

No. 62653-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD BUSHAW,

Appellant.

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

APPELLANT'S REPLY BRIEF

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COURT OF APPEALS  
DIVISION ONE  
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A. ARGUMENT.

1. THE COURT DID NOT PROPERLY  
INSTRUCT THE JURY ON THE ESSENTIAL  
ELEMENTS OF ASSAULT

Intent is an essential element of assault. State v. Davis, 119 Wn.2d 657, 662-663, 835 P.2d 1039 (1992). The fact that the element of intent derives from the common law rather than the statute does not minimize the State's burden to prove this essential element. Id. at 663.

The prosecution faults Bushaw for failing to discuss State v. Smith, 159 Wn.2d 788, 154 P.3d 873 (2007), in his Opening Brief. But Smith involved a claim that the various definitions of assault under the common law constitute alternative means and require unanimous jury verdicts. Id. at 784. The Smith Court ruled that the definition of assault does not create alternative means beyond the alternatives set forth in the statutes defining different degrees of assault.

Unlike the alternative means argument analyzed in Smith, Bushaw asked the court to clearly explain the prosecution's burden of proving the essential element of intent to the jury in the to-convict instruction. The to-convict instruction purports to list all essential elements by its very terms. CP 50 ("to convict the

defendant of third degree assault, as charged in count I, each of the following essential elements must be proved beyond a reasonable doubt.”).

The to-convict instruction is accorded a special importance among the various instructions because it “serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (citing State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). Because the jury will rely on a “to convict” instruction for the essential elements, the jury need not “search the other instructions to see if another element alleged in the information should have been added to those specified in [the instruction].” State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953); see also State v. Mills, 154 Wn.2d 1, 8, 109 P.3d 405 (2005) (“an instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged.”).

These bedrock principles were violated in the case at bar when the court refused Bushaw’s request to include the element of intent from the to-convict instruction. The prosecution contends that intent is implied and therefore redundant to state it, but the jury is not expected to parse and construe language in a jury instruction

to garner the essential elements, rather the court must make them plain and obvious. The prosecution also claims State v. Hall, 104 Wn.App. 56, 62, 14 P.3d 884 (2000), rejected this same argument, but the defendant in Hall was charged with “three types of assault along with their required forms of intent” which differed depending on the jury’s analysis of the case. Furthermore, the language of the to-convict instruction is not reported in the decision so it is impossible to compare the language at issue.

Finally, the State claims any error is harmless because the jury asked a question about intent, thus implying they understood they needed to consider it. Resp. Brf. at 16-17. The jury’s question about what intent means demonstrates the critical importance of Bushaw’s intent and the corollary that clear, accurate instructions would have benefitted the jury and affected their deliberations. CP 58. Bushaw’s defense rested on his belief that he was simply reacting to a confusing situation and not intending to harm or threaten the police officer. The court’s failure to accurately explain the essential element of intent as a critical burden the prosecution must prove is not harmless error.

2. THE VIOLATION OF BUSHAW'S RIGHT TO BE PRESENT AND PARTICIPATE IN JURY DELIBERATIONS REQUIRES REVERSAL

a. The prosecution improperly rests its argument on Bushaw being meaningfully represented by counsel when there is no record of counsel's involvement. There is no record of meaningful representation by Bushaw's attorney when the court responded to the jury's question. CP 105. Nine minutes elapsed between when the jury wrote its question and the court responded. CP 105. The parties were not present in the courtroom, as this was the second day of deliberations and the court had told the parties they did not need to appear. The court directed Bushaw to be available to return to court within 15 or 20 minutes. Although the clerk's minutes refer to the court having consulted "with counsel," the minutes do not explain the names of the attorneys consulted or the nature of the consultation. Thus, the prosecution cannot justify the court's remarks by relying on proper representation and advocacy of counsel.

The prosecution also improperly implies Bushaw may well have participated in this stage of the trial. But the clerk's minutes otherwise document when Bushaw was in the courtroom or involved in the proceedings and they do not indicate Bushaw was

in any way consulted when the court responded to this early morning question by the jurors, as shown by comparing the minutes documenting at proceedings at 2 p.m., when “defendant and respective counsel present” and court “memorializes” unrelated communication with jury about its inability reach verdict on other counts, with the minutes indicating the court responded to the jury’s question, which does not even indicate “respective counsel” was consulted. CP 105.

b. Bushaw had a right to be present during a critical stage. The court did not simply address an administrative or purely legal matter in its responses to the jury’s notes. The court also gave inaccurate or incomplete responses to the jury’s questions, and had Bushaw been present as required, he could have explained that the jury would benefit from more complete instructions.

As discussed in Appellant’s Opening Brief, the jury asked a somewhat vague question about whether it could consider experiences of others, outside of the case. CP 60. The prosecution agrees this question was unclear, and asserts that we “can only speculate” about what they were asking. Resp. Brf. at 7. Yet the court should not ignore a question from the jury because it

is unclear. If the jury's question was unclear, it should have asked for clarification so it could have responded accurately.

Instead of ascertaining what the jury asked, the court told the jury, "no," to its question about whether it could consider experiences of others. This answer was incorrect, because the jury may consider experiences that affect its common sense understanding or was required to consider the "ordinary person" in evaluating whether Bushaw committed an assault. CP 52 (instruction defining assault). The court's answer to this question was incorrect and incomplete and would have benefited from full consideration and participation by the attorneys and Bushaw.

The second question the jury asked involved the facts it could consider when deciding whether an assault occurred and were expressly drawn from Bushaw's defense. CP 60. The jury asked whether Bushaw's pulling away constituted an assault or he needed to actively grab, hit, or touch. They also asked for further explanation of the word "offensive." The court did not respond to the questions substantively, even though they reflected the jury's failure to grasp the scope and essential elements of assault and simply told the jury to rely on instructions it had already found to be inadequate.

A trial court “has the responsibility to eliminate confusion when a jury asks for clarification of a particular issue.” United States v. Southwell, 432 F.3d 1050, 1053 (9<sup>th</sup> Cir. 2005); see also Bollenbach v. United States, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed.2d 350 (1946) (“When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.”).

In Southwell, the court’s original instruction were not legally inaccurate, but were unclear. When the jury asked for clarification, the court refused and told them to use the instructions they had been given. 432 F.3d at 1053. The court’s failure to clarify its instructions in response to the jury’s question was error. Id.

Likewise, the trial court here did not attempt to even seek clarification of confusing questions from the jury, much less attempt to alleviate confusion. The court’s instructions did not “require” the jury to properly apply the essential elements of the charged offense. See Southwell, 432 F.3d at 1055. By failing to clarify the instructions in light of the jury’s plea for further information, the court abused its discretion and failed in its obligation to ensure the jury correctly understands the applicable law. Id. at 1053.

c. At the time of the framing, the defendant’s right to be present during inquires from the deliberating jury was zealously

guarded. Courts interpret the provisions of the Washington Constitution by focusing on the plain language of the text, giving the words of the text their common and ordinary meaning as understood at the time of drafting. Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). The framers use of different language from the federal constitution demonstrates a deliberate intent to create different procedural and substantive requirements. State v. Foster, 135 Wn.2d 441, 484, 957 P.2d 712 (1998) (Johnson, Charles, J., dissenting) (four dissenters and one partially concurring opinion constituted the majority in Foster for purposes of discussing the Washington Constitution, although the concurrence differed from the dissent in its ultimate conclusion as applied to the confrontation clause issue in that case). Provisions of the Washington Constitution are “mandatory, unless by express words they are declared to be otherwise.” Wash. Const. art. I, § 29.

Here, the constitution provides that an accused person “shall” have the right “to appear and defend in person.” This express language prohibits the court from instructing a deliberating jury without affording a defendant his or her right to be present. State v. Shutzler, 82 Wash. 365, 367, 144 P. 284 (1914); State v.

Beaudin, 76 Wash. 306, 308, 136 P. 137 (1913) (“The giving of an instruction in appellant's absence constituted prejudicial error, which was not cured” by later reinstructing the jury with defendant present, because the right to be personally present is mandatory for all substantive trial proceedings and is strictly enforced); Linbeck v. State, 1 Wash. 336, 338-39, 25 P. 452 (1890) (repeating and orally explaining jury instructions to deliberating jury with counsel but without defendant’s presence is error “and we do not think this error was cured by the fact that defendant's attorney was present and made no objection.”).

Although other cases cited by the prosecution have not uniformly held the court to this strict burden, they have not explained why the federal constitution’s harmless error analysis holds sway in this arena, rather than the strictly enforced and express requirements of the state constitution. As the court explained in Shutzler,

Since it is the right of the accused to be present at every stage of the trial when his substantial rights may be affected, it is no answer to say that in the particular proceeding nothing was done which might not lawfully have been done had he been personally present. The excuse, if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all. The wrong lies in the act itself, in the

violation of the constitutional and statutory right of the accused to be present and defend in person and by counsel.

Shutzler, 82 Wash. at 367-68; see also Beaudin, 76 Wash. at 308; Linbeck, 1 Wash. at 339. The excuse the prosecution asserts, that a de minimus analysis should be applied, is improper because “if good for the particular proceeding, would be good for the entire proceedings; the result being a trial and conviction without his presence at all.” Shutzler, 82 Wash. at 367-68.

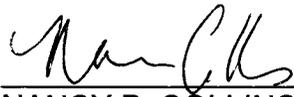
The Washington Supreme Court continues to reject the State’s efforts to undermine the “public trial” right also expressly accorded to an accused person by this same constitutional provision, art. I, section 22. State v. Strobe, \_\_ Wn.2d \_\_, 217 P.3d 310, 316 (2009). The remedy for a denial of the right to be present during a critical stage in the trial is, like the denial of the right to a public trial, “a structural error and prejudice is necessarily presumed.” Id. Even under the constitutional harmless error analysis used in federal courts, the court’s inadequate instructions and failure to properly consult counsel and Bushaw requires reversal. Southwell, 432 F.3d at 1056.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Bushaw respectfully requests this Court reverse his conviction and order a new trial.

DATED this 11<sup>th</sup> day of November 10, 2009.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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	)	
RICHARD BUSHAW,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> RICHARD BUSHAW 6313 NE 94 <sup>TH</sup> AVE VANCOUVER, WA 98662	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_ 

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