Supreme Court No. 97567-1
(COA No. 77560-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER CANFIELD,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Christopher Canfield asks this Court to review the opinion of the Court of Appeals in *State v. Canfield*, No. 77560-0-I (issued on July 22, 2019). A copy of the opinion is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. So long as the trial court understands the reason a party objects to a jury instruction, that party preserves its objection for review. Here, trial counsel objected to the trial court instructing the jury on incomplete portions of the Residential Landlord Tenant Act, and the court understood the objection, noting that it could be reversible error to provide the instruction. Where trial counsel clearly objected to the controversial jury instruction and the court understood the nature of the objection, is the objection preserved for purposes of review?

2. The right to act in self-defense and defense of one's property, is protected by due process, by statute, and by article I, section 24. The law of self-defense must be made manifestly clear to the average juror. Cobbling together incomplete portions of the Residential Landlord Tenant Act, the trial court instructed the jury that landlords have no right to evict tenants by force. Did the court's instructions dilute the prosecution's heavy burden of disproving defense of property and deprive Mr. Canfield of his constitutionally protected right to defend himself and his property?

3. Judges are prohibited by Article IV, section 16 from commenting on the evidence, including instructing a jury that matters of fact have been established as a matter of law. Here, the court instructed the jury a landlord is may not remove or exclude a tenant from a premises if a landlord-tenant rental agreement exists. The court also defined the terms "landlord-tenant rental agreement" and "tenant," but did not instruct the jury to consider whether the State had proved the existence of a landlord-tenant relationship beyond a reasonable doubt. Did the court's instruction constitute a comment on the evidence that a landlord-tenant agreement existed such that Mr. Canfield could not assert defense of property?

C. STATEMENT OF THE CASE

Mr. Canfield inherited property in Monroe from his mother. RP 338. There were several structures on the property, including a mobile home, two tow-behind trailers, and a camper. *Id*. Mr. Canfield resided in the mobile home, and he let homeless acquaintances live with him and in the other structures on the property. RP 338-39.

In January 2017, Mr. Canfield met Cheryl Boersema. RP 339. At the time, Ms. Boersema was living in a tent, and Mr. Canfield "felt sorry for her and didn't want her to be on the street." RP 341. He allowed her to live in the camper and told her that when she got "on her feet" and obtained an income, she could begin paying him rent. RP 341. From that

time through the trial, Ms. Boersema never paid rent. *Id*. There was no written lease and no agreement as to the length of Ms. Boersema's stay. RP 341-42. Mr. Canfield merely asked that she not start fights and not consume hard drugs on the property. RP 342.

On the evening of June 18, 2017, Mr. Canfield had taken his medications and went to take a nap in his mobile home. RP 352. While in his bedroom, he heard yelling and screaming in the front room. RP 352. He went out to inspect and learned from his roommate, Deana Hupp, that Ms. Boersema "had dope and wasn't sharing." RP 352. Mr. Canfield saw Ms. Boersema outside walking back towards the camper with John Fulcher. RP 358. Mr. Canfield estimated Mr. Fulcher was approximately five to six inches taller than him and in his 30s or 40s, while Mr. Canfield was 58 years old and five-foot-three. RP 359.

Mr. Canfield waited a few minutes then went outside to his camper to ask Ms. Boersema and her friend to leave. RP 360. He did not bring anything with him. RP 360. Inside the camper, Mr. Canfield saw baggies on the bed between Ms. Boersema and Mr. Fulcher and believed they contained methamphetamine. RP 361. He confiscated the drugs and ordered them to leave the property. RP 362. He then returned to his mobile home and waited for Ms. Boersema to leave. RP 362.

After about ten minutes, Mr. Canfield realized Ms. Boersema was not leaving. RP 362-63. Rather than call the police, which he worried could to lead to Ms. Boersema's arrest, Mr. Canfield returned to the camper, carrying a machete with him for protection. RP 363-64. Mr. Canfield feared for his safety because Ms. Boersema and Mr. Fulcher were both intoxicated, and Mr. Fulcher was larger than he was. RP 364. Without raising the knife from his side or making threats, Mr. Canfield again ordered both people to leave his property. RP 365-66.

This time, Ms. Boersema and Mr. Fulcher left in Mr. Fulcher's car. RP 367. They drove only one block away, where Ms. Boersema exited the car and called the police. RP 281. Deputy Leyda responded to the call. RP 289. He noted she was very intoxicated, and her speech was heavily slurred and repetitive. RP 290-91. She staggered and had difficulty walking. RP 310. Ms. Boersema had a difficult time recounting the incident. RP 291. Although she claimed at trial Mr. Canfield held the machete to her throat and threatened to "cut our F-ing heads off," she did not report this behavior to police that night. RP 291, 254, 310-11.

Deputy Leyda contacted Mr. Canfield, who was entirely forthcoming. RP 312. He was cooperative with the deputy, turned over the suspected drugs he had confiscated, and readily answered the deputy's questions. RP 312. Mr. Canfield denied assaulting anyone and even

showed Deputy Leyda the knife he had carried. RP 313. Mr. Canfield showed him around and said he was tired of the drugs on his property. RP 315. Despite Mr. Canfield's explanation, the deputy arrested him. RP 370.

The State charged Mr. Canfield with one count second degree assault and one count harassment. CP 181-82. The State requested select portions of Washington's Residential Landlord-Tenant Act ("RLTA") be added to Instruction 15, the self-defense and defense of property instruction. RP 385. It argued Mr. Canfield had testified sufficiently to establish a rental agreement with Ms. Boersema and thus could not assert defense of property. RP 386-87. The parties and the court discussed the proposed instruction at length over two days. RP 385-486. Defense objected repeatedly to the modified instruction, stating, "I think this instruction . . . is a correct statement of some of the applicable law, but it's problematic for many different reasons because there are other provisions that might apply at the beginning." RP 464. Defense also noted confusion over whether the civil RLTA statute could undermine self-defense and defense of property in a criminal setting. RP 425-26.

Nevertheless, the court incorporated portions of the RLTA into Instruction 15. RP 413-415; CP 118. The court instructed the jury on the definitions of tenant and rental agreement, and instructed the jury it is unlawful for a landlord to remove a tenant without a court order. CP 118.

Although the court gave the instruction to the jury, it expressed serious concerns over the validity of the modified Instruction 15. RP 459-461. The court stated:

> "If this was a landlord-tenant type situation, the State was entitled to an instruction that they requested. But even if that were true -- which I don't know if it is true or not -- I'm not sure the instruction was correct. We're way out of the bounds of anything we could find any case authority on. And if it was wrong, it will I believe clearly be reversible error.

RP 579 (emphasis added). The jury convicted Mr. Canfield of assault in the second degree. CP 100. It rejected Ms. Boersema's claims Mr. Canfield threatened to kill her and acquitted Mr. Canfield of harassment. CP 99.

Finding that Mr. Canfield had failed to preserve the issues below, the Court of Appeals declined to reach the merits of his claims that Instruction 15 as modified was improperly given, was incomplete, and lacked clarity, thereby denying him the right to defend his property. Slip Op. at 6-10. The Court further held the modified instruction did not constitute a comment on the evidence because it was an accurate statement of the law. Slip Op. at 11.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Mr. Canfield properly preserved his objection to Instruction 15, clearly stating the reasons for the objection, which the trial court understood.

The trial court fully understood the basis for Mr. Canfield's objection to the modified self-defense and defense of property instruction (Instruction 15). Accordingly, the Court of Appeals erred in concluding Mr. Canfield failed to preserve the issues on appeal. "As long as the trial court understands the reasons a party objects to a jury instruction, the party preserves its objection for review." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 747, 310 P.3d 1275 (2103).

Washburn is directly on point. In *Washburn*, the petitioner argued the Court of Appeals erred in holding it did not adequately object to the trial court's decision to grant an instruction. *Id*. The petitioner contended that because the trial court knew of the substance of its objection to an instruction, the objection was preserved for review. *Id*.

This Court reasoned that CR 51(f) merely requires that a party objection to an instruction "state distinctly the matter to which he objects and the grounds of his objection." *Id*. This Court interpreted this language to mean that in order to assess whether a party sufficiently preserved an issue for review, a court must assess "whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection." *Id*.

(quoting *Crossen v. Skagit County*, 33 Wn.2d 355, 358, 669 P.2d 1244 (1983)) (internal citations omitted). Because the petitioner formally objected to the trial court's denial of the requested instruction, and because the court manifested an understanding of the basis of the petitioner's exception to the jury instructions, this Court held the petitioner preserved the issue for appellate review. *Id*. at 747-48.

Similarly here, defense formally and vehemently objected to the modified instruction. RP 430, 463-64, 478. The parties and the court discussed the issue at length over two days. More importantly, the trial court manifested an understanding of the basis of Mr. Canfield's objection to Instruction 15. The court understood the instruction could result in burden shifting or give the appearance that defense of property was an affirmative defense. RP 459. It understood the instruction could be confusing, incomplete, or inadequate. RP 459-60. The court expressed serious concerns over giving the instruction, stating, "I'm not sure the instruction was correct. We're way out of bounds of anything we could find any case authority on. And if it was wrong, it will I believe clearly be reversible error." RP 579.

Furthermore, the language of CR 51(f) (relied upon in *Washburn*) is nearly identical to CrR 6.15. However, under CR 51, counsel must "state *distinctly* the matter to which counsel objects," while under CrR

6.15, counsel need only "state the reason for the objection." Accordingly, CrR 6.15 the threshold for preservation in the criminal context is lower.

The Court of appeals relied on *State v. Scott* to preclude review of Mr. Canfield's claims, but that case is inapposite. In *Scott*, the defendant never objected to the instruction at issue. 110 Wn.2d 682, 683-84, 757 P.2d 492 (1988). Likewise, the cases cited by this Court to support its decision not to reach the merits in *Scott* all involved defendants who failed to articulate a basis for their objection to a jury instruction. *Id*. at 686 (citing cases).

Here, Mr. Canfield preserved his issues for appeal, timely and repeatedly objecting to Instruction 15 and stating the reasons for his objection. Moreover, the trial court demonstrated a thorough understanding of the nature of the objection. Therefore, the Court of Appeals erred in holding Mr. Canfield did not preserve his claims for review, and this Court should reverse.

2. The court's faulty lawful force instruction relieved the State of its burden of proving each element of the defense and denied Mr. Canfield a fair trial and the right to present his defense.

a. The right to defend one's property is constitutionally and statutorily guaranteed.

The right to defend one's property is constitutionally guaranteed. *State v. Burk*, 114 Wn. 370, 374, 196 P. 16 (1921); *see also Cook v. State*,

192 Wn. 602, 611, 74 P.2d 199 (1937); *State v. Hull*, No. 31078-7-III, 2014 WL 7231496, (Wash. Ct. App. Dec. 18, 2014) (unreported)[1]; U.S. Const. amends. II, V, XIV; Art. I, §§ 3, 30. It is also codified under RCW 9A.16.020(3), permitting the use of force to prevent "malicious trespass, or other malicious interference with real or personal property."

A person is entitled to an instruction on defense of property so long as there is "some evidence" to support that theory. *State v. Yelovich*, 1 Wn. App. 2d 38, 42, 403 P.3d 967 (2017). The court must evaluate evidence supporting a defense of property instruction from the standpoint of a reasonably prudent person who knows everything the defendant knows. *Id*. (citing *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002)). "In defense of property, there is no requirement to fear injury to oneself." *State v. Bland*, 128 Wn. App. 511, 513, 116 P.3d 428 (2005).

An accused's right to due process in a criminal trial "is, in essence, the right to a fair opportunity to defend against the State's accusations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). Where a defendant is entitled to a lawful force instruction, the instruction must "make the relevant legal standard manifestly apparent

[1] Cited pursuant to GR 14.1.

to the average juror." *Id*. (citing *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)) (internal quotation marks omitted). The court may not mislead the jury as to its duties under the law by misstating the law in the instructions. *State v. Irons*, 101 Wn. App. 544, 559, 4 P.3d 175 (2000). Any misstatement "must be presumed to have misled the jury in a manner prejudicial to the defendant." *Id*. (internal citation omitted).

Additionally, the State must disprove a defense where (1) the statute indicates the Legislature's intent to treat the absence of a defense as "one of the elements included in the definition of the offense of which the defendant is charged;" or (2) the defense negates an essential ingredient of the crime. *State v. McCullum*, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); *see also State v. Deer*, 175 Wn.2d 725, 734, 287 P.3d 539 (2012), cert. denied, 133 S. Ct. 991 (2013) ("when a defense 'negates' an element of the charged offense . . . due process requires the State to bear the burden of disproving the defense").

b. The court improperly imbedded incomplete portions of the Residential Landlord-Tenant Act into the self-defense and defense of property instruction and misled the jury.

This Court has set a high threshold for clarity of jury instructions: "The standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve the ambiguous wording of [a statute]

via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction." *LeFaber,* 128 Wn.2d at 902.

Here, the court altered WPIC 17.02, which instructs the jury on lawful force, including defense of property. Instead of providing the pattern instruction, the court imbedded into the instruction incomplete portions of Washington's Residential Landlord-Tenant Act ("RLTA"), codified at Chapter 59.18 RCW. The additions read as follows:

> If a landlord-tenant rental agreement exists, it is unlawful for a landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing. It is unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. A tenant is a person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement. A rental agreement is an agreement which establishes or modifies the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit.

Instruction 15, CP 118. This portion of the instruction is cobbled together from small portions of RCW 59.18.030 and 59.18.290.

Like a "first aggressor" instruction, which tells the jury a defendant is not entitled act in lawful self-defense if he "provoke[ed] a belligerent response" and created the necessity for self-defense, these additions to the pattern defense of property instruction allowed the jury to disregard Mr.

Canfield's claim of defense of property. 11 Washington Practice: Pattern Jury Instructions, Criminal 16.04 (4th Ed. 2016).

This appears to be an issue of first impression in Washington; however, the law on "first aggressor" instructions is helpful. The "first aggressor" instruction is disfavored because other self-defense instructions are generally sufficient for the prosecution to argue its theory of the case. *State v. Riley*, 137 Wn.2d 904, 910 n.2, 976 P.2d 624 (1999). If given erroneously, this instruction impermissibly denies a defendant the right to act in self-defense. *State v. Wasson*, 54 Wn. App. 156, 159-60, 772 P.2d 1039 (1989). Courts must be careful when providing this instruction because it relieves the State of its burden to disprove self-defense beyond a reasonable doubt and deprives a defendant of a constitutionally-protected defense. *Riley*, 137 Wn.2d at 910, n.2.

Likewise, the lawful force instruction given here included language which relieved the prosecution of its heavy burden to disprove Mr. Canfield's claim of defense of property. The instruction told the jurors that if a landlord-tenant agreement existed, Mr. Canfield was not entitled to use force to remove a tenant. This instruction was incomplete, lacked clarity, and relieved the State of its burden to disprove the defense.

i. <u>The instruction was incomplete.</u>

First, the portions of the RLTA incorporated into the lawful force instruction fail to define necessary terms and contain only snippets of certain sections of the act. For example, the instruction defines "tenant" and "rental agreement," but does not define "landlord" or "dwelling unit." This is particularly important here where Mr. Canfield *and* Ms. Boersema both deny that Mr. Canfield was a landlord, and the structure in question is a portable camper resting in the bed of a pick-up truck. These incomplete definitions are confusing and unhelpful because they do not help the jury determine whether Mr. Canfield and the complainant landlord and tenant.

Moreover, the instruction leaves out the fact that RCW 59.18.290, which addresses removal and holding over, does not constitute a crime but rather creates a civil cause of action. ("Any tenant so removed or excluded in violation of this section may recover possession of the property or terminate the rental agreement and, in either case, may recover the actual damages sustained. The prevailing party may recover the costs of suit or arbitration and reasonable attorney's fees"). The instruction as given directs the jury, "it is unlawful for a landlord to remove or exclude from the premises a tenant . . . except under a court order." CP 118. But, this incorrectly implies the landlord is committing a crime, which arguably would prevent him from later claiming defense of property. This distinction is particularly important in the context of a criminal trial, where

unlawfulness refers to criminal activity. It is also particularly concerning here, where the "unlawful removal" language is incorporated into the lawful force defense instruction and undercuts this constitutional defense.

ii. The instruction lacked clarity.

In this case, the additional language from the RLTA muddies Instruction 15. The instruction does not make clear what is required to form a rental agreement, and as discussed above, does not clarify that the RLTA does not criminalize self-help eviction. Assuming for the sake of argument only that a civil statute can undermine a constitutionally-protected defense, the instruction here also fails to explicitly state defense of property is not available to a landlord who removes a tenant without a court order. This is in contrast to a "first aggressor" instruction, which explicitly instructs the jury that "self-defense is not available as a defense" if the jury finds the defendant was the first aggressor. Thus, the instruction here presents an even greater danger of confusing the jury, diluting the State's burden, and denying Mr. Canfield his right to a fair trial.

iii. The instruction relieved the State of its burden to disprove Mr. Canfield's claim of defense of property beyond a reasonable doubt.

Even assuming the RLTA could undercut a defendant's constitutionally-protected right to defend his property, this haphazard instruction did not even have the minimal procedural safeguards included

in a "first aggressor" instruction. The "first aggressor" instruction directs the jury to disregard a defendant's lawful force defense if, and only if, it determines beyond a reasonable doubt a defendant was the first aggressor. 11 Washington Practice: Pattern Jury Instructions Criminal 16.04 (4th Ed. 2016). The lawful force instruction in this case provided no such safeguard for Mr. Canfield's right to present his defense. The court's instruction required the State to prove the existence of a landlord tenant relationship, but it did not establish the requisite burden of proof. That is, the instruction failed to tell the jury that it must find the existence of a landlord-tenant relationship beyond a reasonable doubt before it could disregard Mr. Canfield's claim of defense of property. This faulty instruction relieved the State of its burden to disprove Mr. Canfield's defense of property claim and allowed the jury to reject Mr. Canfield's defense in the absence of proof beyond a reasonable doubt.

c. The court's faulty instruction on the law of defense of property denied Mr. Canfield a fair trial.

Jury instructions must make the legal standard manifestly apparent to the average juror. *Bland*, 128 Wn. App. at 513 (internal citations omitted) (internal quotations omitted). More specifically, the instruction on defense of property must be manifestly clear. *Id*. at 515. An error is presumed prejudicial where jury instructions relieve the State of its burden

of proof. *State v. Eaker*, 113 Wn. App. 111, 120, 53 P.3d 37 (2002), *rev. denied*, 149 Wn.2d 1003 (2003). The State must prove beyond a reasonable doubt the error did not contribute to the verdict. *Id*.

Here, the State based a significant portion of its closing argument on the theory Mr. Canfield and Ms. Boersema had a landlord-tenant relationship. RP 509-511. It urged the jury to find such a relationship existed and argued they had a rental agreement such that Mr. Canfield could not claim defense of property. *Id.* The State cannot reasonably claim the erroneous jury instruction did not contribute to the jury's verdict.

Moreover, even the court expressed grave concerns over the validity of the altered defense of property instruction:

> If this was a landlord-tenant type situation, the State was entitled to an instruction that they requested. But even if that were true -- which I don't know if it is true or not – I'm not sure the instruction was correct. We're way out of bounds of anything we could find any case authority on. And if it was wrong, it will I believe clearly be reversible error.

RP 579.

The court's erroneous instruction was incomplete, lacked clarity, and relieved the State of its burden to disprove defense of property. This instruction misled the jury, permitting them to convict Mr. Canfield based on incomplete and imprecise statements of landlord-tenant law, and denied Mr. Canfield his right to defend his own property. Reversal is required.

3. The court's erroneous lawful force defense instructions constituted an impermissible comment on the evidence.

"A judge is prohibited by article IV, section 16 from 'conveying to the jury his or her personal attitudes toward the merits of the case' or instructing a jury that 'matters of fact have been established as a matter of law.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006) (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). The court's personal feelings need not be expressly conveyed to the jury; it is sufficient if they are merely implied. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). "Thus, any remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *Levy*, 156 Wn.2d at 721.

The Court of Appeals declined to follow the reasoning in *Levy*, reading its holding narrowly to require "to-wit" language. Slip Op. at 11. It additionally determined that because Instruction 15 did not contain misstatements of the law, it could not constitute an improper comment on the evidence. Slip Op. at 11.

However, *Levy* is instructive. In *Levy*, the defendant was charged with burglary in the first degree. The to-convict instruction required the State to prove Levy entered or remained unlawfully in a "building, to-wit: the building of Kenya White." *Levy*, 156 Wn.2d at 716. This Court found

the phrase "the building of Kenya White" improperly suggested to the jury the victim's apartment was a building as a matter of law. *Id*. at 721.

Similarly here, the court's instruction defining tenant and rental agreement and telling the jury it is unlawful for a landlord to remove a tenant without a court order, constituted impermissible comments on the evidence. The instruction, which does not direct the jury to find a landlord-tenant relationship or the existence of a rental agreement beyond a reasonable doubt, strongly implies to the jury that Mr. Canfield was in fact a landlord and Ms. Boersema was his tenant. The court instructed the jury, "it is unlawful for a landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing." CP 118. The instruction also defined the terms "tenant" and "rental agreement," but not "landlord" or "dwelling unit," strongly implying Mr. Canfield was not entitled to claim defense of property because he had a rental agreement with Ms. Boersema. Regardless of whether this additional language is a correct statement of the law, it is incomplete and therefore misleading.

"Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 723 (internal citations omitted). Here, the State cannot prove that no prejudice resulted from the court's faulty instruction. The

instruction allowed the jury to ignore Mr. Canfield's claim of defense of property and relieved the State of its burden to disprove the defense. The State also capitalized on the erroneous instruction, urging the jurors to find Mr. Canfield had no right to defend his property because Ms. Boersema was his tenant.

Mr. Canfield was prejudiced the court's comments on the evidence, and reversal is required.

4. CONCLUSION

Based on the foregoing, Mr. Canfield respectfully requests that review be granted. RAP 13.4(b).

DATED this 21st day of August 2019.

Respectfully submitted,

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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. CHRISTOPHER ALLEN CANFIELD, Respondent.	DIVISION ONE No. 77560-0-I UNPUBLISHED OPINION FILED: July 22, 2019

DWYER, J. — Christopher Canfield appeals from his conviction for assault in the second degree, asserting several errors relating to the instruction provided to the jury on the defense of lawful use of force to defend property, Instruction 15. According to Canfield, Instruction 15 (1) improperly relieved the State of its burden to disprove the defense of protection of property, (2) was incomplete and lacked clarity, and thus denied him the right to defend his property, and (3) constituted an improper comment on the evidence by the trial judge. None of his contentions merit appellate relief. We affirm.

I

In 2017, Canfield owned land, and several structures on his land, including a mobile home, two tow-behind trailers, and a camper, in Monroe, Washington. Canfield lived in the mobile home and permitted several homeless acquaintances to live in the mobile home and other structures on his property for free. While he had no formal lease agreement with any of the people he allowed to live at his

property, he established rules and conditions for the individuals he permitted to live on his property, namely, no possessing or using hard drugs and no arguing.

In January 2017, Canfield met Cheryl Boersema and she moved onto Canfield's property. Canfield explained his rules concerning hard drugs and arguing and agreed that Boersema did not have to pay any rent until she was "on her feet," at which point she would pay him $300 per month to live on his property. There was no discussion of how long Boersema would be staying on the property, and no written lease. Canfield, however, considered their discussion about his rules and her staying on the property to be a verbal contract. Boersema, on the other hand, did not believe that she and Canfield had entered into any specific agreement about the terms of her stay on his property.

At approximately 10:30 p.m. on June 18, 2017, Canfield awoke to noise on his property, and was told by a roommate that Boersema "had dope and wasn't sharing." Upon hearing this, Canfield thought "Cheryl is breaking the rules and I'm going to have to ask her to leave." At this time, Boersema was staying in the camper and had a friend, John Fulcher, visiting. Canfield walked out to the camper from his mobile home, observed small bags of what he believed were methamphetamines in the camper,[1] seized the bags, and, screaming and using expletives, told Boersema and Fulcher that he did not tolerate drugs on his

[1] It was later discovered that the baggies contained only marijuana, not methamphetamines. Canfield did not consider marijuana to be a violation of his ban on hard drugs and permitted its use on the property.

property and that they had to leave the property. Canfield then returned to the mobile home and waited for Boersema and Fulcher to leave.

Approximately 10 minutes later, Boersema and Fulcher were still in the camper on Canfield's property and Canfield believed that they were not planning to leave. Grabbing a machete to protect himself,[2] he returned to the camper to again tell Boersema and Fulcher to leave the property.

Although the exact details of the encounter were later disputed at trial,[3] all parties agreed that Canfield went back to the camper and, still screaming and swearing, ordered Boersema and Fulcher to leave immediately. Boersema and Fulcher immediately left the property.

Soon thereafter, Boersema reported the encounter to the police. Deputy Christopher Leyda responded to the scene, and Canfield turned over the baggies of what he believed to be methamphetamines, showed Deputy Leyda his machete, and denied assaulting Boersema or Fulcher. Deputy Leyda arrested Canfield.

The State charged Canfield with one count of assault in the second degree and one count of harassment. At trial, Canfield proposed an instruction on defense of self, defense of others, and defense of property. The State objected to the court instructing the jury on defense of property, arguing that if the court did so instruct the jury, the court should also instruct the jury on certain

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[2] Canfield testified at trial that Fulcher was significantly younger and larger than him and that he was afraid of Fulcher and Boersema because they outnumbered him and appeared intoxicated.

[3] Canfield testified that he never raised the machete from his side or threatened to use it on Boersema or Fulcher. Boersema testified that he raised the machete to both her and Fulcher's throats and threatened to cut their heads off.

portions of Washington's Residential Landlord-Tenant Act of 1973 (RLTA), chapter 59.18 RCW, to allow the jury to decide whether a residential agreement existed between Canfield and Boersema, and thus whether Canfield had the right to remove Boersema from his property without a court order. [4]

Canfield's attorney objected, arguing that the evidence did not support giving such instructions and that the State's proposed instructions on the RLTA did not make it clear to the jury that Canfield could not rely upon the defense of property as a defense if there was a landlord-tenant relationship between Canfield and Boersema. When the trial judge asked Canfield's attorney for an alternative instruction that might be clearer, she stated, "I've outlined the issue that I think the jury needs to be instructed on, but I think the onus is on the State to craft the instruction."

After further discussion, the State offered a modified form of the standard defense of property instruction as a solution to the issue raised by Canfield's attorney. This modified instruction combined the State's proposed instructions on the RLTA with Canfield's defense of property instruction, inserting a definition of "tenant" and "rental agreement" into the defense of property instruction and explaining that landlords cannot evict tenants without a court order.

As the trial court considered whether to give the State's proposed modified defense of property instruction, the court specifically asked Canfield's attorney if she had any objections to, or wanted to present any argument about, the wording

[4] RCW 59.18.290(1) states: "It is unlawful for the landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing."

of what became Instruction 15. Although she objected generally to the issuance of a defense of property instruction setting forth any provisions of the RLTA,[5] Canfield's attorney declined to be heard on the wording of what became Instruction 15.[6] Thus, the trial court gave the following instruction to the jury as Instruction 15:

> It is a defense to a charge of assault in the second degree 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 or by someone lawfully aiding a person who he reasonably believes 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 offer to use force upon or toward the person of another is lawful when offered in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary. An owner or possessor of real or personal property has the right to prevent malicious trespass or malicious interference of property by use of force as indicated in this instruction. Trespass occurs when a person enters or remains on premises unlawfully, that is when that person is not then licensed, invited, or otherwise privileged to so enter or remain. If a landlord-tenant rental agreement exists, it is unlawful for a landlord to remove or exclude from the premises the tenant thereof except under a court order so authorizing. It is unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing. A tenant is a person who is entitled to occupy a dwelling unit primarily for living or dwelling purposes under a rental agreement. A rental agreement is an agreement which

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[5] At trial, Canfield's attorney asserted that the evidence was insufficient to require the inclusion of any provisions of the RLTA. Canfield does not make this assertion on appeal.

[6] Canfield's attorney did, however, later seek to add additional language to what became Instruction 15, but not any language relevant to the issues presented on appeal. The only modification Canfield's trial attorney sought was to include RCW 59.18.290(2) in the instruction rather than just RCW 59.18.290(1), which required adding the following text: "It is unlawful for the tenant to hold over in the premises or exclude the landlord therefrom after the termination of the rental agreement except under a valid court order so authorizing." The trial court included this language in Instruction 15. Canfield's attorney did not propose any other changes to the wording of Instruction 15.

> establishes or modifies the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit.
>
> The person offering to use the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force offered to be used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

The jury found Canfield guilty of assault in the second degree but acquitted him on the harassment charge. Canfield now appeals from his conviction for assault in the second degree.

II

Canfield contends that the trial court erred when it gave Instruction 15. According to Canfield, Instruction 15 (1) improperly relieved the State of its burden to disprove the defense of protection of property, (2) was incomplete and lacked clarity, and thus denied him the right to defend his property, and (3) constituted an improper comment on the evidence by the trial judge. None of his contentions have merit.

A

Canfield first contends that Instruction 15 improperly relieved the State of the burden to disprove Canfield's defense that he was entitled to use force to defend his property.

Canfield is incorrect. Instruction 15, after outlining the various situations in which the use of force or offering to use force against another is justified, states:

> 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 as to [the assault] charge.

Instruction 15 thus plainly explained that the prosecutor had the burden of proving, beyond a reasonable doubt, the absence of the defense of protection of property. Canfield's contention fails.

B

Canfield next contends that the inclusion in Instruction 15 of incomplete portions of the RLTA denied him his right to act in defense of his property. This is so, Canfield asserts, because the trial court did not give definitional instructions for the terms "landlord" and "dwelling unit" and because the inclusion of portions of the RLTA in Instruction 15 made the instruction on defense of property unclear. Canfield specifically asserts that the instruction failed to make clear what was required to form a rental agreement, failed to clarify that the RLTA does not criminalize self-help evictions, and failed to explicitly state that defense of property is not available as a defense to a landlord who removes a tenant without a court order. But Canfield did not properly preserve any of these claims of error for appeal.

"Under RAP 2.5(a), 'appellate courts will not consider issues raised for the first time on appeal.'"[7] State v. Fluker, 5 Wn. App. 2d 374, 396, 425 P.3d 903

[7] "[A] claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right." State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)(3)). But Canfield does not contend that any of his assignments of error amount to manifest error affecting a constitutional right. Indeed, definitional instructions do not qualify as such. State v. Stearns, 119 Wn.2d 247, 250, 830 P.2d 355 (1992); State v. Duncalf, 164 Wn. App. 900, 911, 267 P.3d 414 (2011), aff'd, 177 Wn.2d 289, 300 P.3d 352 (2013).

(2018) (quoting State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007)). "The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial." State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This general rule is amplified by CrR 6.15(c), which requires trial counsel to "state the reasons" for any objection. Our Supreme Court has cited this rule when refusing to review "asserted instructional errors to which no meaningful exceptions were taken at trial." Scott, 110 Wn.2d at 685-86.

First, Canfield did not argue at trial that Instruction 15 was incomplete because it did not define "landlord" or "dwelling unit." Nor did he present any alternative instructions to the trial court that included definitions of "landlord" and "dwelling unit." It is a longstanding rule that a party may not raise a claim of error regarding the absence of a definitional instruction for the first time on appeal. Scott, 110 Wn.2d at 691. Therefore, we decline to consider Canfield's argument that the trial court erred when it did not give definitional instructions for the terms "landlord" and "dwelling unit" and that the instructions given were thus "incomplete."

Second, Canfield also asserts that the inclusion of portions of the RLTA in Instruction 15 made the defense of property instruction unclear to the jury because the instruction failed to make clear what was required to form a rental agreement, failed to clarify that the RLTA does not criminalize self-help evictions, and failed to explicitly state that defense of property is not available as a defense

to a landlord who removes a tenant without a court order.[8] But Canfield did not make any of these arguments to the trial court.

At trial, Canfield did not propose any instructions adding to the definition of rental agreement, nor did he protest that the definition included in Instruction 15 was insufficient. Thus, as with his claims of error regarding the definitions of "landlord" and "dwelling unit," Canfield did not preserve this claim of error for appeal.[9] Scott, 110 Wn.2d at 691. Similarly, Canfield never objected to Instruction 15 on the ground that it failed to clarify that the RLTA is a civil statute, nor did he propose an alternative instruction that would inform the jury of the civil nature of the RLTA prohibition against self-help evictions.

Canfield's final explanation for his assertion that Instruction 15 was unclear—that the instruction fails to explicitly state that defense of property is not an available defense to a landlord who removes a tenant without a court order—was also not properly preserved for appeal. When the parties first presented proposed instructions to the trial court, Canfield's attorney argued that the State's proposed instructions would not make clear to the jury the law pertaining to when Canfield could not rely upon the defense of property as a defense should the jury find that there existed a landlord-tenant relationship between Canfield and Boersema. But when the trial judge asked Canfield's attorney for an alternative

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[8] To be clear, Canfield does not dispute on appeal that the evidence supported an instruction informing the jury about legal limitations on a landlord's ability to exclude tenants from real property but, rather, asserts that the judge provided unclear information about the law to the jury.

[9] Canfield is also incorrect that Instruction 15 failed to explain what is required to form a rental agreement. Indeed, rental agreement is explicitly defined in the instruction as "an agreement which establishes or modifies the terms, conditions, rules, regulations, or any other provisions concerning the use and occupancy of a dwelling unit."

instruction, she asserted, "I've outlined the issue that I think the jury needs to be instructed on, but I think the onus is on the State to craft the instruction."

After further discussion, the State offered what became Instruction 15. As the trial court considered whether to give Instruction 15, the court specifically asked Canfield's attorney if she had any objections or wanted to present any argument about the wording of Instruction 15. Canfield's attorney declined to be heard on the wording of Instruction 15.[10]

Canfield's attorney did not except to the wording of Instruction 15 on the basis now asserted. She did not request an alternative instruction setting forth additional language pertaining to the effect of a landlord-tenant relationship on Canfield's claim of defense of property. Because Canfield's attorney declined to object to the wording of Instruction 15 or to present any alternative instruction setting forth the language Canfield now asserts should have been included, Canfield did not preserve this claim of error for appeal.

C

Finally, Canfield asserts that Instruction 15 conveyed the trial judge's personal opinion of the evidence to the jury. We disagree.

The Washington Constitution prohibits a judge from expressing, to the jury, his or her opinion about the merits or facts of a case. CONST. art. IV, § 16. "But an instruction that states the law correctly and is pertinent to the issues raised in the case does not constitute a comment on the evidence." State v.

[10] Although, as already noted herein, Canfield's attorney did later seek to add language to Instruction 15, specifically language from RCW 59.18.290(2). The trial court included this language in Instruction 15. Canfield's attorney did not propose any other changes to the wording of Instruction 15.

Winings, 126 Wn. App. 75, 90, 107 P.3d 141 (2005) (citing State v. Johnson, 29 Wn. App. 807, 811, 631 P.2d 413 (1981)).

Canfield asserts that Instruction 15 is analogous to a first degree burglary to-convict instruction given in State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006), which provided that the State was required to prove the defendant had entered or remained unlawfully in a "building, to-wit: the building of Kenya White." Therein, the defendant was convicted of burglary in the first degree. Levy, 156 Wn.2d at 716. In reversing the conviction on appeal, the Levy court explained that the jury was required to determine whether Kenya White, the victim, lived in a building and the "to-wit: the building of Kenya White" part of the instruction improperly implied that the evidence showed that the structure Kenya White lived in was a building. 156 Wn.2d at 721.

Levy is inapposite. Instruction 15 does not include any language similar to the "to-wit" instruction in Levy. Furthermore, at trial, defense counsel stated that she considered the law set forth in Instruction 15 to be accurate. On appeal, Canfield does not assert that any of the law set forth in Instruction 15 is inaccurate. Accurately setting forth the law is not an improper comment on the evidence. Thus, the trial judge did not improperly comment on the evidence in Instruction 15.

Affirmed.

WE CONCUR:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77560-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 21, 2019
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