime, the weapon is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the weapon and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the weapon and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime and the type of weapon.
>
> A knife having a blade longer than three inches is a deadly weapon. A deadly weapon is an implement or instrument that has the capacity to inflict death and, from the manner in which it is used, is likely to produce or may easily produce death. Whether a knife having a blade less than three inches long is a deadly weapon is a question of fact that is for you to decide.

Clerk's Papers (CP) at 112.

The State proposed two jury instructions, numbers 21 and 22, regarding the lawful use of force in defense of property. The State argued that RCW 9A.16.020(3) supported giving the

instructions and that although the instructions were not from the Washington Practice Pattern Criminal Jury Instructions (WPIC), they were supported by case law.

Rose argued to the trial court that the instructions on defense of property should not be provided to the jury because Rose was not requesting the instructions, and the instructions were not supported by the evidence. Rose proposed that WPIC 17.02[3] be used to instruct the jury on self-defense. Rose argued that he did not assert defense of property as a defense, and therefore, the trial court should not instruct on it.

The trial court ruled in the State's favor because the instructions were "kind of a catch-all that includes self-defense against the person as well as the property." 7 RP at 708. The trial court agreed with the State that "to leave the instructions out of the instruction packet is just, again, to invite the jury to speculate as to whether or not the defendant could use force in defense of what he considered to be his apartment." 7 RP at 712. The trial court stated, "I'm going to give both 21 and 22 since it further defines what force is lawful or not lawful." 7 RP at 716. Jury instruction 21 states:

> 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 at 114. Jury instruction 22 states:

> 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.

[3] 11 WPIC 17.02, at 253 (2008).

CP at 115. In addition to instructing the jury on defense of property, the trial court instructed the jury on self-defense. Jury instruction 20 described when the use of force upon or toward another person was lawful. It also instructed on other related issues of self-defense.

Rose requested the trial court include an instruction for the inferior degree crime of assault in the third degree. The trial court denied his request, stating that it did not see the applicability of assault in the third degree because there was

> no criminal negligence here based on his testimony. And so I'm not going to give that instruction since this wasn't criminal negligence.
>
> This was an intent to do exactly what he did, albeit his claim was self-defense, but there was no ambiguity in terms of his testimony as to what he was attempting to do. And it wasn't like the knife slipped out of his hand or that was accidental, that he meant to stab her toe. There's just no element of negligence that I could interpret in this case based on his testimony, and I'm going to respectfully decline to give those lesser includeds.

7 RP at 706.

The jury found Rose guilty of the inferior degree crime of assault in the second degree while armed with a deadly weapon.

At sentencing, Rose filed a motion for a new trial based on the jury instructions and jurors' questions[4] that prejudiced his right to a fair trial; he argued they were essentially comments on the evidence and affected the outcome of the trial. The trial court denied the motion, reasoning the instructions stated the correct law as it exists in Washington. The trial court sentenced Rose to 25 months of confinement. Rose appeals.

[4] The jurors asked questions about the definition of resisting arrest, a further definition for self-defense, and seeing an exhibit that showed the apartment's layout.

ANALYSIS

I. DEFENSE OF PROPERTY JURY INSTRUCTIONS

Rose argues that the trial court erred in instructing the jury with non-WPIC defense of property instructions because they were improper under the facts, misleading, and incorrect statements of the law. We agree that the trial court erred in instructing the jury on a defense not requested by Rose, but we hold that the error was harmless.

A. Standard of Review

We review alleged errors of law in jury instructions de novo. *State v. Dow*, 162 Wn. App. 324, 330, 253 P.3d 476 (2011). "Generally, we review a trial court's choice of jury instructions for an abuse of discretion." *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). The precise wording of the instructions is within the broad discretion of the court. *See State v. Alexander*, 7 Wn. App. 329, 336, 499 P.2d 263 (1972). It is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its case theory. *State v. Portrey*, 102 Wn. App. 898, 902, 10 P.3d 481 (2000).

B. The Trial Court Erred By Giving Instructions 21 and 22

"When read as a whole, jury instructions must make the legal standard 'manifestly apparent to the average juror.'" *State v. Bland*, 128 Wn. App. 511, 514, 116 P.3d 428 (2005) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

Rose opposed the instructions not because they were incorrect statements of the law, but because they would confuse the jury and did not support his asserted defense. Rose did not claim

defense of property and argued to the trial court that instructing the jury on that defense would lead to confusion. The trial court gave the instructions because it did not "want the jury to think that somehow that they can infer he was defending his personal property and that was okay." 7 RP at 713. Rose made it abundantly clear in closing argument to the jury that he was asserting self-defense as a defense and not defense of property. We hold that the trial court erred by instructing the jury on a defense theory that Rose did not assert and did not argue.

C. Harmless Error

The State argues that if the trial court erred in instructing the jury with instructions 21 and 22, any error was harmless. We agree.

There are two standards that can be employed when determining if trial court errors relating to jury instructions are harmless. Under the constitutional harmless error standard, an error in jury instructions is harmless if within the entire context of the record, it is harmless beyond a reasonable doubt. *State v. Grimes*, 165 Wn. App. 172, 187, 267 P.3d 454 (2011). "To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged instructional error did not contribute to the verdict obtained." *Grimes*, 165 Wn. App. at 187-88. "In deciding whether the error contributed to the verdict and whether it is harmless, the court must 'thoroughly examine the record' and may consider how the case is argued to the jury." *State v. Johnson*, 116 Wn. App. 851, 857, 68 P.3d 290 (2003) (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)). Under the nonconstitutional harmless error standard, an error requires reversal only if there is a reasonable probability that the error materially affected the outcome of the trial. *State v. Gower*, 179 Wn.2d 851, 854-55, 321 P.3d 1178 (2014).

The State proposes that we utilize the constitutional harmless error standard. Because this standard benefits Rose, and assuming, but not deciding that the instructional error was

constitutional in nature, we employ the standard the State proposes. We conclude that any errors in the jury instructions were harmless because, beyond a reasonable doubt, any error did not impact the jury's verdict.

In closing, the State focused on the defense of property, arguing that Rose "had no right to use deadly force to defend property that didn't belong to him." 7 RP at 728. The State cited to jury instructions 21 and 22: "You can't use force to defend property that doesn't belong to you . . . [a]nd the one beyond that is you can't use deadly force to protect property either." 7 RP at 738. The State reiterated a number of times that Rose could not "use force to defend that apartment. It didn't belong to him." 7 RP at 752. However, the State also focused on the self-defense instruction that Rose's use of force was not reasonable and therefore, was not a lawful use of force.

Conversely, in closing, Rose argued that the State "talked a lot about property versus persons. What the State is saying [is] that [Rose] had no right to use force against the Ortloffs because it was his intention to protect property and property that wasn't his." 7 RP at 766. The defense unequivocally told the jury that although Rose wanted to keep the Ortloffs out of the building, "that doesn't mean that the force that was being used [by Rose] was . . . to protect property." 7 RP at 767. The defense further argued that Rose had a right to defend himself and "defend his person." 7 RP at 767. Rose made it clear to the jury that he acted in self-defense and not in defense of property.

Because Rose made it abundantly clear to the jury in his closing argument that he did not assert the defense of property, he only asserted that of self-defense, any instructional error was harmless. In addition, both Rose and the State argued that Rose did not act in defense of property. Therefore, both parties argued to the jury that jury instructions 21 and 22 did not apply. Rose fails to show that he suffered prejudice. The trial court's error is harmless beyond a reasonable doubt.

II. STATEMENT OF ADDITIONAL GROUNDS (SAG) CLAIMS

A. Jury Instruction 19 – Deadly Weapon

Rose asserts in his SAG that the trial court erred by instructing the jury on the deadly weapon enhancement in instruction 19 for various reasons. Because Rose proposed the instruction given by the trial court, we are precluded from reviewing the assertion.

The Washington Supreme Court has held, "[a] party may not request an instruction and later complain on appeal that the requested instruction was given." *State v. Boyer*, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). Although a "strict rule," we "have rejected the opportunity to adopt a more flexible approach." *State v. Studd*, 137 Wn.2d 533, 547, 973 P.2d 1049 (1999). Under the invited error doctrine, "even where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn. App. 75, 89, 107 P.3d 141 (2005).

Here, the trial court instructed the jury according to the instruction Rose proposed and invited error precludes our review.

B. Inferior Degree Crime Instruction

Rose asserts that the trial court erred in failing to give his proposed instruction on the inferior degree crime of assault in the third degree. We disagree.

In *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), the Washington Supreme Court "set forth a two-prong test to determine whether a party is entitled to an instruction on a lesser included offense under RCW 10.61.006."[5] *State v. Condon*, 182 Wn.2d 307, 316, 343

[5] The parties argued the case in terms of lesser included offense rather than inferior degree offense. Although the analysis differs when a trial court considers a request for an instruction on an inferior degree offense and when it considers a request for a lesser included offense, the distinction between lesser included and inferior degree offense instructions is not, however, significant in this case. *See State v. Fernandez-Medina*, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000). "This is so because

P.3d 357 (2015). An instruction on an inferior degree offense is properly administered when: "(1) the statutes for both the charged offense and the proposed inferior degree offense proscribe but one offense; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense." *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (internal quotation marks omitted) (quoting *State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d 381 (1997)). "The purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence." *Fernandez-Medina*, 141 Wn.2d at 455. The party requesting the instruction is only entitled to the instruction when both prongs are satisfied. *Condon*, 182 Wn.2d at 316.

Both Rose and the State agree that the legal prong was satisfied. Therefore, we must determine whether the factual prong was satisfied. "When evaluating whether the evidence supports an inference that the lesser crime was committed, courts view the evidence in the light most favorable to the party who requested the instruction." *State v. Henderson*, 182 Wn.2d 734, 742, 344 P.3d 1207 (2015). The rule is particularly important in cases "where the numerous witness accounts varied widely and often conflicted with one other." *Henderson*, 182 Wn.2d at 742. "Our case law is clear, however, that the evidence must affirmatively establish the

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the test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense only with respect to the legal component of the test." *Fernandez-Medina*, 141 Wn.2d at 455. Here, Rose and the State each concede that the legal component of the test is satisfied. Therefore, as in *Fernandez-Medina*, we focus on the factual prong as stated in *Workman*, 90 Wn.2d 443.

defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *Fernandez-Medina*, 141 Wn.2d at 456.

We review a trial court's decision regarding the second prong of the *Workman* test for abuse of discretion. *Henderson*, 182 Wn.2d at 743. A court abuses its discretion when its decision is based on the incorrect legal standard. *Henderson*, 182 Wn.2d at 743.

Rose's proposed jury instruction on assault in the third degree correctly defined the elements of the crime: "A person commits the crime of assault in the third degree when he, with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm." CP at 74. Rose's proposed instruction also defined criminal negligence from WPIC 10.04, at 212 (2014) as:

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.
>
> When criminal negligence as to a particular result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly or recklessly as to that result.

CP at 75.

The trial court determined that because the elements of assault in the third degree under the proposed alternative included a different mens rea from either of assault in the first or second degree, no factual basis existed to give the instruction. Rose admitted to stabbing Susan. He also admitted that he intended to stab her. Even when viewing the evidence in the light most favorable to Rose, no factual basis supported that he acted with negligence. Therefore, the trial court did not abuse its discretion by failing to instruct on the inferior degree crime.

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, J.

Sutton, J.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Petitioner Jeremy Rose, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Petition for Review was sent by first class mail, postage prepaid or by electronic service by prior agreement between the parties on May 5, 2016 to:

Jeremy Rose
PO Box 1231
Tacoma, WA 98401

EMAIL: PCPatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecuting Attorney

Marie Trombley, WSBA 41410
Po Box 829
Graham,WA 98338
253-445-7920
marietrombley@comcast.net

TROMBLEY LAW OFFICE

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