

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,) NO. 65029-7-I
)
 Respondent,) DIVISION ONE
)
 v.)
) UNPUBLISHED OPINION
 JAY DEE MILLER,)
)
 Appellant.) FILED: April 18, 2011
)

Leach, A.C.J. — In order to convict a defendant, the State must prove every essential element of a crime beyond a reasonable doubt. Jury instructions that relieve the State of this burden are insufficient. In this appeal of Jay Miller's conviction for assault in the first degree, he asserts several instructional errors, including a contention that the court's instructions permitted the jury to convict without finding the requisite intent. But the jury instructions in this case set forth all essential elements of the crime of assault in the first degree. Specifically, the instructions properly required the jury to find beyond a reasonable doubt that Miller assaulted the victim with a firearm with intent to inflict great bodily harm. Finding no merit in Miller's claims, we affirm his conviction and sentence.

Facts

In August 2009, Jay Miller met James Engle. Engle and his girl friend needed a place to stay, and Miller agreed to let them stay on his property in

Everett. For the most part, Engle and his girl friend stayed in a trailer parked on the property. But because the trailer did not have a bathroom or running water, the guests also spent time in Engle's house. About a month after they began staying with Miller, Engle and his girl friend broke up, and she left. Miller decided he wanted Engle to leave as well and told him so. Engle informed Miller that he had found somewhere else to stay and would move in a couple of days, on September 3.

On the night of September 1, Engle slept in the trailer. The next morning, Engle banged on the front door and asked to come in the house to use the bathroom. Miller let Engle in for that purpose. Then Engle left. Several arguments followed when Engle returned to the house, asking to come in for various reasons: to take a shower, collect his laundry, and retrieve his things. Miller told Engle several times he did not want him in the house anymore.

According to Engle, Miller refused to let him inside the house and slammed the sliding glass door shut. Then Miller changed his mind, opened the sliding door, and said, "Come on." After Engle walked back into the house, Miller slid the door shut and locked it. Miller said, "Now you're dead, fucker" and shot Engle twice. One of the bullets grazed Engle's shoulder; the other struck him in the back of the head, producing entry and exit bullet wounds.

Miller claimed that he shot Engle in self-defense. According to Miller, in the days preceding the incident, he became concerned that Engle might assault him or that he might have to involve the police to get Engle to leave.

Anticipating that he might need to summon the police, the night before the shooting Miller removed about thirty marijuana plants he was growing in the house.¹ And when Engle banged on the door to come in on the morning of September 2, Miller armed himself with a revolver.

Miller said that when he refused to let Engle inside, Engle began throwing things around in the yard. Miller threatened to call the police, and Engle responded that he would “break [Miller’s] head.” Miller claimed that the sliding door lock was broken, so Engle was able to come back in the house to confront him. Miller testified that he was “sure [Engle] was going to do me bodily harm,” and so he shot him to scare him and make him leave.

The State charged Miller with assault in the first degree based on the shooting. A jury convicted Miller as charged and found by special verdict that he was armed with a firearm.

Assault Instructions

Miller contends the jury instructions given by the trial court relieved the State of its burden of proving an essential element of the crime: that he acted with intent to inflict great bodily harm. As an initial matter, we note that Miller did not object to the jury instructions. But Miller’s contention that the instructions relieved the State of its burden of proof, if true, asserts a manifest error of constitutional magnitude. Therefore, RAP 2.5(a) does not preclude our review.²

¹ Miller was also charged with one count of manufacture of a controlled substance and pleaded guilty to that charge shortly before trial. Miller does not challenge his drug conviction in this appeal.

“[J]ury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case.”³ This court reviews *de novo* whether a jury instruction correctly states the applicable law.⁴ The State must prove every essential element of a crime beyond a reasonable doubt in order for this court to uphold a conviction.⁵ It is reversible error to instruct the jury in a manner that relieves the State of this burden.⁶

The “to-convict” instruction given by the court set forth the intent element required for assault in the first degree. The court gave a separate instruction which provided three common law definitions of the term “assault.” Miller claims that this instruction’s third definition of assault allowed the jury to ignore the intent element of the “to-convict” instruction and to convict him without finding that he intended to inflict great bodily harm.⁷ Miller further maintains that the “to-convict” instruction did not specifically require the jury to find that he committed the assault with the requisite intent but instead required only that the jury find

² See State v. Goble, 131 Wn. App. 194, 203, 126 P.3d 821 (2005).

³ State v. Teal, 152 Wn.2d 333, 339, 96 P.3d 974 (2004); accord State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993).

⁴ State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

⁵ In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 224, 616 P.2d 628 (1980).

⁶ State v. Byrd, 125 Wn.2d 707, 714, 887 P.2d 396 (1995).

⁷ The third definition stated, “An assault is also 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.”

that Miller committed some unspecified act with the required intent. We disagree with both contentions.

A person is guilty of assault in the first degree if he or she, "with intent to inflict great bodily harm [a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death."⁸ In accordance with RCW 9A.36.011(1)(a), the "to-convict" instruction given to the jury in this case states, in relevant part,

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

- (1) That on or about the 2nd day of September, 2009, the defendant assaulted James Engle;
- (2) That the assault was committed with a firearm or by force or means likely to produce great bodily harm or death;
- (3) That the defendant acted with intent to inflict great bodily harm; and
- (4) That this 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.^[9]

Thus, this instruction told the jury twice that each element had to be proved beyond a reasonable doubt. Nothing in this instruction, or any other instruction, informed the jury of any circumstance in which it could return a verdict of guilty on the charge of assault in the first degree without finding all four elements. In closing, the prosecutor specifically told the jury that in order to

⁸ RCW 9A.36.011(1)(a).

⁹ This instruction follows the pattern instruction set forth in Washington Practice: Washington Pattern Jury Instructions: Criminal 35.02, at 453 (3d ed. 2008) (WPIC). We observe that the note on use for this pattern instruction directs the use of the instruction the court gave to define assault.

convict Miller of first degree assault, the State was required to prove beyond a reasonable doubt that Miller assaulted Engle with intent to inflict great bodily harm. Viewing the instructions as a whole and in the context of the arguments, we conclude that the instructions on first degree assault were accurate and not misleading. The “to-convict” instruction clearly required the jury to find beyond a reasonable doubt that Miller assaulted Engle with intent to inflict great bodily harm.

Miller also argues that the trial court was required to instruct the jury that he must have actually inflicted great bodily harm. He claims that without the actual infliction of great bodily harm, the elements of first degree assault are indistinguishable from second degree assault. This argument fails for two reasons. First, Miller was charged under RCW 9A.36.011(1)(a), and actual infliction of great bodily harm is not an element of the crime under this provision.¹⁰ Second, while an assault with a deadly weapon may constitute assault in the second degree under some circumstances, distinct intent requirements differentiate the two crimes. The trial court did not err by omitting from its instructions any requirement that the jury find Miller actually inflicted great bodily harm because this is not an element of assault in the first degree as charged in this case.¹¹

¹⁰ Cf. RCW 9A.36.011(1)(c) (a person is guilty of first degree assault if, with intent to inflict great bodily harm, a person assaults another and inflicts great bodily harm).

¹¹ RCW 9A.36.011(1)(a).

Self-Defense Instructions

In accordance with Miller's claim that he shot Engle because he believed Engle was about to assault him, the court instructed the jury on self-defense. The self-defense instruction provided that the use of force is lawful "when used by a person who reasonably believes that he is about to be injured" and when the force used is not more than necessary. The instructions also informed the jury that Miller was entitled to "act on appearances," it was not necessary to conclude there was "actual danger," and there was no duty to retreat. The instructions further informed the jury that the State bore the burden of proving beyond a reasonable doubt that the force used by the defendant was unlawful.

Nevertheless, because the crime took place in Miller's home, he contends on appeal that he was entitled to a jury instruction incorporating the standard for justifiable homicide in actual resistance of a felony contained in RCW 9A.16.050(2). RCW 9A.16.050(2) provides that a person is justified in committing homicide when it is committed "[i]n the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is." Miller claims this instruction would have been beneficial because justifiable homicide in resistance to a felony encompasses a "broader right of self-defense" and requires no showing that the amount of force used was necessary.

But Miller did not request a justifiable homicide instruction at trial, and we know of no authority which would have required the court to give such an

instruction absent any request. Generally, a party claiming that the trial court's instructions were erroneous must have objected on the same ground below or the party has waived the right to raise the issue on appeal.¹² "No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made."¹³ We therefore decline to address this argument.¹⁴

Finally, Miller challenges the "to-convict" instruction because it failed to include the absence of self-defense as an element of first degree assault. Our Supreme Court has already rejected the argument that absence of self-defense must be included in the "to-convict" instruction, concluding that the better approach is to give a separate instruction on self-defense, which includes the State's burden of proof.¹⁵ As explained, the separate instruction on self-defense provided here informed the jury of the State's burden to prove the absence of self-defense beyond a reasonable doubt. The instructions further informed the jury that if the State did not meet this burden, the jury must return a verdict of not

¹² CrR 6.15(c); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

¹³ State v. Kroll, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).

¹⁴ In any event, we are not persuaded that the premise of Miller's argument is correct. We note that homicide is justifiable under RCW 9A.16.050(2) in resistance to a felony only if there is evidence demonstrating that a reasonable person in similar circumstances would believe the use of deadly force is necessary. See State v. Brightman, 155 Wn.2d 506, 522, 122 P.3d 150 (2005); See also WPIC 16.03, at 239 ("The slayer may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they reasonably appeared to the slayer."). Miller also fails to provide any argument to support his request that this court usurp the role of the legislature in defining the scope of a statutorily-created affirmative defense.

¹⁵ State v. Hoffman, 116 Wn.2d 51, 109, 804 P.2d 577 (1991).

guilty. The jury was instructed to consider the instructions as a whole. We conclude there was no error.

Accordingly, we affirm.

Leach, A.C.J.

WE CONCUR:

Sleineller, J.

Becker, J.