

67349-1

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No. 67349-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANKLIN LOUIS HUTTON,

Appellant.

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENT OF ERROR

The trial court violated Mr. Hutton's right to due process by omitting the element that the force used was unlawful from the to-convict instruction.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires that every element of the charged offense be in the to-convict instruction. Here, the court instructed on consent but failed to include in Court's Instruction 3, the to-convict instruction, the element that the force used was unlawful. Did the to-convict instruction violate Mr. Hutton's right to due process?

C. STATEMENT OF THE CASE

Hearing that his girlfriend, Jessica Valdes, had been sexually assaulted by Alex Chavez when the two were watching a movie at Ms. Valdes' apartment, Franklin Hutton decided to confront Mr. Chavez when he subsequently saw him at the apartment. RP 20-23, 208-10.¹ Mr. Hutton asked Mr. Chavez to step outside the apartment to discuss the matter. RP 210-11.

Mr. Chavez admitted the sexual assault to Mr. Hutton and asked for a "pass" or forgiveness for the act. RP 27-28. Mr. Hutton

¹ "RP refers to the two volumes of transcript containing the proceedings on June 6, 2011, and June 7 and 8, 2011.

refused and struck Mr. Chavez in the jaw. RP 28. The fight continued until Mr. Chavez fell to the ground. RP 28-30, 212-13. It was later determined that Mr. Chavez's jaw was broken during the incident. RP 35-37. Mr. Chavez was convinced to call the police and Mr. Hutton was subsequently arrested and charged with second degree assault. CP 114-15; RP 34-36, 88.

The trial court's to-convict instruction for second degree assault, Instruction 3, stated:

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 the 17th day of December, 2010, the defendant, or an accomplice, intentionally assaulted Osmin Alexander Chavez;
- (2) That the defendant, or an accomplice, thereby recklessly inflicted substantial bodily harm on Osmin Alexander Chavez; and
- (3) That the act occurred in the State 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 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.

CP 69.

The court also instructed on the defense of consent:

An assault is an intentional touching or striking of another person that is harmful or offensive. *An act is not an assault if it is done with the consent of the person alleged to be assaulted.*

CP 70 (emphasis added).

Mr. Hutton objected to the court's failure to include an "unlawful force" requirement in the to-convict instruction, but the court nevertheless refused to add this language. RP 244-46.

Following a jury trial, Mr. Hutton was convicted as charged.

CP 63.

D. ARGUMENT

COURT'S INSTRUCTION 3, THE TO-CONVICT INSTRUCTION, OMITTED AN ESSENTIAL ELEMENT OF ASSAULT

1. All of the elements of the offense are required to be in the "to-convict" instruction. Under the Fourteenth Amendment to the United States Constitution, the State is required to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The court's instructions to the jury therefore must clearly set forth all of the elements of the crime charged. *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). In

Washington, all of the elements of the crime must be contained within a single "to-convict" instruction. *State v. Oster*, 147 Wn.2d 141, 147, 52 P.3d 26 (2002); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other instructions. *Smith*, 131 Wn.2d at 263. "Moreover a reviewing court may not rely on other instructions to supply the element missing from the 'to convict' instruction." *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal. *State v. Fisher*, 165 Wn.2d 727, 753-54, 202 P.3d 937 (2009); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). This Court reviews "to convict" instructions *de novo*. *DeRyke*, 149 Wn.2d at 910.

2. Court's Instruction 3, the to-convict instruction, omitted the element that the State must disprove Mr. Hutton's lawful use of force. Here, despite giving an instruction on consent, the court did not include in the to-convict instruction that the State was required to disprove Mr. Hutton's use of lawful force. This omission violated due process.

As charged here, a person is guilty of second degree assault when he intentionally assaults another and thereby inflicts substantial bodily harm. RCW 9A.36.021(1)(a). The statute does not define "assault," thus Washington law applies the common law definition. *State v. Byrd*, 125 Wn.2d 707, 712, 887 P.2d 396 (1995). The trial court's jury instruction number 4 defined assault as an actual battery:

An assault is an intentional touching or striking of another that is harmful or offensive. An act is not an assault if it is done with the consent of the person alleged to be assaulted.

CP 70. In its definition of assault instruction, the Washington Supreme Court Committee on Jury Instructions explains that the "with unlawful force" language should be included if the defendant argued either self defense or lawful use of force. WPIC 35.50, note on use at 548.

In general, contact is not an assault when the victim consents. *State v. Jarvis*, 160 Wn.App. 111, 120, 246 P.3d 1280 (2011); *State v. Shelley*, 85 Wn.App. 24, 28-29, 929 P.2d 489, review denied, 133 Wn.2d 1010 (1997). Thus, when one is acting with the consent of another, the use of force is lawful. *Id.*

In Washington, when the issue of lawful force is raised, the unlawful force becomes an essential element the State must prove beyond a reasonable doubt. See *State v. Acosta*, 101 Wn.2d 612, 616-17, 683 P.2d 1069 (1984) (holding that self-defense negates the unlawful “intent” and “knowledge” elements of the crimes of first degree murder and second degree assault because a person who acts in self-defense acts “lawfully.” As a result, the State must disprove self-defense beyond a reasonable doubt.) In other words, the absence of lawful force is an element the State must prove. *Id.* Consent is an element here because it negates the element of assault that the use of force was unlawful. Thus, the to-convict instruction omitted the element of absence of lawful force.

3. The omission prejudiced Mr. Hutton, requiring reversal of his conviction. A constitutional error requires reversal unless the State can prove beyond a reasonable doubt that the error did not affect the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). This Court should reverse Mr. Hutton's conviction because the omission of the "absence of lawful force" element in the to-convict instruction prejudiced his defense.

Mr. Hutton argued that Mr. Chavez consented to the assault, that he wanted to fight, and further suggested the incident occurred in the nearby garage. RP 257. Mr. Hutton also argued that Mr. Chavez consented because he wanted to be part of the "hood" and being in fights and being beat up was a badge of honor in the "hood." RP 258. Despite the testimony and argument that Mr. Chavez consented and thereby made the punch a "lawful act," the to-convict instruction did not place the burden on the State to disprove the act was unlawful. The State cannot show that the verdict would have been the same had the element of the absence of lawful force been included in the to-convict instruction. Mr. Hutton's conviction should be reversed.

E. CONCLUSION

For the reasons stated, Mr. Hutton requests this Court reverse his conviction and remand for a new trial.

DATED this 15th day of December 2011.

Respectfully submitted,



THOMAS M. KUMMEROW (WSBA 21518)
tom@washapp.org
Washington Appellate Project – 91052
Attorneys for Appellant

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67349-1-I
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FRANKLIN HUTTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF DECEMBER, 2011, I CAUSED THE ORIGINAL **OPENING 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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SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| [X] | FRANKLIN HUTTON
8003 283RD ST NW
STANWOOD, WA 98292 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 15TH DAY OF DECEMBER, 2011.

X _____
[Handwritten Signature]

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711