



Holtren's house, Doyle parked the truck two blocks away, next door to Thelma Spillers' house.

Approximately 30 minutes later, Doyle heard someone yelling, "Move your truck."<sup>1</sup> Doyle came out of Van Holtren's house and saw Perry Soriano in Van Holtren's driveway. Soriano put his hand on Doyle's shoulder and continued to yell at Doyle to move his truck. Doyle told Soriano to remove his hand and that he would move the truck. Doyle turned to walk towards the truck, and Soriano punched Doyle in the face, fracturing his cheek, nose, and eye socket. Doyle's injuries required multiple surgeries.

Soriano testified that Doyle parked his truck directly in front of Spillers' house, blocking her driveway. Soriano, who is Spillers' ex-husband, went to Van Holtren's house with his son to ask Doyle to move the truck. According to Soriano, Doyle responded, "Fuck you, you don't even live there."<sup>2</sup> Doyle then bumped Soriano with his chest. Soriano turned to walk away and heard his son shout "Watch your back."<sup>3</sup> Soriano saw Doyle reach behind his back for something. Believing that Doyle was armed, Soriano "smacked him."<sup>4</sup>

The State charged Soriano with second degree assault, and the case proceeded to trial. The trial court instructed the jury on the lesser included offense

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<sup>1</sup> Report of Proceedings (RP) (Oct. 17, 2017) at 198.

<sup>2</sup> Id. at 256.

<sup>3</sup> Id. at 267.

<sup>4</sup> Id. at 256.

of fourth degree assault. At Soriano's request, the trial court instructed the jury on self-defense as follows:

It is a defense to a charge of assault in the second degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using 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 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.<sup>[5]</sup>

The State proposed a to-convict instruction for second degree assault based on 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (WPIC) 35.13 (4th ed.):

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about August 21, 2016, the defendant intentionally assaulted Todd Doyle;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Todd Doyle; and

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<sup>5</sup> Clerk's Papers (CP) at 41.

(3) That this act occurred in the [s]tate of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.<sup>[6]</sup>

Soriano sought to add an element to the to-convict instruction requiring the State to prove the absence of self-defense, that “the force used was not lawful, and that the assault was not in defense of the defendant.”<sup>7</sup> The trial court chose to give the pattern instruction offered by the State:

I’m going to use the instruction proffered by the State. I’m going to reject the one proffered by the defense. I’m satisfied that, absent a directive to do so, the court is not inclined to add an additional element which the State must prove. More importantly, they simply have to consider the defense of self-defense in this case.<sup>[8]</sup>

A jury convicted Soriano as charged. Soriano appeals.

#### DISCUSSION

Soriano argues that, because the absence of self-defense is an essential element that the State must prove beyond a reasonable doubt, it must be included in the to-convict instruction. He contends that the instructions relieved the State of its burden of proof and allowed the jury to convict him without finding that the State proved unlawful force beyond a reasonable doubt. But the Washington Supreme

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<sup>6</sup> Id. at 36.

<sup>7</sup> Id. at 52.

<sup>8</sup> RP (Oct. 19, 2017) at 316.

Court has rejected this argument in State v. Hoffman, holding that a to-convict instruction need not contain the absence of self-defense so long as a separate instruction informs the jury of the State's burden of proof.<sup>9</sup>

Here, as in Hoffman, the separate instruction on self-defense informed the jury of the State's burden to prove the absence of self-defense beyond a reasonable doubt. The jury was instructed to consider the instructions as a whole. The trial court did not err in refusing to give Soriano's proposed instruction.

Soriano argues that the instructions as a whole were unclear as to the State's burden because the definition of assault used for the second degree assault charge provided that the assault must be done with "unlawful force,"<sup>10</sup> but the definition of assault used for the lesser-included offense of fourth degree assault did not.<sup>11</sup> Soriano contends that this confused the jury as to whether they had to determine if Soriano's use of force was unlawful for the lesser included offense. But both the prosecutor and Soriano's attorney explained to the jury that self-defense applied to both second degree and fourth degree assault, and that

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<sup>9</sup> 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

<sup>10</sup> "An assault is an intentional striking of another person, with unlawful force, that is harmful or offensive." CP at 37 (based on WPIC 35.50).

<sup>11</sup> "An assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person." CP at 46 (based on WPIC 35.50).

the State had the burden to disprove self-defense in both cases.<sup>12</sup> The jury instructions, read as a whole, did not relieve the State of its burden.

Affirmed.

WE CONCUR:

Andrus, J.

[Signature]

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<sup>12</sup> The trial court also instructed the jury, in response to a jury question, that “[t]he jury instructions involving self-defense also apply to Assault in the Fourth Degree.” RP (Oct. 19, 2017) at 358.