NO. 34207-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY L. CRENSHAW,

Appellant.

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

The Honorable D. Gary Steiner, Judge

BRIEF OF APPELLANT

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2. The trial court committed error in refusing to give defendant's proposed instruction defining accident.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, the defense of accident, though not listed as a defense in the Washington Criminal Code, is a recognized defense to the crime of Assault in the First Degree?

2. If the defense of accident is a recognized defense to the crime of Assault in the First Degree, whether this defense negates the element of intent of Assault in the First Degree requiring the State to disprove the defense of accident beyond a reasonable doubt?

3. Whether the trial court's failure to instruct the jury on the defense of accident constituted constitutional reversible error?

C. STATEMENT OF THE CASE.

On May 8, 2005, Connie Tinitali, the victim in this case, was staying at the Rotham Inn, Room #208, in Tacoma, Washington. (RP 149-50). Her boyfriend was Jeffrey Crenshaw, the defendant. They met in 1999 and lived together until the summer of 2004. (RP 152). Ms. Tinitali and Mr. Crenshaw still dated off and on until May 8, 2005, the date of the incident. RP (153). The defendant and Ms. Tinitali both had substance abuse issues during the relationship, methamphetamine was their drug of choice. (RP 153-56). Mr. Crenshaw would use methamphetamine to cope with the depression from his bipolar disorder. (RP 520).

On May 8th, the defendant arrived at Ms. Tinitali's room about 10:30 a.m. with a Mother's Day present. He and Ms. Tinitali spoke for a short time before an argument ensued. RP (161). They had argued in the past about money and infidelity issues. (RP 154). On this day, Ms. Tinitali testified that the defendant was upset with himself and depressed. (RP 518-19).

Mr. Crenshaw left the room after 45 minutes when Ms. TInitali's children arrived for Mother's Day. (RP 189). Ms. Tinitali's children left early in the afternoon and Mr. Crenshaw returned to the room. (RP 189). Ms.

Tinitali testified that she soon heard the defendant in the bathroom, gagging. (RP 164). She went into the bathroom and saw that Mr. Crenshaw had a gun in his mouth. (RP 164). She testified on cross-examination that Mr. Crenshaw was saying things in the bathroom that, combined with the gun, lead her to believe he was going to commit suicide. (RP 194). Ms. Tinitali testified that she spoke to Mr. Crenshaw and told him not to do this suicidal act because it would impact his son Curtis. (RP 165). She managed to calm him down, though he was still pacing back and forth with the gun in his hand. (RP 169). The gun was a .22 caliber revolver. (RP 532).

The defendant's testimony was somewhat different on these points. Mr. Crenshaw testified that he returned to the room with the gun, which he had previously placed in his car. (RP 528-530). He acknowledged that he was suicidal. (RP 529-30). He testified he did have the gun to his throat in the bathroom and that Connie talked him out of the suicide attempt. (RP 536). Mr. Crenshaw also testified that Connie was on the bed and he was at the foot of the bed with the gun to his head and the hammer cocked. (RP 533-34). The room was extremely small, there was very little space between the end of the bed and the wall. (RP 531-32). Mr. Crenshaw held the gun in his right hand. (RP 533). Mr. Crenshaw has a missing index or pointer finger on

his right hand and was using his middle finger as the trigger finger. (RP 533). Mr. Crenshaw lost his index finger in a job related accident. (RP 511). He testified that he was very clumsy with that hand as a result of the missing finger and would often drop things. (RP 512). He had not previously fired or handled this .22 caliber gun or any other handgun since losing his finger. (RP 513).

Mr. Crenshaw then began to lower the gun from his head and began putting the safety in position to make the gun safe. (RP 537). While he was making the gun safe, it fired a shot. (RP 537). The shot hit Ms. Tinitali who was sitting on the bed. (RP 537). Mr. Crenshaw and Ms. Tinitali testified that he never intentionally pointed the gun at her and never threatened her with the gun. (RP 535-36), (RP 203). Ms. Tinitali further testified that the shooting was an accident. (RP 201). Ms. Tinitali was struck in the abdomen and the bullet caused significant injury to her abdomen and liver, as well as significant internal bleeding. (RP 228).

Mr. Crenshaw then went into an immediate panic. (RP 171). He began screaming for somebody to call 911 and help her. (RP 171). Ms. Tinitali testified that she would tell police that she accidentally shot herself. (RP 171-72). She was afraid that Mr. Crenshaw would be in trouble, because

he had been in previous trouble with the law (RP 172). Mr. Crenshaw and Ms. Tinitali agreed to tell police that Ms. Tinitali shot herself. Ms. Tinitali testified it was her idea to tell this story to police and not Mr. Crenshaw's. (RP 172).

Mr. Crenshaw ran outside the room continuing to scream for someone to call 911. (RP 136). The motel manager observed Mr. Crenshaw running, jumping up and down, and heard him screaming. (RP 139).

Tacoma Police Officer Harrington arrived first on the scene and saw Mr. Crenshaw standing on the street corner waving his hands. Mr. Crenshaw then ran upstairs to the room. (RP 11). Officer Harrington placed Mr. Crenshaw in handcuffs for security reasons. (RP 12). Mr. Crenshaw told him the story he and Ms. Tinitali agreed to tell about Ms. Tinitali shooting herself. (RP 13-14). Detectives soon arrived and took charge of the investigation (RP 16). Detectives took Mr. Crenshaw to the police station for an interview. Mr. Crenshaw, following Miranda warnings, initially told detectives that Ms. Tinitali shot herself (RP 50). Detective's soon realized that this story didn't make sense and confronted Mr. Crenshaw. Mr. Crenshaw then told them that it was he who shot Ms. Tinitali and that it was an accident. (RP 51). Detectives taped Mr. Crenshaw's statement and the tape was admitted as an

exhibit and played to the jury. (CP Exhibit). Ms. Tinitali also admitted to detectives that she fabricated the story of shooting herself. (RP 351-52).

Mr. Crenshaw was charged by information with one count of Assault in the First Degree with a firearm sentencing enhancement and on count of Unlawful Possession of a Firearm in the First Degree which was later amended to Second Degree in an amended information. (CP 5-6). The defense throughout the trial was accident and the defense of accident was the theme of closing argument. (RP 653-667).

The defendant proposed three instructions in his proposed instructions to the jury, all dealt with the defense of accident. (CP 67, 68, 107). These instructions are also attached to the Appendix of this brief. Defendant argued that the defense of accident is recognized by Washington caselaw as a defense. (RP 559, 621). Defendant further argued that the defense of accident negates the intent element of assault and that the Washington Supreme Court requires that if a defense negates an element of a crime, the State has the burden to disprove the defense beyond a reasonable doubt. (RP 600, 604-05).

The defendant proposed an instruction defining "accident" (CP 107). The defendant also proposed an instruction which was a modification of WPIC 15.01 excusable homicide, stating that accident was a defense to the

crime of assault and that the State had the burden to disprove accident beyond a reasonable doubt. (CP 67).

The defendant also proposed an instruction from California's Pattern Instructions stating that accident was a defense in this case. (CP 68).

The State opposed all three instructions, arguing that by proving intent they also disprove accident and that the defense could still argue , without the instructions, that the shooting was an accident and that the State failed to prove intent. (RP 601-02).

The trial court refused to give the defendant's proposed instructions stating that they were not the present state of the law in Washington. (RP 620). Defendant objected to the court's failure to give the three proposed accident instructions. (RP 621). The court acknowledged that evidence showed accident was a defense that could be argued in this case and that whether accident negates intent is for the Court of Appeals or Supreme Court to decide. (RP 623). The court ruled that if the jury found absence of intent, they have in essence found the shooting was an accident. (RP 623).

The defendant was convicted of the lesser included charge of Assault in the Second Degree with a firearm sentencing enhancement verdict. He was also convicted of Unlawful Possession of a Firearm in the Second

Degree. (CP 84-88).

On December 9, 2005, the defendant was sentenced to 17.5 months in the Department of Corrections plus an additional 36 months for the firearm enhancement. (CP 89-100). A Notice of Appeal was timely filed with this court. (CP 101).

D. ARGUMENT

I. THE DEFENSE OF ACCIDENT IS RECOGNIZED BY WASHINGTON CASELAW AS A DEFENSE TO ASSAULT, IS INCORPORATED IN THE DEFENSE OF EXCUSABLE HOMICIDE, AND ACCIDENT IS A DEFENSE THAT NEGATES THE ELEMENT OF INTENT REQUIRING THE STATE TO PROVE THE ABSENCE OF THAT DEFENSE BEYOND A REASONABLE DOUBT.

a. The defense of accident in Washington.

Washington caselaw specifically recognizes the defense of accident. State v Hendrickson, 81 Wn. App. 397,399,914 P. 2d 1194 (1996) provides that an unintentional assault or killing can be excused through the defense of accident. The defense of accident can also arise in sexual assault cases where the defendant claims that the touching was accidental. State v Baker, 89 Wn. App. 726, 950 P. 2d 486 (1997). The defense of accident is also

acknowledged in ER 404 (b) by which prior acts may be admissible to rebut a defense of accident. Baker supra.

RCW 9A.16.030 states that:

> "homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent".

There exists no other reference to the defense of accident in the Washington Criminal Code other than what is contained in RCW 9A.16.030. The term "accident" is not defined in the Washington Criminal Code. WPIC 15.01 is the pattern jury instruction which incorporates the defense of excusable homicide, it provides:

> It is a defense to a charge of murder or manslaughter that the homicide was excusable as defined in this instruction.
>
> Homicide is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.
>
> The state has the burden of proving the absence of excuse beyond a reasonable doubt. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty of return a verdict of not guilty.

The defense in the present case was that the shooting was an accident.

b. Washington caselaw has long held that when a criminal defendant properly raises a defense that negates an element of the charged crime, the burden is on the State to prove the absence of the defense beyond a reasonable doubt.

In State v McCullum, 98 Wn.2d.484, 656 P. 2d 1064 (1983) the Washington State Supreme Court set forth the requirement of when the State bears the burden of proving the absence of a defense. McCullum, at 490

> The State bears the burden of proving beyond a reasonable doubt the absence of a defense if the absence of such defense is an ingredient of the offense and there is some evidence of the defense. Patterson, at 214-15.
>
> There are two ways to determine if the absence of a defense is an ingredient of the offense: (1) the statute may reflect a legislative intent to treat absence of a defense as one "of the elements included in the definition of the offense of which the defendant is charged", Patterson, at 210; or (2) one or more elements of the defense may "negate" one or more elements of the offense which the prosecution must prove beyond a reasonable doubt, Hanton, at 132-33. See generally Note, The Constitutionality of Affirmative Defenses After Patterson v. New York, 78 Colum. L. Rev. 655, 6666-70 (1978); Note, Criminal Law--Affirmative Defenses in the Washington Criminal Code--The Impact of Mullaney v. Wilbur, 421 U.S. 684 (1975), 51 Wash. L. Rev. 953 (1076).

McCullum held that when the defendant presents some evidence of self-defense, the State bears the burden to disprove that defense beyond a reasonable doubt. The court affirmed its holding in State v Acosta, 101 Wn. 2d 612, 683 P. 2d 1069 (1984).

The Supreme Court and Courts of Appeals have extended the McCullum/Acosta concepts to other defenses. State v R.H., 86 Wn. App. 807, 939 P. 2d 217 (1997) (Public premises defense to criminal trespassing), State v Hicks 102 Wn. 2d. 182, 683 P. 2d 186 (1984) (good faith claim of title defense to theft/robbery).

The courts have also held that the State does not bear the burden to prove the absence of a defense which does not negate an element of the charged crime. In State v Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996) the court dealt with the defense of entrapment and held that it did not negate an element of the charged crime. The court however, reaffirmed the McCullum/Acosta rule; Lively at 10-11.

> McCullum and Acosta provide a two-tiered test to evaluate whether the State or a defendant has the ultimate burden of persuasion. First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime.
>
> Under the due process provisions of

> the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt. McCullum, 98 Wn.2d at 490; Acosta, 101 Wn.2d at 615; see also Patterson v New York, 432 U.S. 197, 214-15, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977).
>
> Second, if there is no due process requirement, the court must determine whether the Legislature intended, nevertheless, to place the ultimate burden of persuasion on the State to prove the absence of the defense beyond a reasonable doubt. It the statute does not expressly assign the burden to either the State or the defendant, and provides no indication of the Legislature's intent to overrule common law, the statute will be presumed to follow judicial precedent. McCullam, 98 Wn.2d at 493; see also State v Calderon, 102 Wn.2d 348, 351, 648 P. 2d 1293 (1984).

The failure of the State to prove every element of the crime rises to the level of a constitutional due process violation. Lively, supra

There are no Washington appellate cases that address whether or not a defendant is entitled to an instruction on the defense of accident and whether it negates the element of intent, requiring the State to bear the burden

of disproving accident beyond a reasonable doubt. However, other jurisdictions have addressed these issues. In State v Rosciti, 740 A. 2d 198 (1999) the New Hampshire Supreme Court held that even though accident is not a recognized defense in New Hampshire's Criminal Code, the court must instruct if there is some evidence to support the defense. Rosciti at 200.

> Accident is not a recognized defense under the Criminal Code. See State v Russo, 140 N.H. 751, 753, 674 A.2d 156, 158 (1996). We have held that a defendant's requested jury instruction on an accident defense must be granted, however, if there is some evidence to support a rational finding in favor of that defense. See State v Aubert, 120 N.H. 634, 635, 421 A. 2d 124, 125 (1980).

Washington also does not recognize accident in the Criminal Code except for excusable homicide. Accident however, is not specifically recognized as a defense to crimes other than homicide except by caselaw.

The Supreme Judicial Court of Massachusetts has repeatedly held that accident is a defense in a criminal case and that because it negates intent, the State bears the burden of proof to show absence of that defense. In Commonwealth v Podkowka, 840 N.E. 2d 476, 482, (2006) the court held;

> Accident, like provocation, self-defense, and defense of others, are treated as if they are affirmative defenses, which, when they negate an essential element of a crime

> (here, malice) must be disproved by the Commonwealth beyond a reasonable doubt. See Commonwealth V. Robinson, 382 Mass. 189, 203, 415 N.E. 2d 805 (1981). When the issue of accident is "fairly raised," the judge, at least on request, must instruct the jury that the Commonwealth must disprove accident beyond a reasonable doubt. See Commonwealth v Palmariello, 392 Mass. 126, 145, 466 N.E.2d 805 (1984); Commonwealth v Lowe, 391 Mass. 97, 109-110, 461 N.E. 2d 192, cert. denied, 469 U.S. 840, 105 S. Ct. 143, 83 L. Ed. 2d 82 (1984); Commonwealth v Zezima, 987 Mass. 748, 756, 443 N.E. 2d 1282 (1982); Lannon v Commonwealth, 379 Mass. 786, 790, 400 N.E. 2d 862 (1980).

In Commonwealth v Zezima, 443 N.E. 2d 1282 (1982) the court held that it was error to instruct the jury on the charged crime and intent without specifically informing the jury that the State must prove absence of accident beyond a reasonable doubt. Zezima at 1287

> A defendant is also, entitled, as a matter of due process, to have the judge instruct the jury that the Commonwealth has the burden of proving that a shooting was accidental, when that issue is farily raise. Commonwealth v Zaccagnini, 383 Mass. 615, 616 (1981). Commonwealth v Robinson, 382 Mass. 189, 203 (1981). Lannon v Commonwealth, 379 Mass. 786, 790 (1980). Here, the defendant's primary defense was that the shooting was an accident, and he testified to that effect. The judge referred to accidental firing in his instructions on

involuntary manslaughter, but he never informed the jury that the Commonwealth bore the burden of disproving accident. Cf. Commonwealth v Sellon, 380 Mass. 220, 233 (1980) (no error where the judge instructed jury that Commonwealth must show that acid spill was not accident). He also indicated several times that the jury had to find that the defendant's conduct was unintentional. Such "finding" language has been criticized as improperly suggesting to the jury that the defendant has the burden of proof of a defense negating malice. Connolly v Commonwealth, 377 Mass. 527, 532-534 (1979). The judge also failed to make the crucial point that proof of malice depended on proof of the absence of accident. See Commonwealth v Robinson, supra at 207; Connolly v Commonwealth, supra at 531 (self-defense); Commonwealth v Rodriquez, supra at 691 (self-defense). Cf. Reddick v Commonwealth 381 Mass. 398, 405 (1980) (no error where judge was careful to explain that malice was exclusive of any legal justification, mitigation, or excuse); Commonwealth v Fitzgerald, 380 Mass. 840, 846 (1980) (no error where judge emphasized that provocation and malice were mutually exclusive). Since instruction on the Commonwealth's general burden of proof was limited to one brief portion of the charge, the judge's failure to inform the jury that the Commonwealth bore the burden of disproving accident, his use of "finding" language, and most significantly, his failure to establish the "nexus" between proof of malice and disproof of accident, deprived the defendant of due process.

In the present case the trial court provided no instruction to the jury on accident or that because it negates intent, the State must disprove that defense. The failure to give an instruction on accident and the shifting of the burden of proof mislead the jury into believing that the defendant had to prove that the shooting was accidental. The Court in the present case committed the same error as the trial court in Zezima supra; by stating that the jury, by finding the defendant's conduct unintentional, finds that the shooting was an accident. The jury must be clearly instructed that the State must disprove accident beyond a reasonable doubt.

The Massachusetts Court of Appeals has also ruled on this issue. Commonwealth v Depradine, 677 N.E. 2d 262 (1997). The trial court in that case correctly instructed the jury on accident in that case. Depradine at 405 note 3.

> The defendant, having fairly raised the possibility of accident through the officers' testimony of the defendant's statements, see Commonwealth v Lowe, 391 Mass. 97, 108, 461 N.E. 2d 192, cert. denied, 469 U.S. 840, 83 L. Ed. 2d 82, 105 S. Ct. 143 (1984), Commonwealth v Lowe, 405 Mass. 1104, 540 N.E. 2d 1308 (1989), was entitled to an instruction that the Commonwealth had the burden of proving beyond a reasonable doubt that the shooting was not accidental. See ibid., citing Commonwealth v Zezima, 387

> Mass. 748, 756-757, 443 N.E. 2d 1282 (1982). The judge so instructed the jury; he defined an "accident and discussed it in detail--"an unexpected happening that occurs without intention or design on a person's part."

The Supreme Court of Georgia has had the opportunity to address the defense of accident. In Griffin v State, 481 S.E. 2d 223 (1997) the Court held that even though accident was not included in the list of affirmative defenses in the Criminal Code, it was recognized by caselaw. The Court held that the trial court committed reversible error by failing to instruct the jury on accident and the State's burden to disprove it. Griffin, at 223-24.

> 1. Griffin contends the trial court erred in failing to charge the jury that the State had the burden of proving beyond a reasonable doubt that he did not accidentally shoot the victim. Griffin requested a charge on accident, and the trial court charged on accident. He also requested a charge on the State's burden of disproving an affirmative defense beyond a reasonable doubt, which was rejected. Although not included in the affirmative defenses enumerated in Article 2 of O.C.G.A. Title 16, Chapter 3, see O.C.G.A.§ 16-3-28, we have held that accident is an affirmative defense. Chandle v State, 230 Ga. 574 (3) (198 S.E. 2d 289) (1973); see State v Moore, 237 Ga. 269 (1) (227 S.E. 2d 241) (1976). We have also held that where a defendant raises an affirmative defense, the State has the burden to disprove the affirmative defense beyond a reasonable

> doubt. Anderson v State, 262 Ga. 7 (2) (413 S.E. 2d 722) (1992); State v Shepperd, 253 Ga. 321 (320 S.E. 2d 154) (1984). Because Griffin's requested charge was a correct statement of the law and was adjusted to the evidence, it was reversible error for the trial court to fail to give the requested instruction regarding that burden of proof. See Shearer v State, 259 Ga. 51 (12) (376 S.E. 2d 194) (1989); Shepperd, supra. For these reasons Griffin's conviction must be reversed.

California, in its Penal Code, specifically provides for the defense of accident. Cal. Pen. Code § 26 provides in pertinent part:

> § 26. Persons capable of committing crimes
>
> All persons are capable of committing crimes except those belonging to the following classes: Five--Persons who committed the act or made the omission charged through misfortune of by accident, when it appears that there was no evil design, intention, or culpable negligence.

California courts provide for an accident instruction and caselaw holds that accident negates the element of intent. People v Gonzales, 74 Cal App 4th 382, 88 Cal Rptr 2d 111 (1999).

One of the instructions requested by the defendant in the present case was taken from the California Criminal Pattern Instruction CALJIC 4.45 and it simply provided the jury with the rule that accident is a defense. A second

instruction was compiled from Washington caselaw and defined accident to be an unexpected and unintentional event. The final instruction from the defendant took WPIC 15.01 (excusable homicide) and substituted assault for murder and manslaughter. This proposed instruction explained to the jury that accident was a defense to assault and because it negated the element of intent, the state had the burden to disprove accident beyond a reasonable doubt. Washington caselaw and caselaw from other jurisdictions support these instructions and they should have been given by the trial court.

c. The defendant was entitled to have the jury instructed on the defense of accident and because accident negates the intent element of first degree assault, the jury should have been instructed that the State bears the burden of disproving accident beyond a reasonable doubt.

There exists no Washington appellate caselaw which raises the issue of whether in a trial in which the crime charged was an intentional assault and the defendant proposed instructions to the jury claiming that the State has the burden to disprove accident beyond a reasonable doubt. There is no question that in homicide cases that WPIC 15.01 allows the defense of accident and places the burden on the State to disprove the defense of accident beyond a reasonable doubt. There exists no similar instruction in the Criminal Pattern

Instructions for the crime of assault whether it be in the first, second, or third degree, yet accident is a recognized defense to these crimes.

A basic rule concerning jury instructions is that "each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it". State v Redmond, 150 Wn.2d 489, 495, 78 P. 3d 489 (2003), State v Griffin, 100 Wn.2d 417, 670 P. 2d 265 (1983). In the present case both the defendant and victim, in detail, repeatedly testified that the shooting was accidental. The trial court in its ruling denying defendant's proposed instructions indicated that the evidence allowed the defendant to argue that the shooting was accidental (RP 623). The state also argued that the defendant could present the defense of accident to the jury. (RP 601). There existed ample evidence to support the defendant's defense of accident in this case. Jury instructions are proper if they allow both parties to argue their theory of the case. State v Clausing, 147 Wn.2d 620, 626-27, 56 P. 3d 550 (2002). The Clausing court held at 626-27:

> Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v Riley, 137 Wn.2d 904, 908, 909, 976 P. 2d 624 (1999). We review the adequacy of jury instructions de novo as a question of law. State v Pirtle, 127 Wn.2d 628, 656, 905 P. 2d 245 (1995).

The trial court's failure to instruct the jury that accident is a defense to assault in the first degree and that the burden of proof was on the state to disprove that defense beyond a reasonable doubt deprived the defendant of effectively and completely arguing his theory of the case. The trial court's error as argued earlier, improperly shifted the burden of proof to the defendant.

In Griffin, supra, the trial court failed to instruct the jury on diminished capacity as requested by the defendant. The trial court concluded that instructing the jury on the crime of forgery and the element of intent allowed the defendant to argue that because the defendant's mental illness prevented the crime from being intentional, the state failed to prove intent beyond a reasonable doubt. The Supreme Court found instructional error and reversed the conviction, Griffin, at 419-20.

> Although the jury in this case may have been presented with evidence to support a defense theory of diminished capacity, it was not properly instructed to understand the effect diminished capacity had upon formation of criminal intent. Generalized instructions on criminal intent are not sufficient to apprise a jury of mental disorders which may diminish a defendants capacity to commit a crime.
>
> A similar error was made in State v. Conklin, 79 Wn.2d 805, 489 P.2d 1130 (1971) in Conklin the defendant was charged with

> first degree forgery and at trial introduced an intoxication defense which was refused. State v. Conklin, supra at 807. The court found error in that "[w]hile the instructions given did express that 'intent to defraud' is a necessary element, nowhere in the instructions is the jury informed as to the effect of intoxication upon the formation of criminal intent." State v. Conklin, supra at 807-08. Accord, State v. Simmons, 30 Wn.2d 432, 635 P.2d 745 (1981).
>
> "Each side is entitled to have the trial court instruct upon its theory of the case if there is evidence to support that theory." State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968). In Griffin's trial there was abundant evidence in the record to show defendant's mental disorders impeded his ability to formulate the requisite intent. Denial of such instruction constitutes reversible error.

The same problem in Griffin exists in the present case. The defendant wanted to argue that the burden of proof was on the State to show beyond a reasonable doubt that the shooting was not accidental. The trial court's general instructions on intent and assault in the first degree prevented him from fully arguing his theory of the case and placed in the minds of the jurors that the defendant had to prove that the shooting was an accident. The trial court committed error by failing to instruct the jury on the defense of accident and that because

it negates an element of intent, the State was required to disprove accident beyond a reasonable doubt.

d. The court's failure to instruct on the defense of accident and the State's burden of proof on that defense is reversible error.

The Washington Supreme Court has held that whether an instructional error constitutes harmless error is subject to a multi-step test. State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). The Brown court adopted its test from the United State Supreme Court case of Neder v. United States, 527 U.S. 1, 119 S. Ct 1827, 144 L. Ed 2d 35, (1999). Brown at 341-42.

> In order to conduct its analysis, the Neder court set forth the following test for determining whether a constitutional error is harmless: "Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Neder, 527 U.S. at 15 (quoting Chapman v. California, 386 U.S. 18, 24 87 S.Ct. 824 17 L.Ed. 2d 705 (1967)). When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence. Neder, 527 U.S. at 18.
>
> Therefore, we must thoroughly examine the record before us as to each defendant. In order to hold the error harmless, we must "conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id. at 19.*

The court in a subsequent case held that under the harmless error standard, "an error is presumed prejudicial unless we conclude the error could not have rationally affected the verdict." State v. Deryke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

In the present case, both the defendant and the victim testified that the shooting was accidental. The defendant was given no instructions to support his theory of the case, particularly that the State should have had to disprove accident beyond a reasonable doubt. This court cannot conclude beyond a reasonable doubt that the verdict would have been the same absent the error. The instructional error was not harmless here.

E. CONCLUSION

The trial court committed reversible error by denying the defendant's proposed instructions defining accident as a defense to the crime of assault in the first degree. Accident is a defense that negates the element of intent and Washington caselaw requires that the State disprove a defense beyond a reasonable doubt if the defense negates an element of a charged crime. The trial court erred by failing to instruct the jury on the State's burden to disprove accident beyond a reasonable doubt. The defendant's conviction of assault in

the second degree should be reversed and he should be granted a new trial.

Respectfully submitted this 9th day of June, 2006

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APPENDIX

INSTRUCTION NO. 22

It is a defense to a charge of assault that the assault was excusable as defined in this instruction.

An assault is excusable when committed by accident or misfortune in doing any lawful act by lawful means, without criminal negligence, or without any unlawful intent.

The State has the burden of proving the absence of excuse beyond a reasonable doubt. 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.

WPIC 15.01 as modified
State v. Hendrickson, 81 Wn. App. 397 (1996)
State v. Fondren, 41 Wn. App. 17 (1985)
State v. Peters, 47 Wn. App. 854 (1987)
State v. Takacs, 35 Wn. App. 914 (1983)
State v. R. H., 86 Wn. App. 807 (1997)
State v. Riker, 123 Wn.2d 351 (1994)

INSTRUCTION NO. 23

When a person commits an act or makes an omission through misfortune or by accident under circumstances that show neither criminal intent nor purpose or criminal negligence he does not thereby commit a crime.

California Pattern Criminal Jury Instruction
CALJIC 4.45

05-1-02245-2 24025928 INS 11-09-05

INSTRUCTION NO. 32

Accident means a sudden unexpected or unintentional happening, consequence or event from either a known or unknown cause.

Stolp v. Dept. of Labor and Industries, 138 Wn. 685 (1926)
Yakima Cement Co. v. Great American Ins. Co., 93 Wn.2d 210 (1980)
Roller v. Stonewall Ins. Co., 55 Wn. App. 758 (1989)
Palouse Seed Co. v. Aetna Insurance Co., 40 Wn. App. 119 (1985)
Federated American Insurance v. Strong, 36 Wn. App. 256 (1983)

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS-DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. JEFFREY L. CRENSHAW, Appellant.	)	NO. 34207-3-II AFFIDAVIT OF SERVICE

Dino G. Sepe, a United States citizen over 18 years of age did serve a true copy of the Brief of Appellant to: Jeffrey Crenshaw, DOC#261618
Clallum Bay Corrections Center
1830 Eagle Crest Way
Clallum Bay, WA 98326

Service was made on June 10, 2006 by depositing the brief in the United States Mail properly stamped.

SUBSCRIBED and SWORN to before me this 12th day of June, 2006.

Dino G Sepe

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Karen Blowers

Notary Public in and for the State
of Washington, residing at Tacoma
My commission expires 11-3-06.

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Dino G. Sepe, a United States citizen over 18 years of age did serve a true copy of the Brief of Appellant to: Office of Prosecuting Attorney for Pierce County
Appeals Division
946 County City Building
Tacoma, WA 98402

Service was made on June 10, 2006 by personal service.

SUBSCRIBED and SWORN to before me this 12TH day of June, 2006.

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