

NO. 48050-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIANA MILIANI BOLDEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00481-4

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

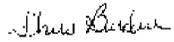
SERVICE	<p>Thomas E. Weaver Po Box 1056 Bremerton, Wa 98337 Email: tweaver@tomweaverlaw.com</p>	<p>This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically</i>. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.</p> <p>DATED March 4, 2016, Port Orchard, WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID #91103 kcpa@co.kitsap.wa.us</p>
----------------	---	---

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 1

IV. CONCLUSION..... 9

TABLE OF AUTHORITIES

CASES

<i>State v. Arthur</i> , 42 Wn.App. 120, 708 P.2d 1230 (1985).....	3
<i>State v. Callahan</i> , 87 Wn.App. 925, 943 P.2d 676 (1997).....	4
<i>State v. Calvin</i> , 176 Wn.App. 1, 316 P.3d 496 (2013), <i>rev. granted</i> , 183 Wn.2d 1013.....	4
<i>State v. Calvin</i> , Wn.App., 316 P.3d 496 (2013).....	3
<i>State v. Hardy</i> , 44 Wn.App. 477, 722 P.2d 872 (1986).....	3
<i>State v. Hupe</i> , 50 Wn.App. 277, 748 P.2d 263 (1988).....	3
<i>State v. Krup</i> , 36 Wn.App. 454, 676 P.2d 507 (1984).....	3
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	3
<i>Sutton v. Tacoma School District</i> , No. 10, 180 Wn.App. 859, 324 P.3d 763 (2014).....	4

I. COUNTERSTATEMENT OF THE ISSUES

Whether the trial court properly instructed the jury on the definition of actual battery under the facts of the case.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Tiana Miliani Bolden was charged by information filed in Kitsap County Superior Court with Assault in the Second Degree (assault two) with a special allegation of domestic violence. CP 1. At trial, Bolden objected to the trial court's instruction number 10. CP 49. Bolden's counsel was concerned that that instruction might allow the jury to find that "simply touching is an assault." RP 192-93. Bolden was convicted as charged and given a standard range sentence. CP 61. Bolden timely appealed. CP 72.

B. FACTS

Bolden's recitation of facts is accurate and sufficient to address the single issue raised.

III. ARGUMENT

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE DEFINITION OF ACTUAL BATTERY UNDER THE FACTS OF THIS CASE.

Bolden argues that the trial erred in providing the jury with an

erroneous instruction as to the definition of assault. She claims that omission of the phrase “with unlawful force” made the instruction “incomplete.” Brief at 7. Further, she avers it was error to omit the phrase defining what is “offensive” with regard to the offensive touching aspect of the assault definition. *Id.* It is claimed that such is required to distinguish between subjective and objective offensiveness. This claim is without merit because the instruction was an accurate statement of the law, was consistent with the evidence, and was likely not required.

The allegedly offensive definitional instruction reads “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 49 (instruction #10). This is an application of Washington Pattern Jury Instructions—Criminal (WPIC) 35.50. It is a permutation of the “first bracketed definition” of assault found in 35.50. With all brackets, 35.50 provides

[An assault is an intentional [touching] [or] [striking] [or] [cutting] [or] [shooting] of another person[, with unlawful force,] that is harmful or offensive [regardless of whether any physical injury is done to the person]. [A [touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]

The comment indicates that this paragraph “defines assault by battery.”

Under “Notes on use,” the following advice is give:

Use the first bracketed definition in cases involving a battery whether accompanied or unaccompanied by an apprehension or fear of bodily injury on the part of the victim. Use the bracketed sentence of this paragraph, if it is necessary to define “offensive” for the jury.

Defining offensive, then, is not required; it is to be included if necessary only. Similarly, the notes say that the bracketed phrase “with unlawful force” is to be included “if there is a claim of self defense or other lawful use of force.” Bolden made no such claim in the present case.

The comment to WPIC 35.50 further discusses the unlawful force language

The phrase “with unlawful force” has been bracketed in all three paragraphs. The definition of “assault” includes the requirement that it be committed with unlawful force. See, e.g., *State v. Hupe*, 50 Wn.App. 277, 748 P.2d 263 (1988), disapproved of on other grounds by *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007); *State v. Krup*, 36 Wn.App. 454, 676 P.2d 507 (1984). In another context, however, the court has criticized jury instructions that used the term “unlawful” without defining it. See *State v. Hardy*, 44 Wn.App. 477, 722 P.2d 872 (1986) (aggressor instruction for second degree murder); *State v. Arthur*, 42 Wn.App. 120, 708 P.2d 1230 (1985) (aggressor instruction for second degree assault). If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term “lawful.” If there is no such evidence, the jury should not be left to speculate on what might constitute “lawful” conduct. See *State v. Calvin*, Wn.App. , 316 P.3d 496 (2013), as amended on reconsideration October 22, 2013, review stayed on February 5, 2014.

Thus the WPIC editors recognize that instructing a jury with “with unlawful force” would invite juror confusion and speculation unless “unlawful” is separately defined. If evidence of lawful force obtains, a definition of lawful force would serve to distinguish that from force that is

unlawful. See WPIC 17.02. Notably, an aggressor instruction as presently constituted under WPIC 16.04 does not include the word “unlawful” instead simply referring to “any intentional act.” Again, there was no claim of or evidence of lawful use of force in the present case.

Citing a civil case, Bolden baldly asserts that “[i]n order for an offensive touching to be criminal assault in Washington, the touching must be objectively offensive.” Brief at 7. The civil case, *Sutton v. Tacoma School Dist. No. 10*, 180 Wn.App. 859, 324 P.3d 763 (2014), applies a tort law definition of assault which is not the same as the definition in the criminal code. More to the point, that case and none other found by the state supports the proposition. Although the definitions of assault contain arguably subjective parts, no case found discusses the subjective versus objective mental state of a victim of assault as such. Such considerations may be found in the law of self-defense, but not here. See, e.g., *State v. Callahan*, 87 Wn.App. 925, 929, 943 P.2d 676 (1997) (law of self-defense has both subjective and objective elements).

Recently, the status of the phrase “with unlawful force” in the assault definition was reviewed. *State v. Calvin*, 176 Wn.App. 1, 316 P.3d 496 (2013) *rev. granted* 183 Wn.2d 1013 (2015) (cause remanded regarding legal financial obligation only). There, the trial court had instructed the jury, *inter alia*, that

An assault is an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Id., 316 P.3d at 505.¹ The jury sent a question out from deliberations asking “How does the law define ‘unlawful force’?” The trial court sent back a definitional instruction omitting the phrase “with unlawful force.” Finding no error, the Court of Appeals said

The trial court correctly reasoned that the instruction misstated the posture and facts of the case. The term “unlawful force” is only necessary in the definition of assault when there is a specific argument from the defense that the use of force was somehow lawful. See WPIC 35.50, at 548. Without any specific lawful force argument, self-defense or otherwise, the trial court was faced with a dilemma. It could issue a response such as, “unlawful force is force that is not lawful.” But, that response would be unhelpful. Alternatively, it could give a supplemental instruction that enumerated each type of lawful force. But, that option would give Calvin the benefit of arguments that he did not make. Instead, the trial court drafted a new definition of assault that omitted the “unlawful force” language. Defense counsel objected on the grounds that the State made a mistake and had to live with that mistake, because the instructions had already been submitted.

316 P.3d at 505-06. The court held that the trial court had not abused its discretion. Id. at 507. The passage containing that holding is particularly apt in the present case

There is no evidence, or even any suggestion, that Calvin adapted his trial strategy to the inclusion of the “unlawful force” language. Defense counsel was given the opportunity to reargue the case but declined. Calvin does not articulate why that remedy was

¹ Wn.App. page breaks not found in Westlaw.

inadequate. Further, there is no dispute that the trial court's supplemental instruction was a correct statement of the law. Calvin did not argue lawful force and was not entitled to any lawful force instructions or the inclusion of unlawful force in the definition of assault. The trial court did not abuse its discretion.

Id. at 507. It is the same in the present case where Bolden did not argue lawful force and in fact had no facts to support such an argument.

But assuming that the objective proposition is the law, Bolden sally's forth and argues about how the jury may have been confused as to the offensiveness of Bolden's conduct. Her concluding sentiment being that "the jury could have concluded Ms. Bolden was upset and distraught that Ms. Bartlett was leaving and grabbed her, recklessly knocking her down and injuring her. Brief at 11 (emphasis added). Just so: the jury could have so found and in doing so would clearly have established facts sufficient to establish a battery. The state submits that under that scenario the issue of the offensiveness or not of the touching is irrelevant. Grabbing and pulling down constitutes a battery or intentional assault. Recklessly causing injury goes to the degree of the assault.

Moreover, Bolden's focus on offensive touching ignores the unrebutted testimony of Ms. Bartlett, the victim. Ms. Bartlett testified that she was not "knocked" down but that she was "thrown" down. RP 76. Ms. Bartlett testified that Bolden then straddled her and hit her with a closed fist around 10 times. Id. Bolden laid on her and then got up but

soon returned to push her down again and hit her again. RP 79. As noted, this testimony was unrebutted; Bolden claimed she had blacked out and had no memory of that conduct. RP 58 (an admission testified to by investigating police). The result was four broken ribs. Simply put, then, there was no offensive touching or unlawful force issue in the case.

Bolden cites *State v. Daniels*, 87 Wn.App. 149, 940 P.2d 690, so that she may attempt to distinguish the case. Brief at There, assault by actual battery, as in the present case, was addressed. The trial court had instructed the jury on the definition of second degree assault, “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” Id. at 153. But no definitional instruction was given. Id. Daniels claimed on appeal that the definitional instruction constitutes an element of second degree assault and the trial court erred in not giving the same. Id. at 154. The *Daniels* Court found that the above quoted first paragraph of WPIC 35.50 defines assault by actual battery. Such is distinguished from the other two definitions of assault in that those require specific intent but “assault by battery, in contrast, does not require specific intent to inflict substantial bodily harm [assault by attempted battery] or cause apprehension[common law assault].”

The Court of Appeals ultimately held that Daniels had failed to preserve the issue for review. Id. at 156. However, the court said

The WPIC definition is exactly that—a definition. It does not add an element to those contained in the instructions given. “The word ‘assault’ is not exclusively of legal cognizance, and an understanding of its meaning can fairly be imputed to laymen. Where the legislature has not defined a term, we must give it its everyday meaning.” The everyday understanding of “assault” encompasses assault by actual battery.

Id. at 157. In announcing its holding, the Court observed “[g]iven the evidence in this case, we do not perceive there was a realistic danger that a juror would find Daniels recklessly inflicted substantial bodily harm without believing there was an actual battery.” Preservation issue aside, there was no error in not instructing as to any definition of assault in WPIC 35.50.

Thus *Daniels* is not the straw man Bolden uses it for. The case enlightens the present question. Under sufficiently straight forward facts, a definitional instruction is not even necessary. And the facts of the present case are in fact sufficiently straight forward. Here, there is no realistic danger that a juror would find Bolden recklessly inflicted substantial bodily harm without believing there was an actual battery. The definitional instruction here was superfluous but also a correct statement of the law that covered the facts of the case. There was no error in instructing the jury on actual battery and omitting offensive touching language that is unsupported by the facts.

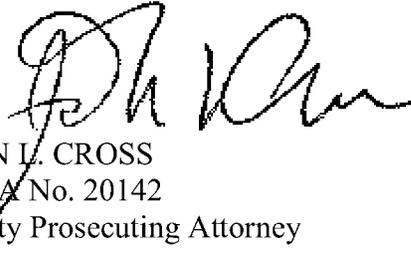
IV. CONCLUSION

For the foregoing reasons, Bolden's conviction and sentence should be affirmed.

DATED March 4, 2016.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross", written over the typed name and title.

JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

KITSAP COUNTY PROSECUTOR

March 04, 2016 - 12:43 PM

Transmittal Letter

Document Uploaded: 1-480506-Respondents' Brief.pdf

Case Name: State of Washington v Tiana Miliani Bolden

Court of Appeals Case Number: 48050-6

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondents'

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Sheri Burdue - Email: siburdue@co.kitsap.wa.us

A copy of this document has been emailed to the following addresses:

tweaver@tomweaverlaw.com