

70234-3

70234-3

NO. 70234-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KHAIR SIDDIQ,

Appellant.

2014 JAN -6 PM 3:00
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BARBARA LINDE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

In general, all elements of the crime must be included in the “to convict” jury instruction. However, the absence of self-defense is not an element of assault. Rather, self-defense negates the *mens rea* element of the offense. Did the trial court properly instruct the jury when it used the pattern jury instructions on self-defense instead of the defendant’s proposed “to convict” instructions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 21, 2011, Appellant Khair Siddiq was charged in the King County Superior Court with second-degree assault. CP 1. The State alleged that he intentionally assaulted Michael Freeman, and thereby recklessly inflicted substantial bodily harm. Id. Siddiq, along with his co-defendant, Yevgeniy Kushner, went to trial in front of the Honorable Barbara Linde on January 24, 2013. RP 4.

The trial court instructed the jury on both the charged crime of second-degree assault, as well as the lesser offense of fourth-degree assault. CP 72. Using the Washington Pattern

Criminal Jury Instructions (“WPICs”), the court instructed the jury on self-defense. CP 66-70. The jury found Siddiq guilty as charged of second-degree assault. CP 29.

Siddiq failed to appear for sentencing on March 15, 2013, and a warrant issued for his arrest. RP 541-43. He appeared in-custody on April 12, 2013, and was sentenced to a standard range sentence of 19 months incarceration and 18 months of community custody. RP 544-53; CP 34-35. He now appeals his conviction. CP 40.

2. SUBSTANTIVE FACTS

On December 17, 2011, Michael Freeman went to a nightclub at the Pacific Place Shopping Center to celebrate the birthday of his girlfriend, Maria Klink. RP 51. Other friends that attended the club included Lisa Cooke, Lanai Jenkins, and Ansley Towerk. RP 56. Jenkins was the designated driver, consuming just one drink the entire evening, when they first arrived at the nightclub. RP 56-57, 254-55.

After spending several hours at the club, chatting, dancing, eating, and celebrating, Freeman and his friends went to leave. RP 255-56. In the elevator to the parking garage, the group

encountered Siddiq, Kushner, and another male that Siddiq claimed to know only as "Jamal." RP 380-81, 389-90.

While in the elevator, Kushner tried to talk to Cooke, who was uninterested. RP 124, 225, 230, 232, 260. After Cooke rebuffed Kushner's advances, Kushner touched her or pushed her in some manner. RP 124, 230, 232, 260-61. At that point, Freeman said either, "Don't talk to girls like that," or, "Don't touch her." RP 124, 130. Freeman also moved closer to Cooke and put his arm between her and Kushner, Siddiq, and "Jamal." RP 261.

When Freeman spoke up on behalf of Cooke, Siddiq, Kushner, and "Jamal" got agitated and began to "talk trash" to Freeman. RP 128, 230, 233. A verbal back and forth ensued. RP 129. One of the three men pushed Freeman, who went to steady himself. RP 262. The man pushed Freeman harder, until Freeman's arms swung in an effort to keep his balance. Id. At approximately the same time, the elevator doors opened and the three men shoved the girls and Freeman, knocking all but Jenkins down, and spilling everyone out onto the floor outside the elevator. RP 129, 263.

Jenkins observed Siddiq stomping repeatedly on Freeman's head, while Freeman lay on the ground, not moving and appearing

unconscious. RP 264, 284. Jenkins ran over and began to pepper-spray Siddiq, who fled. RP 265.

At trial, Klink testified that she observed both Siddiq and Kushner stomping on Freeman's head. RP 135-36. Towerk remembered Kushner kicking Freeman's head "into the ground," and remembers Siddiq "punching [Freeman's] head in." RP 234. Freeman remembered nothing of the assault other than feeling his head "bouncing on the ground." RP 55. Cooke also remembered nothing of the assault other than falling out of the elevator. RP 295.

Off-duty Seattle Police Officers McNew and Blackmer were working as security for the Pacific Place Shopping Center when they were called to respond to the parking garage disturbance. RP 311, 336. They encountered Siddiq and Kushner in the parking garage, about 100 feet from the elevators. RP 317, 338. Although Siddiq initially complied with their orders to get onto the ground, when Officer Blackmer attempted to handcuff him, Siddiq responded by placing his hands underneath his body and pushing himself up off the ground. RP 319-20, 339. McNew had to leave Kushner to come over and assist Blackmer in handcuffing Siddiq. RP 319-20, 339. The officers were eventually able to place Siddiq into handcuffs. RP 329.

Siddiq testified that while in the elevator, Freeman became agitated and aggressive, began shouting, and that he started “swinging wildly.” RP 382-83. Siddiq claimed that he had no idea why Freeman was upset. RP 382. Siddiq told the jury that Freeman hit him in the face, so he struck Freeman back and then they began “wrestling.” RP 383. Siddiq testified that the elevator doors opened and they fell out. RP 383-84. Siddiq claimed that he simply picked himself up and started walking toward his car. RP 384-85. He denied ever kicking or stomping on Freeman, and testified that he never looked back at his friends because he “just wasn’t really concerned” with anything other than himself. RP 384-85. Siddiq claimed that he complied immediately with the police and never resisted their efforts to handcuff him. RP 386, 392.

Freeman was taken to Harborview, where he was diagnosed with a closed-head injury. RP 91. He had superficial bruising to his eye as well as bleeding beneath the skin of his head, and he received stitches in his lip. RP 87-89. Freeman also suffered headaches, blurred vision, light-headedness and dizziness that lasted a few months. RP 57-61. His lingering symptoms were consistent with his having suffered a concussion. RP 93-94.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY REFUSING TO INCLUDE THE ABSENCE OF SELF-DEFENSE IN THE “TO-CONVICT” INSTRUCTIONS.

Siddiq argues that the trial court erred by not adopting his proposed “to convict” instructions that included the State’s burden to disprove self-defense beyond a reasonable doubt. This claim should be rejected. First, Siddiq’s position is contrary to existing Washington Supreme Court precedent that approves of a separate self-defense instruction. Second, Siddiq’s proposed “to convict” instructions were confusing and misleading, and the trial court had no obligation to give them. The jury instructions as a whole correctly stated the law and allowed Siddiq to argue his self-defense theory of the case. There was no error.

a. The Instructions.

The jury was instructed that “[a] person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” CP 87 (Jury Instruction 7); WPIC 35.10; RCW 9A.36.021(1)(a). The jury was also instructed on the lesser offense of fourth-degree assault: “A person commits the crime of assault in the fourth

degree when he or she commits an assault.” CP 98 (Jury Instruction 18); WPIC 35.25; RCW 9A.36.041(1). The jury was informed:

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. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

CP 90 (Jury Instruction 10); WPIC 35.50. The jury was also provided with the applicable *mens rea* instruction as follows:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

CP 91 (Jury Instruction 11); WPIC 10.01.

In pertinent part, the “to convict” instruction for the second-degree assault charge read as follows:

To convict the defendant Khair Siddiq 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 December 18, 2011, the defendant intentionally assaulted Michael Freeman;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Michael Freeman; and

(3) That the acts occurred in the State of Washington.

CP 89 (Jury Instruction 9); WPIC 35.13. The relevant portion of the

“to convict” instruction for the lesser offense of fourth-degree

assault read:

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

(1) That on or about December 18, 2011, the defendant assaulted Michael Freeman; and

(2) That the acts occurred in the State of Washington.

CP 100 (Jury Instruction 20); WPIC 35.26.

Finally, the jury was provided with the WPIC self-defense

instruction as follows:

It is a defense to the charge of assault 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.

CP 102 (Jury Instruction 22); WPIC 17.02.

b. The Court Properly Declined To Provide Siddiq's Proposed "To Convict" Instructions.

Siddiq argues that the absence of self-defense was an element of the crime that the court should have included in the "to convict" jury instructions. He claims that the court committed reversible error by rejecting his proposed instructions, which indicated that the State must prove, "That the force used was not lawful, and that the assault was not in defense of the defendant." See CP 23, 24 (Siddiq's proposed instructions). His argument should be rejected.

The adequacy of a challenged "to convict" jury instruction is reviewed de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (citing State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)). Jury instructions are sufficient if, when read as a whole, they properly inform the jury of the applicable law, are

supported by substantial evidence, and allow the parties to argue their theory of the case. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

As a general principle, the “to convict” instruction must contain all elements required to convict the defendant of the charged crime. State v. Mills, 154 Wn.2d 1, 7, 19 P.3d 415 (2005) (citing DeRyke, 149 Wn.2d at 910). However, disproving that a defendant acted in self-defense is not an element of the crime of assault; rather, self-defense negates the *mens rea* element of the offense. See State v. McCullum, 98 Wn.2d 484, 495, 656 P.2d 1064 (1983) (self-defense negates the intent element of murder); State v. Acosta, 101 Wn.2d 612, 616, 683 P.2d 1069 (1984), abrogated on other grounds by State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989) (self-defense negates the knowledge element of second-degree assault).

In State v. Jorden, this Court noted that past decisions which described the absence of self-defense as an “element” of the crime pre-date the modern criminal code, and that such language was simply shorthand for the principle that the State must disprove self-defense once properly raised. 158 Wn. App. 297, 301-02, 241 P.3d 464 (2010). Here, because the absence of self-defense is not

an element of the crime of assault, it was not error to separately instruct the jury on the State's burden to disprove self-defense.

Indeed, the Supreme Court has flatly rejected Siddiq's argument. In State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991), the defendant, who was charged with aggravated first-degree murder, raised a claim of self-defense. The trial court provided a separate self-defense instruction that allocated the burden of proof to the State to disprove self-defense beyond a reasonable doubt. Hoffman argued that the instruction "must be part of the 'to convict' instruction which sets forth the elements of the crime of murder in the first degree." Hoffman, 116 Wn.2d at 109. The Supreme Court rejected this argument, stating, "We perceive no error in this instructional mode." Id.

The doctrine of *stare decisis* requires a court to hold firm to a prior decision. State v. Gentry, 125 Wn.2d 570, 587, n.12, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). The binding nature of precedent can be overcome only by a clear showing that an established rule is incorrect and harmful. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970).

The only difference between this case and Hoffman is that Hoffman was charged with intentional murder, while Siddiq was

charged with second-degree assault. However, like intentional murder, Siddiq's charged crime of second-degree assault also required proof of specific intent—the State was required to prove that Siddiq intentionally assaulted Freeman, and thereby recklessly inflicted substantial bodily harm. CP 1, 51; RCW 9A.36.021(1)(a). Also, the lesser offense of fourth-degree assault required proof that Siddiq acted with specific intent. CP 54; see also State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992) (specific intent is an element of fourth-degree assault). Thus, there is no principled basis upon which to distinguish Hoffman from the present case.

Although Siddiq cites to several post-Hoffman cases in support of his argument, none of those cases address the precise issue here,¹ which is directly controlled by Hoffman. In order to overcome the dictates of Hoffman, Siddiq would have to show that it is both incorrect and harmful. He does neither.

¹ Mills reversed a defendant's conviction for felony harassment because it was not clear from the special verdict form that the jury had to find that the victim was placed in reasonable fear by the defendant's threat to kill. 154 Wn.2d at 14-15. In State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997), the court reversed the defendant's conviction because the "to convict" instruction erroneously informed the jury that it must find that the defendant conspired to commit "Conspiracy to Commit Murder in the First Degree" instead of conspiring to commit "Murder in the First Degree." In State v. Sibert, 168 Wn.2d 306, 312, 230 P.3d 142 (2010), the court concluded that, under the facts of the case, it was unnecessary to include the specific identity of the controlled substance at issue in the "to convict" instruction. None of the cases cited by Siddiq involve self-defense.

Finally, a trial court is under no obligation to give a confusing and misleading jury instruction. Griffin v. West R.S., Inc., 143 Wn.2d 81, 90-91, 18 P.3d 558 (2001); State v. Crittenden, 146 Wn. App. 361, 369, 189 P.3d 849 (2008). Here, Siddiq's proposed "to convict" instructions informed the jury that in order to find him guilty, it must find, "That the force used was not lawful, and that the assault was not in defense of the defendant[.]" CP 23, 24 (emphasis added). These proposed instructions were confusing and misleading, and the court did not err in refusing to provide them.

A person acting in self-defense cannot act intentionally as that term is statutorily defined. McCullum, 98 Wn.2d at 495. A person acts with intent or intentionally if the actor has the objective or purpose to accomplish a result that constitutes a crime. RCW 9A.08.010(1)(a). A person acting in self-defense is not acting "with the objective or purpose to accomplish a result that constitutes a crime." McCullum, 98 Wn.2d at 495. Therefore, self-defense negates the unlawfulness contained within the statutory definition of intent. Id.

Because the State had to prove that the charged second-degree assault (and the lesser offense of fourth-degree assault) was an intentional act, Siddiq could not have committed an assault if acting in self-defense, i.e., if acting lawfully. Therefore, Siddiq's proposed jury instruction language that "the assault" was not in defense of the defendant was confusing and misleading. An "assault" is a legal conclusion, and the jury could not simultaneously find that an assault occurred, but that it occurred in self-defense. The court did not err in refusing to provide Siddiq's confusing and misleading "to convict" instructions.

The self-defense instruction provided by the court accurately stated the law and correctly allocated the burden of proof. Siddiq was able to fully argue his self-defense theory of the case. There was no error.

c. The "Error," if Any, Was Harmless.

Finally, even if the trial court erred by not providing Siddiq's proposed "to convict" instructions, any error was harmless beyond a reasonable doubt. An instructional error is harmless if, beyond a reasonable doubt, the error complained of did not contribute to the

verdict. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

Reversal is unnecessary if the error was trivial, formal, merely academic, and in no way affected the outcome of the case. Smith, 131 Wn.2d at 263-64 (citations omitted).

As stated above, the instructions in this case were substantively accurate and appropriately allocated the burden of proof. There is no chance that providing an accurate self-defense instruction contributed to the verdict merely because it was contained in an instruction separate from the “to convict” instruction. This type of error (if error at all) was harmless beyond a reasonable doubt.

D. CONCLUSION

The absence of self-defense is not an element of assault that was required to be included in the “to convict” jury instructions. The court did not err when it properly instructed the jury on the law of self-defense, properly allocated the burden to disprove self-defense to the State, and allowed Siddiq to thoroughly argue his theory of the case. Moreover, the “to convict” instructions offered by Siddiq were confusing and misleading, and the trial court

was under no obligation to provide them. Finally, even if the court erred by not providing Siddiq's proposed instructions, the error was harmless beyond a reasonable doubt because it in no way contributed to the verdict. Siddiq's conviction should be affirmed.

DATED this 6th day of January, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
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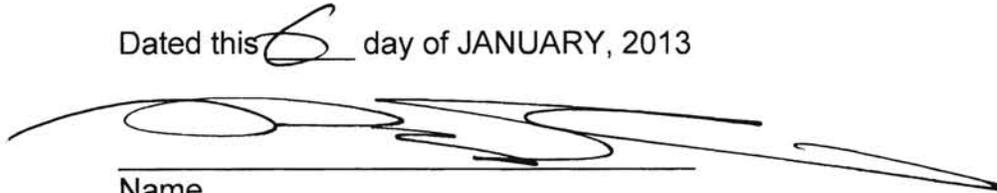
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KHAIR SIDDIQ, Cause No. 70234-3 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 6 day of JANUARY, 2013

A large, stylized handwritten signature in black ink, written over a horizontal line.

Name
Done in Seattle, Washington