Petition Appendix

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2020 CO 74

Supreme Court Case No. 18SC923
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 16CA138

Petitioner:

The People of the State of Colorado,

v.

Respondent:

Derek Michael Rigsby.

Judgment Reversed
en banc
September 14, 2020

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JUSTICE SAMOUR delivered the Opinion of the Court.
JUSTICE GABRIEL dissents.

¶1 The People charged Derek Michael Rigsby with three felony counts of second degree assault for smashing a glass into someone's face during a bar fight. The three charges represented alternative methods of committing the same crime. The jury found Rigsby guilty as charged on the first two counts: (1) second degree assault (acting with intent to cause bodily injury and causing serious bodily injury); and (2) second degree assault (acting recklessly and causing serious bodily injury with a deadly weapon). On the third count, second degree assault (acting with intent to cause bodily injury and causing bodily injury with a deadly weapon), the jury returned a guilty verdict on the lesser included offense of third degree assault (acting with criminal negligence and causing bodily injury with a deadly weapon), a misdemeanor; in so doing, the jury necessarily acquitted Rigsby of the charged offense on that count.

¶2 Concluding that the guilty verdicts for second degree assault, on the one hand, and the guilty verdict for third degree assault, on the other, were mutually exclusive, a division of the court of appeals reversed the judgment of conviction and remanded for a new trial. The division determined that the guilty verdicts could not be reconciled because the second degree assault convictions required the jury to find that Rigsby acted intentionally and recklessly and was thus aware of the risk of bodily injury, while the third degree assault conviction required the jury to find that Rigsby acted with criminal negligence and was thus unaware of the

risk of bodily injury. In the division's view, the guilty verdicts for second degree assault negated the guilty verdict for third degree assault and vice versa.

¶3 The People concede that the judgment of conviction entered by the trial court was defective, but argue that the error was one of multiplicity, not mutually exclusive verdicts, and that it should be corrected by merging the three guilty verdicts. We agree.

¶4 Pursuant to section 18-1-503(3), C.R.S. (2019), proving the mental state required for each of the second degree assault convictions ("intentionally" or "with intent" for one and "recklessly" for the other) necessarily established the mental state required for the third degree assault conviction ("criminal negligence"). Therefore, even if each of the guilty verdicts for second degree assault is *logically* inconsistent with the guilty verdict for third degree assault, no *legal* inconsistency exists. Accordingly, the division was mistaken in determining that the trial court accepted mutually exclusive verdicts.

¶5 We nevertheless conclude that the trial court erred by entering multiplicitous convictions, which violated Rigsby's right to be free from double jeopardy. We thus remand to the court of appeals with instructions to return the case to the trial court to merge all of the convictions into a single conviction for second degree assault and to leave in place only one sentence (one of the two concurrent five-year prison sentences imposed).

I. Facts and Procedural History

¶6 Rigsby, his girlfriend, and two of their friends (a man and a woman) went to a bar. While Rigsby's girlfriend and her female friend stood on the dance floor, Nathan Mohrman and his male friend began talking to them. What followed was disputed at trial. However, there was no disagreement that a confrontation ensued shortly thereafter between Rigsby and Mohrman during which Rigsby struck Mohrman in the face with the glass Rigsby was holding in his hand. Mohrman's resulting injury required several stitches.

¶7 The People subsequently charged Rigsby with second degree assault, a felony. Because they proceeded under three alternative theories of liability, however, they filed three separate charges: count 1, second degree assault (acting with intent to cause bodily injury and causing serious bodily injury); count 2, second degree assault (acting recklessly and causing serious bodily injury with a deadly weapon); and count 3, second degree assault (acting with intent to cause bodily injury and causing bodily injury with a deadly weapon). On the first two counts, the jury found Rigsby guilty as charged. On count 3, the jury acquitted Rigsby of the charged offense, but returned a guilty verdict on the lesser included offense of third degree assault (acting with criminal negligence and causing bodily

injury with a deadly weapon).[1] The trial court later sentenced Rigsby to five years in prison on each of the two felonies and to sixty-six days in jail on the misdemeanor, with all of the sentences to be served concurrently.

¶8 Rigsby appealed his convictions. As relevant here, he contended that the verdicts were mutually exclusive because counts 1 and 2 required the jury to determine that he acted intentionally and recklessly and was thus aware of the risk of bodily injury, but the lesser included offense on count 3 required the jury to determine that he acted with criminal negligence and was thus unaware of the risk of bodily injury. In a published opinion, the division unanimously agreed with Rigsby. *People v. Rigsby*, 2018 COA 171, ¶ 1, __ P.3d __. It held that, while the convictions for second degree assault were consistent with each other, Rigsby could not simultaneously stand convicted of those offenses, which required proof that he acted intentionally and recklessly, and of third degree assault, which required proof that he acted with criminal negligence. *Id.* at ¶ 14. Elaborating, the division explained that to act intentionally or recklessly requires that a defendant act with knowledge of a result or potential result, while to act with criminal

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[1] The trial court instructed the jury on the lesser included offense on count 3 at Rigsby's request. On count 2, the trial court instructed the jury, again at Rigsby's request, on the lesser included offense of third degree assault (acting recklessly and causing bodily injury).

negligence requires that a defendant act without such knowledge. *Id.* at ¶ 13. The division reasoned that "separate convictions for both knowing and negligent mental states for the same act"—hitting Mohrman in the face with a glass—could not be sustained because someone cannot concomitantly "consciously act" despite being aware of the risk and "fail to perceive [that] risk." *Id.*

¶9 Believing the guilty verdicts for second degree assault, on the one hand, and the guilty verdict for third degree assault, on the other, to be mutually exclusive, the division found that the former negated the latter and vice versa. *Id.* at ¶ 15. Addressing the proper remedy, the division ruled that it had to set aside the convictions and remand the case for a new trial because there was no way to discern the jury's intent. *Id.* at ¶¶ 16–19.

¶10 The People timely petitioned our court for certiorari. And we granted their petition.[2]

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[2] Here are the two issues we agreed to review:

1. Whether the court of appeals erred in concluding the jury's verdicts finding defendant guilty of both second degree assault and third degree assault were inconsistent under *People v. Frye*, 898 P.2d 559 (Colo. 1995).
2. Whether the court of appeals erred by reversing for a new trial for inconsistent jury verdicts, instead of maximizing the jury verdicts by affirming the most serious conviction.

II. Standard of Review

¶11 Whether verdicts are mutually exclusive is a question of law. *People v. Delgado*, 2019 CO 82, ¶ 13, 450 P.3d 703, 705. We review questions of law de novo. *Id.*

¶12 The People maintain that even if we find, as the division did, that the trial court accepted mutually exclusive verdicts, we should determine that the error wasn't plain and doesn't require reversal. The plain error standard of reversal applies, according to the People, because Rigsby failed to preserve his claim. We disagree with the People's preservation contention.

¶13 Immediately after the jury returned its verdicts and was discharged, Rigsby moved for a new trial on the ground that the culpable mental states required for the guilty verdicts were mutually exclusive. In the court of appeals, the People explicitly agreed that Rigsby preserved this claim. The People do not explain why they now take a diametrically opposed position. And the record supports the People's earlier concession.

¶14 In any event, preservation is of no moment because the error that did occur was one of multiplicity, which violates the Double Jeopardy Clauses of the federal and state constitutions and requires a remedy. *See Reyna-Abarca v. People*, 2017 CO 15, ¶ 81, 390 P.3d 816, 828. Hence, even if Rigsby had failed to preserve his claim, he would still be entitled to relief. *See id.*

III. Analysis

A. The Verdicts Are Not Mutually Exclusive

¶15 Courts have historically given deference to the jury's fact-finding authority. *See, e.g.*, *People v. Frye*, 898 P.2d 559, 567 (Colo. 1995). In line with such deference, some eighty-eight years ago, both the Supreme Court and our court held that a defendant who is convicted on one count may not attack that conviction on the ground that it is inconsistent with the verdict of acquittal on another count. *See Dunn v. United States*, 284 U.S. 390, 393 (1932) (holding that consistency in verdicts is not necessary); *Crane v. People*, 11 P.2d 567, 568–69 (Colo. 1932) (adopting the holding in *Dunn*). In 1984, the Supreme Court reaffirmed the rule in *Dunn* as "rest[ing] on a sound rationale," *United States v. Powell*, 469 U.S. 57, 64 (1984), and eleven years later, we reaffirmed the rule in *Crane* as being aligned with "the federal rule . . . articulated in . . . *Powell*," *Frye*, 898 P.2d at 571.[3]

¶16 But the Court in *Powell* cautioned that it was not resolving a situation where a defendant is convicted of two crimes and a guilty verdict on one count excludes

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[3] This line of cases renders inconsequential any inconsistency between the guilty verdicts on the first two counts and the acquittal of the charged offense on the third count. We recognize that these types of inconsistencies between guilty and acquittal verdicts "often are a product of jury lenity," *Powell*, 469 U.S. at 65, and do not prove that the jury was "not convinced of the defendant's guilt," *Dunn*, 284 U.S. at 393.

a finding of guilt on the other. *Powell*, 469 U.S. at 69 n.8. And we took note of this limitation in *Frye*. 898 P.2d at 569 & n.13. In such situations, we observed, "courts are generally uniform in their agreement that the verdicts are legally and logically inconsistent and should not be sustained." *Id.* at 569 n.13.

¶17 Just last term, we were confronted with the type of case *Powell* and *Frye* excluded from the scope of their holdings. *See Delgado*, 2019 CO 82, 450 P.3d 703. In *Delgado*, we held that guilty verdicts for robbery and theft vis-à-vis a single taking were mutually exclusive and could not be upheld. *Id.* at ¶ 3, 450 P.3d at 704. We noted that it was impossible for the defendant to have unlawfully taken items from the victim by force, as required by robbery, and also without force, as required by theft. *Id.* Such verdicts, we reasoned, flew in the face of due process because each offense included an element that negated an element of the other offense, which meant that the prosecution had necessarily failed to prove at least one element of each offense beyond a reasonable doubt. *Id.* at ¶¶ 23, 27–28, 450 P.3d at 707–08. We explained that the establishment of every element of robbery (including the use of force) had necessarily negated the element of theft that required the use of any means other than force, and, conversely, the establishment of every element of theft (including the use of any means other than force) had necessarily negated the element of robbery that required the use of force. *Id.*

¶18 Significantly, in arriving at our decision in *Delgado*, we undertook an elements-based analysis. *Id.* at ¶ 20, 450 P.3d at 707. We did so based in part on our comment in *Frye* that a jury returns mutually exclusive guilty verdicts "where the existence of an *element* of one of the crimes negates the existence of a necessary *element* of the other crime." *Id.* (quoting *Frye*, 898 P.2d at 569 n.13). Thus, to determine whether two guilty verdicts are mutually exclusive, we must compare the statutory elements of the underlying crimes. *Id.* at ¶ 27, 450 P.3d at 707.

¶19 Focusing on the statutory language defining each of the three crimes implicated here, the division correctly stated that: count 1 required a finding that Rigsby acted *with intent* to cause Mohrman bodily injury; count 2 required a finding that Rigsby *recklessly* caused Mohrman serious bodily injury; and count 3 required a finding that Rigsby acted *with criminal negligence* in causing bodily injury to Mohrman. *Rigsby*, ¶ 10. Under section 18-1-501(5), C.R.S. (2019), a person acts "intentionally" or "with intent" when "his conscious objective is to cause the specific result proscribed by the statute defining the offense," regardless of "whether . . . the result actually occurred." Under subsection (8) of that statute, a person acts "recklessly" when "he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." And under subsection (3) of the same statute, a person acts with "criminal negligence" when, "through a gross deviation from the standard of care that a reasonable person

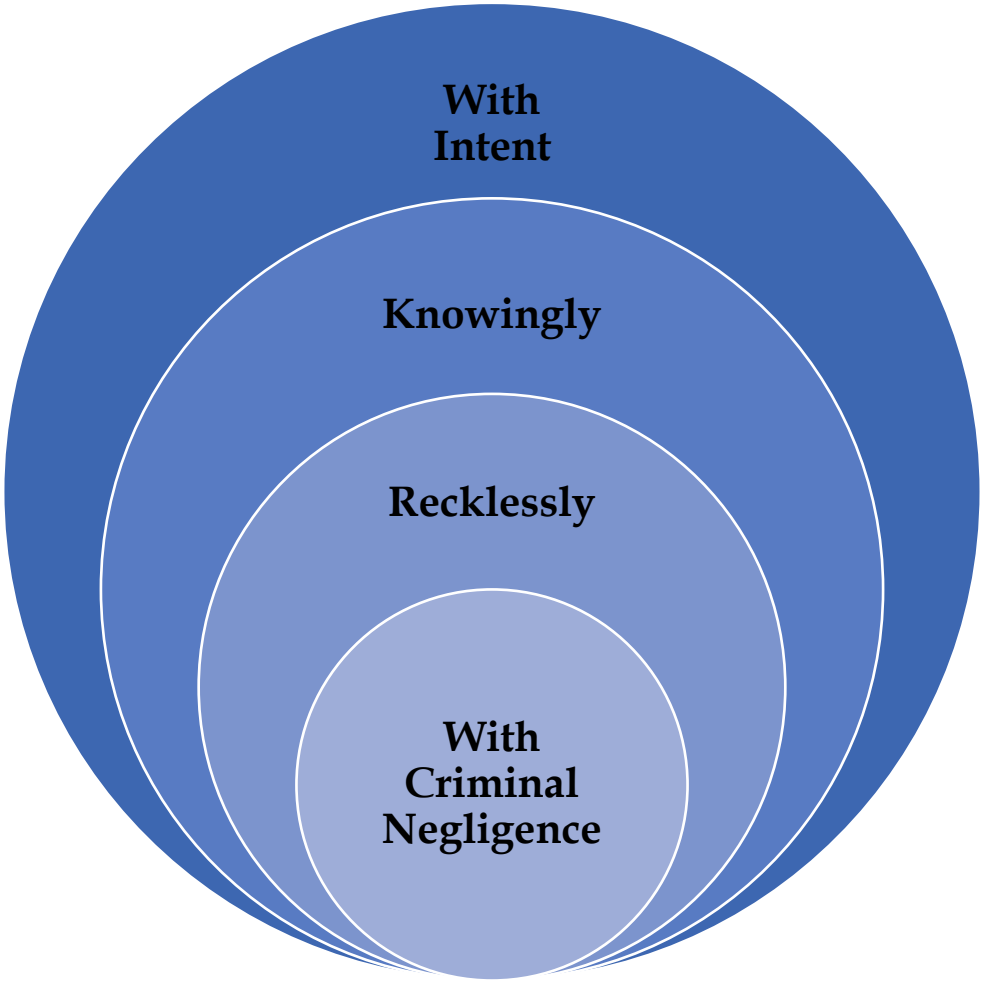
would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists."

¶20 Based on those statutory definitions, the division concluded that the guilty verdicts on counts 1 and 2, while logically and legally consistent with each other, were logically and legally inconsistent with the guilty verdict on count 3, and that the guilty verdict on count 3, in turn, was logically and legally inconsistent with the guilty verdicts on counts 1 and 2. *Rigsby*, ¶ 14. Rigsby points to *Delgado* in defending the division's rationale. But *Delgado* is inapposite.

¶21 Whereas *Delgado* involved an inconsistency between the element in robbery of taking an item by force and the element in theft of taking an item without force, the alleged inconsistent elements here are the required culpable mental states: intentionally and recklessly (for the second degree assault convictions), on the one hand, and criminal negligence (for the third degree assault conviction), on the other. And the reason this distinction from *Delgado* is meaningful is that section 18-1-503(3) accords special treatment to culpable mental states in Colorado:

> If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.

Thus, section 18-1-503(3) sets up a hierarchical system of culpable mental states in which: (1) with intent is the most culpable, knowingly is the next most culpable, recklessly is the next most culpable, and with criminal negligence is the least culpable; and (2) proving a culpable mental state necessarily establishes any lesser culpable mental state(s). The Venn diagram below highlights these points:



¶22 As this illustration reflects, acting recklessly necessarily includes acting with criminal negligence. Acting knowingly necessarily includes acting recklessly and

acting with criminal negligence. And acting with intent necessarily includes acting knowingly, acting recklessly, and acting with criminal negligence.

¶23 Under section 18-1-503(3), then, by proving that Rigsby acted with intent for purposes of count 1, the People necessarily established that he acted with criminal negligence for purposes of count 3, and by proving that Rigsby acted recklessly for purposes of count 2, the People necessarily established that he acted with criminal negligence for purposes of count 3. It follows that by returning a guilty verdict on count 1 and finding that Rigsby acted with intent, the jury, as a matter of law, necessarily found that he acted with criminal negligence, and by returning a guilty verdict on count 2 and finding that Rigsby acted recklessly, the jury, as a matter of law, necessarily found that he acted with criminal negligence. Hence, even if there is a *logical* inconsistency between acting with intent and acting with criminal negligence, and between acting recklessly and acting with criminal negligence, no *legal* inconsistency exists in either scenario based on section 18-1-503(3). And guilty verdicts that are legally consistent are not mutually exclusive.

¶24 Rigsby recognizes that, pursuant to section 18-1-503(3), proving that a defendant acted intentionally or recklessly suffices to establish that he acted with criminal negligence. He dismisses section 18-1-503(3), though, as simply expressing the legislative prerogative that proving a culpable mental state

establishes any lesser culpable mental state(s). But that is precisely why Rigsby cannot prevail: Section 18-1-503(3) reflects the legislature's prerogative, which we must honor. The legislature "has the power to define terms used by it," and it is beyond question that those "statutory definitions control judicial interpretation." *Indus. Comm'n v. Nw. Mut. Life Ins. Co.*, 88 P.2d 560, 563 (Colo. 1939). When the legislature includes particular definitions for terms it uses in a statute, those definitions, not an average person's understanding of the terms, govern. *R.E.N. v. City of Colo. Springs*, 823 P.2d 1359, 1364 (Colo. 1992). Here, the legislature has spoken loud and clear: Proving a culpable mental state necessarily establishes any lesser culpable mental state(s). And we are bound by that declaration.

¶25 Moreover, contrary to Rigsby's assertion, the fact that the jury was not instructed on section 18-1-503(3) is inconsequential. Rigsby cites no authority approving, let alone requiring, a jury instruction based on section 18-1-503(3). Nor does Rigsby explain why the lack of such an instruction renders the statutory provision meaningless. We are not free to disregard section 18-1-503(3) simply because the jury was not informed about it. Had the intent been for section 18-1-503(3) to apply only when the jury is instructed on it, the legislature presumably would have said so. Instead, the legislature simply pronounced that, as a matter of law, a culpable mental state is established by a finding that the defendant acted with a more culpable mental state.

¶26 Rigsby insists, though, that he could not have intended to cause injury or been aware of a risk of injury while contemporaneously being unaware of that risk of injury. This assertion misses the mark because it addresses at most whether the second degree assault guilty verdicts, on the one hand, and the third degree assault guilty verdict, on the other, are *logically* inconsistent. Even assuming they are, Rigsby does not, and cannot, show that there is a *legal* inconsistency. Section 18-1-503(3) forecloses such a showing. Therefore, Rigsby cannot establish that the guilty verdicts are mutually exclusive.

¶27 We reiterate that two guilty verdicts are mutually exclusive when the existence of an *element* of one of the crimes negates the existence of an *element* of the other crime. *Delgado*, ¶ 20, 450 P.3d at 707; *Frye*, 898 P.2d at 569 n.13. Because no element of a guilty verdict negates an element of another guilty verdict here, this case does not involve mutually exclusive guilty verdicts.

B. Multiplicity and Merger

¶28 The People nevertheless submit that the trial court erred by entering multiplicitous convictions instead of merging them and entering a single conviction. We agree.

¶29 The U.S. Constitution shields a person from being "twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. Similarly, the Colorado Constitution provides that a person shall not "be twice put in jeopardy for the

same offense." Colo. Const. art. II, § 18. The protective umbrella of these constitutional provisions prohibits a second trial for the same offense, *Whalen v. United States*, 445 U.S. 684, 688 (1980), and "affords shelter 'against receiving multiple punishments for the same offense,'" *Waddell v. People*, 2020 CO 39, ¶ 11, 462 P.3d 1100, 1105 (quoting *Allman v. People*, 2019 CO 78, ¶ 11, 451 P.3d 826, 829). We deal here only with the protection against improper multiple punishments.

¶30 Double jeopardy tends to be implicated when multiplicity issues exist. *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005). Multiplicity refers to "the charging of multiple counts and the imposition of multiple punishments for the same criminal conduct." *Id.* We have said that the "vice of multiplicity" is that it may yield multiple punishments for the same offense, thereby running afoul of double jeopardy principles. *Id.* Multiple punishments do not merely encompass multiple sentences. In the double jeopardy realm, "[e]ven a conviction unaccompanied by a sentence bears sufficiently adverse collateral consequences to amount to punishment." *People v. Wood*, 2019 CO 7, ¶ 23, 433 P.3d 585, 592.

¶31 The mantle of protection afforded by the Double Jeopardy Clauses does not prevent the legislature from specifying multiple punishments based on the same criminal conduct. *Woellhaf*, 105 P.3d at 214. After all, the power to define criminal offenses and to prescribe the punishments to be imposed upon defendants found guilty of those offenses lies solely with the legislature. *Reyna-Abarca*, ¶ 49, 390 P.3d

at 824. Consequently, to determine whether a punishment imposed following a conviction infringes on a defendant's double jeopardy rights, we must first examine the punishment authorized by the legislature for that conviction. *Id.* at ¶ 50, 390 P.3d at 824. If the legislature has not authorized multiple punishments, then the protection against double jeopardy prohibits the imposition of multiple punishments. *Id.* In this regard, the Double Jeopardy Clauses embody "the constitutional principle of separation of powers by ensuring that courts do not exceed their own authority by imposing multiple punishments not authorized by the legislature." *Woellhaf*, 105 P.3d at 214.

¶32 The General Assembly established a single offense of second degree assault that may be committed in alternative ways. § 18-3-203(1), C.R.S. (2019). It did not authorize multiple punishments for second degree assault based on the same criminal conduct. *Id.* Therefore, by entering two second degree assault convictions for the same criminal conduct, the trial court violated Rigsby's right to be free from double jeopardy. *See People v. Denhartog*, 2019 COA 23, ¶ 74, 452 P.3d 148, 160.

¶33 The third degree assault conviction is equally problematic for a different reason. The General Assembly has decreed that when an offense is a lesser included offense of another, the defendant "may not be convicted" of both

offenses. § 18-1-408(1), C.R.S. (2019). Simultaneous convictions for a charged offense and a lesser included offense give rise to multiplicity issues. *See id.*

¶34 Here, it is undisputed that third degree assault is a lesser included offense of second degree assault. It is also uncontested that the three offenses in question stemmed from the same criminal conduct. *See People v. Rock*, 2017 CO 84, ¶ 17, 402 P.3d 472, 478 (recognizing that convictions for two separate offenses, where the elements of one constitute a subset of the elements of the other, "can clearly stand if the offenses were committed by distinctly different conduct"). Thus, Rigsby may not stand convicted of both second degree assault and third degree assault.

¶35 The appropriate remedy for Rigsby's multiplicitous convictions is to instruct the trial court to merge all the convictions into a single conviction for second degree assault. *See Halaseh v. People*, 2020 CO 35M, ¶ 10, 463 P.3d 249, 252 (observing that when multiplicitous convictions are involved, we instruct the trial court "to select the combination of offenses that can simultaneously stand that produce the most convictions and the longest sentences, in order to maximize the effect of the jury's verdict"); *Wood*, ¶ 34, 433 P.3d at 594 (clarifying that "when a mittimus provides that two multiplicitous convictions merge . . . , the defendant is afforded the protection to which he is entitled under the double jeopardy clause[s] just the same as when a mittimus indicates that one of two multiplicitous

convictions is vacated"). Correspondingly, the trial court should leave only one sentence in place: one of the two concurrent five-year prison sentences.

IV. Conclusion

¶36 We conclude that the division erred. The second degree assault guilty verdicts, on the one hand, and the third degree assault guilty verdict, on the other, are not mutually exclusive. Therefore, we reverse the division's judgment. Because the convictions are multiplicitous, however, we remand to the court of appeals with instructions to return the case to the trial court to merge the convictions into a single second degree assault conviction and to leave in place only one sentence (one of the two concurrent five-year prison sentences imposed).

JUSTICE GABRIEL dissents.

JUSTICE GABRIEL, dissenting.

¶37 Perceiving this case to involve an issue of multiplicity and merger, and not one of legally and logically inconsistent verdicts, the majority reverses the judgment of the division below. Maj. op. ¶¶ 3–5, 28–36. The majority reaches this conclusion notwithstanding the fact that upholding Derek Rigsby's convictions for second degree assault (intent to cause bodily injury, causing serious bodily injury), second degree assault (reckless conduct), and third degree assault (negligent conduct with a deadly weapon) necessarily means that the jury found that Rigsby was aware of the risk of injury presented by his conduct and unaware of that same risk at the very same time.

¶38 In my view, this case does not present an issue of multiplicity and merger, which implicates double jeopardy concerns. Rather, it presents a question of due process and of a criminal defendant's right to have a jury find beyond a reasonable doubt every element of the crimes charged. Because I believe, contrary to the majority's view, that it is both legally and logically inconsistent for the jury to have found that Rigsby was aware of the risk of injury to the victim and unaware of that same risk at the same time based on the same conduct, I would conclude that reasonable doubt inheres in the jury's verdicts and that Rigsby is therefore entitled to a new trial.

¶39 Accordingly, I respectfully dissent.

I. Factual Background

¶40 The material facts are not disputed. In the course of a bar fight, Rigsby hit the victim in the face with a glass, causing the victim substantial injuries. Based on this single incident, the prosecution charged Rigsby with three separate counts of second degree assault:

- Second degree assault (intent to cause bodily injury, causing serious bodily injury), which required the prosecution to prove that Rigsby, with intent to cause bodily injury to another, caused serious bodily injury to another, § 18-3-203(1)(g), C.R.S. (2019);
- Second degree assault (reckless conduct), which required the prosecution to prove that Rigsby recklessly caused serious bodily injury to the victim by means of a deadly weapon, § 18-3-203(1)(d); and
- Second degree assault (causing bodily injury with a deadly weapon), which required the prosecution to prove that Rigsby, with intent to cause bodily injury to another, caused such injury by means of a deadly weapon, § 18-3-203(1)(b).

¶41 The case proceeded to trial, and at trial, the court instructed the jury on the three above-described counts. In addition, the court instructed the jury on, among other offenses, third degree assault (negligent conduct with a deadly weapon) as a lesser included offense solely of second degree assault (causing bodily injury

with a deadly weapon). This lesser included offense required the prosecution to prove, as pertinent here, that Rigsby, with criminal negligence, caused bodily injury to the victim by means of a deadly weapon. § 18-3-204(1)(a), C.R.S. (2019). The court did not instruct the jury on third degree assault (negligent conduct with a deadly weapon) as a lesser included offense of either of the other two second degree assault counts.

¶42 In addition to the foregoing, the trial court instructed the jury on the mental states set forth in the elemental instructions. In particular, the court correctly instructed the jury that (1) a person acts intentionally or with intent "when his conscious objective is to cause the specific result proscribed by the statute defining the offense"; (2) a person acts recklessly "when he consciously disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists"; and (3) a person acts with criminal negligence "when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists." *See* § 18-1-501(3), (5), (8), C.R.S. (2019). In accordance with these instructions, to establish that Rigsby acted intentionally or recklessly, the prosecution had to prove that Rigsby either had a *conscious objective* to cause a specific result or *consciously disregarded* a substantial and unjustifiable risk that the result would occur. To establish that Rigsby acted with criminal negligence, in

contrast, the prosecution had to prove that Rigsby *failed to perceive* a substantial and unjustifiable risk that the result would occur. The jury was not instructed that proof of intent or recklessness was sufficient to establish criminal negligence, nor did the prosecution so argue at trial.

¶43 The jury ultimately convicted Rigsby of second degree assault (intent to cause bodily injury, causing serious bodily injury), second degree assault (reckless conduct), and third degree assault (negligent conduct with a deadly weapon) as a lesser included offense of second degree assault (causing bodily injury with a deadly weapon). The jury did not, however, convict Rigsby of third degree assault (negligent conduct with a deadly weapon) as a lesser included offense of either of the second degree assault counts of conviction.

¶44 Rigsby appealed, arguing, as pertinent here, that his convictions were legally and logically inconsistent because he could not have had a conscious objective to cause bodily injury to the victim, nor could he have consciously disregarded a substantial and unjustifiable risk that his conduct would cause serious bodily injury to the victim, while at the same time failing to perceive the risk of bodily injury to the same victim based on the same act. In other words, Rigsby contended that he could not simultaneously act consciously to cause injury and fail to perceive the risk of the same injury based on the same conduct. The division below agreed and reversed Rigsby's conviction, *People v. Rigsby*, 2018

COA 171, ¶¶ 6–19, __ P.3d __, and we granted the People's petition for a writ of certiorari.

II. Analysis

¶45 I begin by addressing and rejecting the People's contention, made for the first time before us, that Rigsby forfeited his argument that the verdicts here were legally and logically inconsistent. I then proceed to the merits of Rigsby's contention, and I explain why I respectfully disagree with the majority's analysis and conclusions in this case.

A. Preservation

¶46 Relying principally on a concurring opinion from a decision of the Maryland Court of Appeals, the People argue that Rigsby did not preserve and therefore forfeited the assertion that he raises in this court. As the majority observes, however, the People expressly *conceded* in the division below that Rigsby preserved this issue. Maj. op. ¶ 13.

¶47 It is unclear to me why the People believe that they can concede preservation of an issue in the court of appeals and then take the opposite position in this court (apparently not recognizing the irony of their asserting a waiver when they themselves arguably waived such an assertion). Needless to say, arguments regarding waivers and forfeitures do not operate solely against criminal defendants; they work both ways. In addition, we have long made clear that the

actions of those who represent the state in our courts "must always comport with the sovereign's goal that justice be done in every case and not necessarily that the prosecution 'win.'" *Domingo-Gomez v. People*, 125 P.3d 1043, 1049 (Colo. 2005). In my view, conceding in the court of appeals that a defendant preserved an argument and then arguing in this court that the defendant waived or forfeited that very same argument can be read to suggest too much of a focus on just winning.

¶48 In any event, like the majority, maj. op. ¶¶ 12–13, I believe that Rigsby preserved the issue that he asserts before us, and I next turn to my view of the merits of this case.

B. Inconsistent Verdicts

¶49 A criminal defendant's constitutional rights to due process of law and a fair trial require the prosecution to prove each element of a charged offense beyond a reasonable doubt. *See People v. Delgado*, 2019 CO 82, ¶ 22, 450 P.3d 703, 707. When, however, a defendant is convicted of two crimes requiring the jury to have found the existence of mutually exclusive elements, the defendant cannot be said to have been convicted of each crime beyond a reasonable doubt. *See id.* at ¶ 23, 450 P.3d at 707. This is because a finding of contradictory elements necessarily expresses a finding of doubt. *Id.*

¶50 Applying this principle in a recent case, we opined that a defendant cannot have been convicted beyond a reasonable doubt of both robbery, which is an unlawful taking of an item with force, and theft, which is an unlawful taking of an item without force, based on the same taking because such a conviction would mean that the jury both convicted and absolved the defendant of taking the item without force. *Id.* at ¶¶ 2–5, 450 P.3d at 704. And "where the existence of an element of one of the [charged] crimes negates the existence of a necessary element of the other [charged] crime . . . [,] the verdicts are legally and logically inconsistent and should not be sustained." *People v. Frye*, 898 P.2d 559, 569 n.13 (Colo. 1995); *accord Delgado*, ¶ 20, 450 P.3d at 707.

¶51 Applying these settled principles here, I believe that Rigsby's convictions for second degree assault (intent to cause bodily injury, causing serious bodily injury) and second degree assault (reckless conduct) are legally and logically inconsistent with his conviction for third degree assault (negligent conduct with a deadly weapon). As noted above, the second degree assault convictions required the jury to find, beyond a reasonable doubt, that Rigsby either *consciously* acted to cause the victim's injury or *consciously* disregarded the risk of such injury. The third degree assault conviction, in contrast, required the jury to find, beyond a reasonable doubt, that Rigsby *failed to perceive* the risk of the same injury based on the same conduct. It is both legally and logically impossible, however, for Rigsby

to have acted consciously in such a way as to cause the victim's injury while failing to perceive the risk of the same injury based on the same conduct at the same time.

¶52 In light of the foregoing, I do not believe that these verdicts can be sustained. *See Delgado*, ¶¶ 20–23, 450 P.3d at 707; *Frye*, 898 P.2d at 569 n.13. To do so would deprive Rigsby of his rights to due process and a fair trial. *See Delgado*, ¶¶ 22–23, 450 P.3d at 707. Accordingly, I would affirm the judgment of the division below and remand this case for a new trial. *See id.* at ¶ 45, 450 P.3d at 710 ("The proper remedy for mutually exclusive verdicts is retrial.").

¶53 In reaching this conclusion, I am not persuaded by the majority's view that, by operation of section 18-1-503(3), C.R.S. (2019), even if the verdicts in this case were logically inconsistent, they were not legally inconsistent. Maj. op. ¶¶ 4, 24. Section 18-1-503(3) states, "If a statute provides that criminal negligence suffices to establish an element of an offense, that element also is established if a person acts recklessly, knowingly, or intentionally." In light of this provision, the majority concludes that, by operation of law, proof of intent and recklessness establishes criminal negligence and therefore, even if the verdicts here were logically inconsistent, they were not legally inconsistent. Maj. op. ¶ 23. In so concluding, the majority deems it inconsequential that the jury was not instructed that proof of intent and recklessness establishes criminal negligence. *Id.* at ¶ 25. For several reasons, I disagree.

¶54 First, in reaching its conclusion, the majority starts from the premise that an inconsistent verdict analysis turns on the statutory elements. *Id.* at ¶ 18. As noted above, however, an inconsistent verdict analysis is properly premised on the jury's contradictory *findings* as to the elements of the crimes charged because a *finding* of contradictory elements necessarily expresses a finding of reasonable doubt. *See Delgado*, ¶ 23, 450 P.3d at 707.

¶55 Second, although the majority perceives no legal inconsistency in the verdicts at issue, it never explains how a jury can find—either factually or legally—that a defendant both knew of a risk of injury to a victim and did not know of that same risk at the same time and based on the same conduct. Nor, in my view, does anything in section 18-1-503(3) resolve such inconsistent findings, at least absent a jury instruction advising the jury that sufficient proof of intent and recklessness establishes criminal negligence.

¶56 Third, and related to the last point, although the majority deems it inconsequential that the jury was not instructed that proof of intent and recklessness establishes criminal negligence, maj. op. ¶ 25, I believe that such an instruction would have allowed us to resolve the facial inconsistency in the jury's verdicts. Specifically, had the jury been instructed that proof of intent or recklessness establishes criminal negligence, then we would have an explanation for the jury's otherwise inconsistent verdicts. Absent such an instruction,

however, we are left with findings that Rigsby simultaneously knew of the risk of injury to the victim arising from his conduct and did not know of that same risk, and nothing in the record allows us to determine, absent speculation, which of the charges the jury found to be supported by the evidence. Because such contradictory findings necessitate a conclusion of reasonable doubt, I believe that a new trial is required. *See Delgado*, ¶ 23, 450 P.3d at 707.

¶57 I am likewise unpersuaded by the People's somewhat different, albeit related, assertion that the verdicts here are not legally inconsistent because, by operation of section 18-1-503(3), third degree assault is a lesser included offense of second degree assault.

¶58 As a general matter, "an offense is a lesser included offense of another offense if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense." *Reyna-Abarca v. People*, 2017 CO 15, ¶ 64, 390 P.3d 816, 826. Thus, in the typical lesser included offense scenario, proof of the greater offense necessarily establishes all of the elements of the lesser offense, and convictions on both the greater and lesser offenses would not be legally and logically inconsistent.

¶59 Here, the People argue that third degree assault (negligent conduct with a deadly weapon) is a lesser included offense of both second degree assault (intent

to cause bodily injury, causing serious bodily injury) and second degree assault (reckless conduct) because, under section 18-1-503(3), proof of intent and recklessness establishes criminal negligence. Even assuming that the People are correct in this regard, however, for several reasons, I do not believe that their analysis solves the problem of the mutually inconsistent verdicts in this case.

¶60 First, as noted above, the jury was not instructed that third degree assault (negligent conduct with a deadly weapon) is a lesser included offense of either second degree assault (intent to cause bodily injury, causing serious bodily injury) or second degree assault (reckless conduct). Nor did the jury so find. Accordingly, the fact that the third degree assault charge might, by operation of section 18-1-503(3), be deemed to be a lesser included offense of the two second degree assault charges on which Rigsby was convicted does not resolve the legal and logical inconsistency in what the jury actually found in this case.

¶61 Second, applying section 18-1-503(3) here does not change the fact that Rigsby could not have perceived and intended to cause the victim's injury and, at the same time, failed to perceive the risk of the same injury based on the same conduct. As the Texas Court of Criminal Appeals stated, citing Texas's analogue to section 18-1-503(3) in a substantially similar context, a guilty verdict on what is deemed to be a greater offense under the statute only "artificially 'includes'" a verdict on the lesser offense. *Saunders v. State*, 913 S.W.2d 564, 572 (Tex. Crim.

App. 1995). It does not, however, resolve the conflict in mutually inconsistent verdicts. *See id.* at 572–73.

¶62 In this regard, the Connecticut Supreme Court's decision in *State v. Chyung*, 157 A.3d 628, 642–43, (Conn. 2017), is instructive. In *Chyung*, the jury convicted the defendant of both murder and first degree manslaughter with a firearm. *Id.* at 632. The defendant moved for a judgment of acquittal and a new trial, arguing that the verdicts were legally inconsistent because to convict him of murder, the jury had to find that he had the specific intent to kill the victim, whereas, to convict him of first degree manslaughter, the jury had to find that he had acted recklessly, and those mental states are inconsistent. *Id.* The trial court denied the defendant's motion, concluding that double jeopardy principles required that the manslaughter conviction be vacated because it was a lesser included offense of the murder conviction. *Id.* The Connecticut Supreme Court reversed, however, concluding that because the verdicts were legally inconsistent and because neither the supreme court nor the trial court could know which charge the jury found to be supported by the evidence, neither verdict could stand and a new trial was required. *Id.* at 632–33.

¶63 In so concluding, the court noted, as pertinent here, that although its prior case law had made clear that first degree manslaughter is a lesser included offense of murder, the case law also made clear that in reaching this determination, the

court was applying an exception to the ordinary rule that, for a crime to be a lesser included offense, proof of the elements of the greater offense must necessarily establish all of the elements of the lesser offense. *See id.* at 642–43. Because, however, proof of murder did not necessarily establish all of the elements of first degree manslaughter (because first degree manslaughter required a different mental state from murder), the fact that first degree manslaughter is a lesser included offense of murder did not resolve the inconsistency in the jury's verdicts, and both verdicts had to be vacated. *Id.* at 643.

¶64 In my view, the same principle applies in this case. It may well be that, by operation of section 18-1-503(3), third degree assault (negligent conduct with a deadly weapon) might be deemed a lesser included offense of second degree assault (intent to cause bodily injury, causing serious bodily injury) and second degree assault (reckless conduct). But this does not resolve the inconsistency between the jury's findings that, on the one hand, Rigsby perceived and intended to cause the victim's injury and, on the other hand, he failed to perceive the risk of the same injury based on precisely the same conduct at precisely the same time. Nor can we know which of the charges the jury found to be supported by the evidence. *Chyung*, 157 A.3d at 632.

¶65 Finally, I note that the majority rests its conclusion on principles of multiplicity and merger, *see* maj. op. ¶¶ 3–5, 28–35, which principles are grounded

in the Double Jeopardy Clause of the Constitution, *see, e.g.*, *Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005). This case, however, does not involve a matter of double jeopardy. Rather, it involves a matter of Rigsby's rights to due process of law under the Fifth and Fourteenth Amendments, to a fair trial under the Sixth Amendment, and to have the jury find beyond a reasonable doubt all elements of the crimes charged before convicting him. *See Delgado*, ¶ 22, 450 P.3d at 707. Because the majority's analysis does not explain how the inconsistent verdicts in this case can stand in light of what I believe to be the applicable constitutional principles, I respectfully disagree with the majority's decision to uphold those inconsistent verdicts.

III. Conclusion

¶66 Rigsby's convictions in this case required the jury to find that Rigsby consciously perceived the risk of, or consciously intended to cause, the victim's injury while at the same time, and based on the very same conduct, he failed to perceive the risk of that same injury. Unlike the majority, I believe that the impossibility of Rigsby's simultaneously having such conflicting mental states rendered the jury's verdicts both legally and logically inconsistent. Accordingly, like the division below, I believe that settled law requires that we vacate those verdicts and remand this case for a new trial.

¶67 For these reasons, I respectfully dissent.

COLORADO COURT OF APPEALS **2018COA171**

Court of Appeals No. 16CA0138
Boulder County District Court No. 14CR1706
Honorable Maria E. Berkenkotter, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Derek Michael Rigsby,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Terry and Fox, JJ., concur

Announced December 13, 2018

Cynthia H. Coffman, Attorney General, Jillian J. Price, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Jessica Sommer, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Derek Michael Rigsby, appeals his judgment of conviction of two counts of second degree assault and one count of third degree assault arising from his involvement in a bar fight. Rigsby contends that (1) the district court erred in precluding prior consistent statements; (2) his convictions are logically and legally inconsistent because they relate to the same conduct yet contemplate separate mental states of culpability; and (3) his multiple convictions for second degree assault based on the same criminal act violate the Double Jeopardy Clause. Because we agree with his second contention, we reverse and remand to the district court for a new trial.

I. Background

¶ 2 In September 2014, Rigsby, along with his girlfriend, Leah Lusk, and two of their friends, Katie Pace and Jordan Kinnett, went to a bar. Lusk and Pace left the company of Rigsby and Kinnett to go to the dance floor, where Nathan Mohrman and Benjamin Galloway began talking to the women. Rigsby testified that Pace looked uncomfortable and annoyed, and he received a text from Lusk directing him to act like Pace's boyfriend.

¶ 3 The following events were disputed at trial. Rigsby testified that he stepped between Mohrman and Pace, stating that "she's not interested." He testified that Mohrman initially backed away but then grabbed Rigsby by the shoulder and began yelling at him, forcing Rigsby to use his elbow to push Mohrman away. Rigsby recalled that, at this point, he was attacked from behind and received multiple blows to the head before, fearing for his life, he swung at his attacker. He testified that he failed to realize that he was holding a glass in his hand and did not notice his hand was bleeding until bar staff escorted him out of the bar. He went home without contacting police.

¶ 4 Mohrman testified that he spoke to Lusk and Pace for about five minutes before he and Galloway stepped away to stand by themselves. He stated that, after moving away, Rigsby knocked into him, causing Mohrman to spill his drink. He and Galloway asserted that, as Mohrman reached out to tap Rigsby on the shoulder, Rigsby rapidly turned around and struck Mohrman in the face with a glass. A bystander reported that Rigsby hit Mohrman in the face with a glass, and it seemed unprovoked by Mohrman.

Mohrman immediately went to the hospital and received several stitches.

¶ 5 The following day, Rigsby contacted police and recounted the night's events to a detective. The district attorney charged Rigsby with three counts of second degree assault based on his act of hitting Mohrman in the face with a glass. The jury convicted him of two counts of second degree assault, pursuant to section 18–3–203(1)(d), (g),[1] C.R.S. 2018, and one count of third degree assault, a lesser included offense under section 18–3–204(1)(a), C.R.S. 2018. The trial court sentenced him to five years in the custody of the Department of Corrections for the second degree assault convictions and sixty-six days in jail for the third degree assault conviction, with all sentences running concurrently. Rigsby now appeals his convictions and requests a new trial.

[1] As relevant here, a person commits second degree assault if he or she "recklessly causes serious bodily injury to another person by means of a deadly weapon," § 18–3–203(1)(d), C.R.S. 2018, or "[w]ith intent to cause bodily injury to another person, he or she causes serious bodily injury to that person or another," § 18–3–203(1)(g).

II. Inconsistent Verdicts

¶ 6 Rigsby contends that the jury verdicts are logically and legally inconsistent because the second degree assault convictions required the jury to determine he was aware of the risk of bodily injury, and thus acted with intent or recklessly, while the third degree assault conviction required the jury to find he was unaware of the risk of bodily injury. We agree.

A. Standard of Review

¶ 7 We review de novo whether a conviction must be set aside based on inconsistency in the jury's verdicts. *People v. Zweygardt*, 2012 COA 119, ¶ 30, 298 P.3d 1018, 1024.

B. Applicable Law

¶ 8 Courts assume verdicts are consistent when each offense requires proof of separate and distinct elements; however, this is not the case when jury verdicts convict a defendant of multiple crimes and the existence of an element of one crime negates the existence of a necessary element of another crime. *See People v. Frye*, 898 P.2d 559, 569 n.13 (Colo. 1995) (stating that courts agree verdicts are legally and logically inconsistent under these circumstances). We cannot sustain legally and logically

inconsistent verdicts. *Id.*; *see also People v. White*, 64 P.3d 864, 875 (Colo. App. 2002).

¶ 9 While acknowledging that legally and logically inconsistent verdicts cannot be sustained, a division of our court stated that, when the court encounters inconsistent verdicts, convictions should merge to "maximize the effect of the jury's verdict, retaining as many convictions and upholding as many sentences as are legally possible." *People v. Beatty*, 80 P.3d 847, 853 (Colo. App. 2003); *see People v. Lee*, 914 P.2d 441, 448 (Colo. App. 1995). Therefore, the *Beatty* division held that the proper remedy for inconsistent verdicts is to merge and maximize the convictions. 80 P.3d at 853. However, more recently, a division of our court reasoned that logically and legally inconsistent verdicts require a new trial because we cannot reconcile the jury's findings to determine its intent; therefore, we must set aside the convictions and allow a jury to make new findings supported by the evidence. *See People v. Delgado*, 2016 COA 174, ¶¶ 32–33, 410 P.3d 697, 702 (rejecting the reasoning in *Beatty* and *Lee*) (*cert. granted* Dec. 11, 2017).

¶ 10 The determination of whether verdicts are legally and logically inconsistent, and thus negate each other, rests on the language in

the applicable statutes. *Id.* at ¶ 16, 410 P.3d at 700. Section 18–3–203(1)(d) requires a finding that a defendant acted recklessly in causing serious bodily injury to convict for second degree assault. Section 18–3–203(1)(g) requires a finding that a defendant intended to cause, and actually caused, bodily injury to the victim to convict for second degree assault. In contrast, section 18–3–204(1)(a), as applicable here, required the jury to find that Rigsby acted with criminal negligence in causing bodily injury with a deadly weapon to convict for third degree assault.

¶ 11 A defendant acts recklessly[2] or with intent[3] when he or she *knows* that certain actions could result in bodily injury and disregards the risk or has a conscious objective to cause bodily injury. *See* § 18–1–501(5), (8), C.R.S. 2018. A defendant acts with criminal negligence when he or she "fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists." § 18–1–501(3).

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[2] "A person acts recklessly when he *consciously* disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists." § 18–1–501(8), C.R.S. 2018 (emphasis added).

[3] "A person acts . . . 'with intent' when his *conscious objective* is to cause the specific result proscribed by the statute defining the offense." § 18–1–501(5) (emphasis added).

¶ 12 The *Beatty* division concluded, and we agree, that a finding of an intentional mens rea subsumes a reckless mens rea. Accordingly, a finding of intentional conduct does not negate a reckless mens rea. *Beatty*, 80 P.3d at 853–54; *see* § 18–1–503(3), C.R.S. 2018. Thus, if a defendant is convicted of one offense for acting recklessly and another for acting intentionally with regard to the same conduct, the convictions are consistent.

¶ 13 However, to act recklessly or with intent requires that a defendant act with knowledge of a result, or potential result, while to act with criminal negligence requires that a defendant act without knowledge of a result. Therefore, separate convictions for both knowing and negligent mental states for the same act cannot be sustained because a defendant cannot consciously act and also fail to perceive a risk simultaneously.[4] *See Delgado*, ¶ 31, 410 P.3d at 702.

C. Analysis

¶ 14 We agree with the remedy announced in *Delgado* that convictions based on inconsistent *mentes reae* cannot stand. Thus,

[4] Because it was not raised, we do not address whether criminally negligent homicide may be treated as a lesser included or lesser nonincluded offense of reckless or intentional homicide.

we reject the remedy set forth in *Beatty* that inconsistent verdicts should be remedied by vacating one conviction so as to maximize the jury's verdict.[5] Rigsby's convictions of two counts of second degree assault and one count of third degree assault are based on legally and logically inconsistent verdicts. Therefore, they cannot be sustained. *Delgado*, ¶ 32, 410 P.3d at 702. The jury convicted Rigsby based on three mental states for the same criminal act — hitting Mohrman in the face with a glass. While the convictions on the two counts of second degree assault are not inconsistent, we conclude that Rigsby could not have simultaneously acted with knowledge — intentionally or recklessly — to cause bodily injury while also acting without knowledge, unaware of the risk of causing bodily injury.

¶ 15 We recognize that the *Zweygardt* division reached the opposite conclusion, determining that "proof that a defendant was reckless necessarily establishes that he or she acted with criminal negligence." *Zweygardt*, ¶ 33, 298 P.3d at 1025. Thus, the

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[5] Though the author judge concurred with the division's decision in *People v. Beatty*, 80 P.3d 847 (Colo. App. 2003), he is persuaded by the court's later reasoning in *People v. Delgado*, 2016 COA 174, 410 P.3d 697, regarding the remedy for inconsistent verdicts.

Zweygardt division concluded that the mental states of recklessness and criminal negligence do not negate each other. *Id.* We disagree with this conclusion because it effectively eviscerates the *Frye* court's holding that legally and logically inconsistent verdicts cannot stand.[6] The plain language of section 18–1–501(8) — the statute defining recklessness — requires a court fact finder to determine that a defendant was aware of a certain risk, while section 18–1–501(3) — the statute defining criminal negligence — requires a fact finder to determine the defendant was unaware of a certain risk. While a defendant may be charged on both theories of recklessness and negligence, we conclude, contrary to the analysis in *Zweygardt*, that a defendant's convictions based on both theories are legally and logically inconsistent. *Id.*; *see Frye*, 898 P.2d at 569 n.13.

¶ 16 The People argue that, when we determine verdicts are inconsistent, we should maximize the effect of the jury's verdicts by employing the approach that yields the longest sentence. *See*

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[6] The decisions of other divisions of our court are not binding on our division. *People v. Thomas*, 195 P.3d 1162, 1164 (Colo. App. 2008).

People v. Vigil, 251 P.3d 442, 450 (Colo. App. 2010); *see also Beatty*, 80 P.3d at 853. We disagree.

¶ 17 Following this logic, the People contend that the two second degree assault counts should merge, resulting in Rigsby being convicted of recklessly causing serious bodily injury by means of a deadly weapon. The People further argue that recklessness inherently encompasses criminal negligence, so there is no legal or logical inconsistency between the second and third degree assault convictions, and therefore, a new trial is unnecessary. *See People v. Hall*, 999 P.2d 207, 219–20 (Colo. 2000).

¶ 18 However, we do not read *Hall* as the People do. In fact, *Hall* distinguishes negligence from recklessness by asserting "even if [he or] she should be, a person who is not actually aware that [his or] her conduct creates a substantial and unjustifiable risk is not acting recklessly." *Id.* at 220.

¶ 19 Thus, we disagree with the People's contention that a new trial is unnecessary and that Rigsby's three convictions should merge. We cannot determine the jury's intent because the verdicts are logically and legally inconsistent. Further, requiring a new trial here is not an academic exercise because the second degree assault

convictions are class 4 felonies (with a five-year sentence) but the third degree assault conviction is a class 1 misdemeanor (with a sixty-six day sentence).[7] The convictions must be set aside to allow a jury to consider the charges against Rigsby anew.

III. Double Jeopardy

¶ 20 Rigsby contends, the People concede,[8] and we agree that Rigsby's three convictions must merge because they are multiplicitous and violate the Double Jeopardy Clause. We address this issue because it could arise on remand.

A. Applicable Law

¶ 21 The United States and Colorado Constitutions preclude a defendant from being convicted and punished twice for the same crime. U.S. Const. amends. V, XIV; Colo. Const. art. II, § 18. If the legislature intended to provide multiple punishments for the same criminal conduct, the prosecution may charge a defendant with separate counts based on alternative methods of committing a

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[7] Class 4 felonies carry a presumptive sentencing range of two to six years imprisonment. § 18–1.3–401(1)(a)(V)(A), C.R.S. 2018. Class 1 misdemeanors carry a presumptive sentencing range of six to eight months imprisonment. § 18–1.3–501(1)(a), C.R.S. 2018.

[8] We rely on our own legal interpretations and are not bound by the concessions of the parties. *See People v. Backus*, 952 P.2d 846, 850 (Colo. App. 1998).

single offense. *People v. Abiodun*, 111 P.3d 462, 467 (Colo. 2005). However, a defendant is constitutionally protected from multiple *convictions* for the same offense when the relevant statute does not create separate offenses for the same criminal conduct. *See id.*

B. Analysis

¶ 22 If, on remand, the jury again convicts Rigsby of both second degree assault counts, the convictions must merge as discussed above. Because the second degree assault statute provides alternative methods of committing the same offense, it cannot prescribe multiple punishments for the same criminal conduct. Because the third degree assault conviction is for a lesser included offense, the People concede that Rigsby may not be convicted on remand of both second and third degree assault based on the same act. *See Page v. People*, 2017 CO 88, ¶ 9, 402 P.3d 468, 470 ("A conviction for an offense that is a lesser included offense of a greater offense must merge into the conviction for the greater offense.").

IV. Exclusion of Evidence

¶ 23 Since we reverse the convictions and remand for a new trial, we need not address whether the district court properly exercised

its discretion in precluding prior consistent statements offered by Rigsby. This prior ruling shall not bind any party at retrial.

V. Conclusion

¶ 24 Accordingly, the convictions are reversed, and the case is remanded to the district court for a new trial.

JUDGE TERRY and JUDGE FOX concur.

DISTRICT COURT **BOULDER COUNTY** **COLORADO** 1777-6th Street Boulder, CO 80302	
PEOPLE OF THE STATE OF COLORADO v. DEREK MICHAEL RIGSBY	***FOR COURT USE ONLY*** Case No. 14CR1706
For the People: Erica Baasten, Esq. Jack Peters, Esq. For the Defendant: Jason Sharman, Esq. Nelissa Milfeld, Esq.	

The matter came on for Jury Trial on September 30, 2015, before the **HONORABLE MARIA BERKENKOTTER,** Judge of the District Court and a Jury of Twelve.

THE COURT: We are on the record here in 14CR1706, People v. Derek Rigsby. Counsel, enter appearances.

MS. BAASTEN: Erica Baasten with advisory witness Chuck Heidel.

MR. SHARMAN: Jason Sharman and Nelissa Milfeld on behalf of Mr. Rigsby. He appears on bond.

THE COURT: Good morning. We are here for our third day of trial. A couple minutes ago I talked briefly with the attorneys about sort of the limits of them walking around during closing, which I know they understand. They're the same as the limits before and I know they'll keep their voice up for Ms. Butler, and if not, she's going to tell them and maybe they can try the microphone or retreat back to the podium.

In terms of the instructions, just to close the loop, there's an FTR record from the jury conference, instruction conference that we had last night. After that was done, Ms. Alford confirmed with the attorneys that the replacement instructions were correctly replaced, that they were in the right order. She made copies. They have now been distributed already to everyone. I have the originals. I think we are good to go. Ms. Baasten, is that correct?

MS. BAASTEN: Yes, Your Honor.

MR. SHARMAN: Your Honor, we did make one small change. We noticed on Instruction 14 the reference to

Instruction 16 was omitted. I assume it was fixed all by hand.

THE COURT: She did. Then there's an issue about exhibits, for the record. We will take that up after we are done with everything else. I'm going to ask Ms. Alford to see if our jury is ready.

MR. SHARMAN: Your Honor, as far as the instructions go, now that the packet is complete, we want to formally object to the packet based on the fact we believe self-defense is an affirmative defense to all charges.

THE COURT: Mr. Sharman, you previously asserted these objections.

MR. SHARMAN: We do that under the Federal and Colorado constitutions, Mr. Rigsby's right to a fair trial and due process based upon a very recent Court of Appeals case where the failure to object to the complete packet was based on prior waiver of the instruction.

THE COURT: I think what you did was adequate. I don't think you have to state every single one.

MR. SHARMAN: As far as a matter of closing, since the district attorneys are doing the primary close and rebuttal and splitting it up between the two of them, we should be able to split up too. I'd like Ms. Milfeld to make any objection, if necessary, at closing, and I'm going to go do the actual closing. Is that permissible?

THE COURT: No.

MR. SHARMAN: Okay. Thank you.

THE COURT: It's -- I understand the point you are making about tag teaming, but it's like if you had a witness and, you know, you had one of you doing the direct and then on cross the other person was standing up and making the objections. It seems to me it's analogous to that, which I also wouldn't allow. Ms. Alford, bring in our jury.

Counsel, I normally ask the attorneys to waive the reporting of the reading of the instructions. Certainly you can read along with me and if you are at any point in time concerned that I had skipped a word, added a word, you of course could stop me and bring that to my attention. I can put it on the FTR also. Ms. Baasten?

MS. BAASTEN: No objection to waiving the transcription or recording of the reading.

THE COURT: Thank you. Mr. Sharman.

MR. SHARMAN: Our appellate office did tell us we are supposed to have this recorded, but that's only if we find an error and then we need to raise it later.

(Jury entered courtroom.)

THE COURT: Welcome back, ladies and gentlemen. We are here for day three of our jury trial. We are now ready to -- I'm going to pause until everybody has the headsets. How is that? Is it working? We are good. If at

any time they stop working, let us know.

We are here for day three of our jury trial. We are now ready for the reading of the instructions. Ms. Alford, did you give them their copies? Ms. Alford has copies. You can read along if you would like. You can just listen. Do whatever works for you in terms of listening or listening and reading along.

Jury instruction one, members of the jury, the evidence in this case has been completed. In a moment I will read you jury instructions that contain the rules of law you must apply to reach your verdict. You will have copies of what I read to take with you to the jury room, but first, I want to mention a few things you need to keep in mind when you are discussing this case in the jury room.

Until you have returned a verdict, you must not do any research about this case or this kind of case using any source including dictionaries, reference materials, Internet or any other electronic means. You must not communicate in any way with anyone else about this case or this kind of case until you have returned a verdict in court. This includes your family and friends. If you have a cell phone or other electronic device, you must keep it turned off during jury deliberations.

It is my job to decide what rules of law apply to the case. While the attorneys may comment on some of these

rules, you must follow the instructions I give you. Even if you disagree with or do not understand the reason for some of these rules of law, you must follow them. No single instruction describes all the law which must be applied. The instructions must be considered together as a whole.

During the trial you received all of the evidence that you may properly consider in deciding the case. Your decision must be made by applying the rules of law that I give you to the evidence presented at trial. Remember you must not be influenced by sympathy, bias or prejudice in reaching your decision.

If you decide that the prosecution has proved beyond a reasonable doubt that the defendant is guilty, it will be my job to decide what the punishment will be. In making your decision you must not consider punishment at all. At time during the trial, attorneys made objections. Do not draw any conclusions from the objections or from my rulings on the objections. These only related to legal questions I had to decide and should not influence your thinking. If I told you not to consider a particular statement that was made during the trial, you must not consider it in your deliberations.

Finally, you should consider all the evidence in light of your experience in life.

Instruction two: The charge against the defendant

is not evidence. The charge against the defendant is just an accusation. The fact that the defendant has been accused is not evidence that the defendant committed any crime.

Mr. Rigsby is charged with committing the crime of assault in the second-degree, intent to cause bodily injury, causing serious bodily injury, assault in the second-degree, reckless, and assault in the second-degree, bodily injury with a deadly weapon in Boulder County, Colorado on or about September 26, 2015. Mr. Rigsby has pleaded not guilty.

Instruction three: Every person charged with a crime is presumed innocent. This presumption of innocence remains with the defendant throughout the trial and should be given effect by you unless, after considering all of the evidence, you are then convinced that the defendant is guilty beyond a reasonable doubt.

The burden of proof is upon the prosecution to prove to the satisfaction of the jury beyond a reasonable doubt the existence of all of the elements necessary to constitute the crime charged.

Reasonable doubt means a doubt based upon reason and common sense which arises from a fair and rational consideration of all of the evidence or the lack of evidence in the case. It is a doubt which is not a vague, speculative or imaginary doubt but such a doubt as would cause reasonable people to hesitate to act in matters of

importance to themselves. If you find from the evidence that each and every element of a crime has been proven beyond a reasonable doubt, you should find the defendant guilty of that crime. If you find from the evidence that the prosecution has failed to prove any one or more of the elements of a crime beyond a reasonable doubt, you should find the defendant not guilty of that crime.

Instruction four: The number of witnesses testifying for or against a certain fact does not, by itself, prove or disprove that fact.

Instruction five: You are the sole judges of the credibility of each witness and the weight to be given the witness's testimony. You should carefully consider all of the testimony given and the circumstance under which each witness has testified.

For each witness, consider that person's knowledge, motive, state of mind, demeanor and manner while testifying. Consider the witness's ability to observe, the strength of that person's memory, and how that person obtains his or her knowledge. Consider any relationship the witness may have to either side of the case and how each witness might be affected by the verdict. Consider how the testimony of the witness is supported or contradicted by other evidence in the case. You should consider all facts and circumstances shown by the evidence when you evaluate

each witness's testimony. You may believe all of the testimony of a witness, part of it, or none of it.

Instruction six: You are not bound by the testimony of witnesses who have testified as experts. The credibility of an expert's testimony is to be considered as that of any other witness. You may believe all of an expert witness's testimony, part of it or none of it. The weight you give the testimony is entirely your decision.

Instruction seven: The credibility of a witness may be challenged by showing that the witness has been convicted of a felony. A previous felony conviction is one factor you may consider in determining the credibility of a witness. It is up to you to determine what weight, if any, is to be given to such a conviction. Mr. Rigsby is to be tried for the crime charged in this case and no other. You may consider testimony of a previous conviction only in determining the credibility of Mr. Rigsby as a witness and for no other purpose. When the defendant testifies, his credibility is to be determined in the same manner as any other witness.

Instruction eight: A fact may be proven either -- by either direct or circumstantial evidence. Under the law, both are acceptable ways to prove something. Neither is necessarily more reliable than the other.

Direct evidence is based on firsthand observation

of the fact in question. For example, a witness's testimony that he looked out a window and saw snow falling might be offered as direct evidence that it had snowed.

Circumstantial evidence is indirect. It is based on observations of related facts that may lead you to reach a conclusion about the fact in question. For example, a witness's testimony that she looked out a window and saw snow covering the ground might be offered as circumstantial evidence that it had snowed.

Instruction nine: A crime is committed when the defendant has committed a voluntary act prohibited by law, together with a culpable mental state of mind. Voluntary act means an act performed consciously as a result of effort or determination. Proof of the voluntary act alone is insufficient to prove that the defendant had the required state of mind. The culpable state of mind is as much an element of the crime as the act itself and must be proven beyond a reasonable doubt either by direct or circumstantial evidence.

In this case, the applicable states of mind are explained below. A person acts intentionally or with intent when his conscious objective is to cause the specific result prescribed by the statute defining the offense. It is immaterial whether or not the result actually occurred.

A person acts recklessly when he consciously

disregards a substantial and unjustifiable risk that a result will occur or that a circumstance exists. A person acts with criminal negligence when, through a gross deviation from the standard of care that a reasonable person would exercise, he fails to perceive a substantial and unjustifiable risk that a result will occur or that a circumstance exists.

Instruction ten: In this case, certain words and phrases have particular meaning. Accordingly, you are to use the following definitions where these words and phrases appear in instructions that define crime, defenses, specific rules and verdict questions. Bodily injury means physical pain, illness or any impairment of physical or mental condition. Deadly weapon means a knife, bludgeon or any other weapon, device, instrument, material or substance, whether animate or inanimate, that in the manner it is used or intended to be used is capable of producing death or serious bodily injury.

Serious bodily injury means bodily injury which, either at the time of actual injury or at a later time involves a substantial risk of death, a substantial risk of serious permanent disfigurement, a substantial risk of protracted loss or impairment of the function of any part or organ of the body, or breaks, fractures or burns of the second or third-degree.

Instruction 11: Assault in the second-degree, intent to cause bodily injury, causing serious bodily injury. The elements of the crime of assault in the second-degree, intent to cause bodily injury, causing serious bodily injury are, one, that the defendant; two, in the State of Colorado, at or about the date and place charged; three, with intent; four, to cause bodily injury to another person; five, caused serious bodily injury to Nathan Mohrman; six, and that the defendant's conduct was not legally authorized by the affirmative defense in Instruction 16.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second-degree, intent to cause bodily injury, causing serious bodily injury.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second-degree, intent to cause bodily injury, causing serious bodily injury.

Instruction 12: Assault in the second-degree, reckless. The elements of the crime of assault in the second-degree reckless are, one, that the defendant; two, in the State of Colorado at or about the date and place

charged; three, recklessly; four, caused serious bodily injury to Nathan Mohrman; five, by means of a deadly weapon.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second-degree, reckless.

After considering all the evidence, if you decide the prosecution has failed to prove any one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second-degree, reckless.

Instruction 13, if you are not satisfied beyond a reasonable doubt that Mr. Rigsby is guilty of the offense charged, he may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged if the evidence is sufficient to establish his guilt of the lesser offense beyond a reasonable doubt.

The offense of assault in the second-degree, reckless, as charged in the information in this case necessarily includes the lesser events of assault in the third-degree, reckless.

The elements of the crime of assault in the third-degree, reckless, are, one, that the defendant; two, in the State of Colorado, at or about the date and place

charged; three, recklessly; four, caused bodily injury to Nathan Morhman.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser included offense, which is necessarily included in any offense charged in the information. The law never imposes on a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged or of a lesser included offense, you should find the defendant guilty of the offense proven, and you should so state in your verdict.

After considering all the evidence, if you decide that the prosecution has failed to prove one or more of the elements of the crime charged and one or more of the elements of the lesser included offenses, you should find the defendant not guilty of these offenses, and you should so state in your verdict.

While you may find the defendant not guilty of the crimes charged and the lesser included offenses, you may not find the defendant guilty of one -- guilty of more than one of the following offenses: Assault in the second-degree, reckless, assault in the third-degree, reckless.

Instruction 14: Assault in the second-degree, bodily injury with a deadly weapon. The elements of the crime of assault in the second-degree, bodily injury with a deadly weapon are one, that the defendant; two, in the State of Colorado at or about the date and place charged; three, with intent; four, to cause bodily injury to another person; five, caused such injury to Nathan Mohrman; six, by means of a deadly weapon; seven, and that the defendant's conduct was not legally authorized by the affirmative defense Instruction 16.

After considering all the evidence, if you decide the prosecution has proven each of the elements beyond a reasonable doubt, you should find the defendant guilty of assault in the second-degree, bodily injury with a deadly weapon.

After considering all the evidence, if you decide the prosecution has failed to prove one or more of the elements beyond a reasonable doubt, you should find the defendant not guilty of assault in the second-degree, bodily injury with a deadly weapon.

Instruction 15: If you are not satisfied beyond a reasonable doubt that Mr. Rigsby is guilty of the offense charged, he may, however, be found guilty of any lesser offense, the commission of which is necessarily included in the offense charged if the evidence is sufficient to

establish his guilt of a lesser offense beyond a reasonable doubt.

The offense of assault in the second-degree, bodily injury with a deadly weapon as charged in the information in this case necessarily includes the lesser offense of assault in the third-degree, negligence and deadly weapon.

The elements of the crime of assault in the third-degree, negligence and deadly weapon are, one, that the defendant; two, in the State of Colorado, at or about the date and place charged; three, with criminal negligence; four, caused bodily injury to Nathan Morhman; five, by means of a deadly weapon.

You should bear in mind that the burden is always upon the prosecution to prove beyond a reasonable doubt each and every element of any lesser included offense which is necessarily included in any offense charged in the information. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence.

After considering all the evidence, if you decide that the prosecution has proven each of the elements of the crime charged, or of a lesser included offense, you should find the defendant guilty of the offense proven and you should so state in your verdict.

After considering all the evidence, if you decide that the prosecution has failed to prove one or more of the elements of the crime charged and one or more elements of the lesser included offenses, you should find the defendant not guilty of these offenses and you should so state in your verdict.

While you may find the defendant not guilty of the crimes charged and the lesser included offenses, you may not find the defendant guilty of more than one of the following offenses: Assault in the second-degree, bodily injury with a deadly weapon; assault in the third-degree, negligence and deadly weapon.

Instruction 16, the evidence presented in this case has raised the affirmative defense of "defense of person" as a defense to assault in the second-degree, intent to cause bodily injury, causing serious bodily injury, and assault in the second-degree, bodily injury with a deadly weapon.

The defendant was legally authorized to use physical force upon another person without first retreating if, one, he used that physical force in order to defend himself or a third person from what he reasonably believed to be the use or imminent use of unlawful physical force by that other person; and two, he used a degree of force which he reasonably believed to be necessary for that purpose; and

three, he was not the initial aggressor or if he was the initial aggressor, he had withdrawn from the encounter and effectively communicated to the other person his intent to do so and the other person nevertheless continued or threatened the use of unlawful physical force.

The prosecution has the burden to prove beyond a reasonable doubt that the defendant's conduct was not legally authorized by this defense. In order to meet this burden of proof, the prosecution must disprove beyond a reasonable doubt at least one of the above numbered conditions.

After considering all the evidence, if you decide the prosecution has failed to meet this burden of proof, then the prosecution has failed to prove the defendant's conduct was not legally authorized by this defense which is an essential element of assault in the second-degree, intent to cause bodily injury, causing serious bodily injury, and assault in the second-degree, bodily injury with a deadly weapon. In that event, you must return a verdict of not guilty of those offenses.

After considering all the evidence, if you decide the prosecution has met this burden of proof, then the prosecution has proved the defendant's conduct was not legally authorized by this defense. In that event, your verdicts concerning the charge of assault in the

second-degree, intent to cause bodily injury, causing serious bodily injury and assault in the second-degree, bodily injury with a deadly weapon must depend upon your determination whether the prosecution has met its burden of proof with respect to the remaining elements of those offenses.

Instruction 17: The evidence presented in this case has raised the question of self-defense with respect to assault in the second-degree, reckless, assault in the third-degree, reckless, and assault in the third-degree, negligence and deadly weapon. A person is justified in using physical force upon another person without first retreating in order to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose. However, a person is not justified in using physical force if he is the initial aggressor, except that his use of physical force upon another person under the circumstances is justifiable if he withdraws from the encounter and effectively communicate to the other person his intent to do so, but the other person nevertheless continues or threatens the use of unlawful physical force.

You have been instructed that the prosecution has

the burden of proving beyond a reasonable doubt all of the elements of assault in the second-degree, reckless, assault in the third-degree, reckless, and assault in the third-degree, negligence and deadly weapon, including that the defendant acted recklessly or with criminal negligence. You are further instructed with respect to assault in the second-degree, reckless, assault in the third-degree, reckless and assault in the third-degree, negligence and deadly weapon, the prosecution does not have an additional burden to disprove self-defense, but that a person does not act recklessly or with criminal negligence if his conduct is legally justified as set forth above.

Instruction 18: During this trial you were permitted to submit written questions to witnesses. If a particular question was not asked, do not guess why the question was not asked or what the answer might have been. My decision not to ask a question submitted by a juror is not a reflection on the person asking it, and you should not attach any significance to the failure to ask a question. By making legal rulings on the admissibility of questions, I did not intend to suggest or express any opinion about the question. My decision whether or not to allow a question is based on the applicable Rules of Evidence and other rules of law and not on the facts of this particular case. It is my responsibility to assure that all parties receive a fair

trial according to the law and Rules of Evidence.

The fact that certain questions were not asked must not affect your consideration of the evidence in any way. Do not give greater weight to questions, or answers to questions, that are submitted by yourself or your fellow jurors. In making your decision, you must consider all of the evidence that has been presented.

Instruction 19: Members of the jury, you must discuss this case only when you are all present and you may only deliberate in the jury room. No juror should attempt to discuss this case with other jurors or anyone else at any other time except when all jurors are in the jury room.

Instruction 20: Once you begin your deliberations, if you have a question, your foreperson should write it on a piece of paper, sign it and give to the bailiff who will bring it to me. The Court will then determine the appropriate way to answer the question. However, there may be some questions that, under the law, the Court is not permitted to answer. Please do not speculate about what the answer to your question might have been or why the Court is not able to answer a particular question.

Finally, please be sure to keep the original question and response. Do not destroy them as they are part of the official record in this case and must be returned to

me when you return the instructions and verdict forms at the end of the case.

Instruction 21: I'm going to go ahead and read this and then we are going to do closings in a little bit, and at the very end I will read this again. Instruction 21: The bailiff will now escort you to the jury room where you will select one of your members to be your foreperson. Your foreperson will preside over your deliberations and shall sign any verdict form that you may agree on according to the rules that I'm about to explain.

The verdict for each charge must represent the considered judgment of each juror and it must be unanimous. In other words, all of you must agree to all parts of it. Only one verdict shall be returned signed for each count. The verdict forms and these instructions shall remain in the possession of your foreperson until I ask for them in open court.

Upon reaching a verdict you will inform the bailiff who in turn will notify me, and you will remain in the jury room until I call you into the courtroom.

You will be provided with three verdict forms.

When you have unanimously agreed upon your verdict, you will select the option on each form which reflects your verdict and the foreperson will sign the verdict forms as I have stated.

I will now read to you the verdict forms. You must not draw any inferences based on the order in which I read them. The verdict forms you will receive read as follows: Jury verdict count No. 1, assault in the second-degree, intent to cause bodily injury, cause serious bodily injury. Roman numeral I: We, the jury, find the defendant, Derek Michael Rigsby, not guilty of count No. 1, assault in the second-degree, intent to cause bodily injury, caused serious bodily injury, and there's a signature line for the foreperson.

Roman numeral II: We, the jury, find the defendant, Derek Michael Rigsby, guilty of number No. 1, assault in the second degree, intent to cause bodily injury, caused serious bodily injury, and there's a signature line for the foreperson. There's an asterisk at the bottom that connects to both Roman numeral I and Roman numeral II. It provides the foreperson should sign only one of the above, Roman numeral I or Roman numeral II. If the verdict is not guilty, then Roman numeral I above should be signed. If the verdict is guilty, then Roman numeral II above should be signed.

Jury verdict Count No. 2, assault in the second-degree, reckless. Roman numeral I: We, the jury, find the defendant, Derek Michael Rigsby, not guilty of count No. 2, assault in the second-degree, reckless, and the

lesser included offense of assault in the third-degree, reckless, and there's a signature line for the foreperson.

Roman Numeral II: We, the jury, find the defendant, Derek Michael Rigsby, guilty of, and there's a box and it says, assault in the second-degree, reckless, and there's a box, assault in the third-degree, reckless, and signature line for the foreperson. Asterisk one provides, if you find the defendant not guilty of the charged offense and lesser included offense, the foreperson should sign section Roman numeral I above. There are two asterisks and it provides, if you find the defendant guilty of the crime charged or lesser included offense, the foreperson should complete only this guilty verdict by placing, in ink, an X in the appropriate square. Only one square may be filled in, with the remainder to remain unmarked. The foreperson should then sign only section II above.

Jury verdict form for count No. 3, assault in the second-degree, bodily injury, with a deadly weapon. Roman numeral I: We, the jury, find the defendant, Derek Michael Rigsby, not guilty of count No. 3, assault in the second-degree, bodily injury with a deadly weapon, and a lesser included offense of assault in the third-degree, negligence and deadly weapon. And there's a signature line for the foreperson.

Roman numeral II: We, the jury, find the

defendant, Derek Michael Rigsby, guilty of and there's a box and next to it, it says assault in the second-degree, bodily injury with a deadly weapon, or, and there's a box and it says assault in the third-degree, negligence and deadly weapon, and a signature line for the foreperson. Next to the single asterisk it says, if you find the defendant not guilty of the charged offense and the lesser included offense, the foreperson should sign section I above. Next to the double asterisk, it says, if you find the defendant guilty of the crime charged or the lesser included offense, the foreperson should complete only this guilty verdict by placing, in ink, an X in the appropriate square. Only one square may be filled in with the remainder to remain unmarked. The foreperson should then sign only section II above.

Ladies and gentlemen, that concludes the reading of the jury instructions. We will now turn to closing statements. Mr. Peters.

MR. PETERS: Thank you, Your Honor. At the beginning of trial, I told you Mr. Rigsby smashed a class into Mr. Mohrman's face ripping it open. You heard all the evidence now. You've seen what happened. You've seen that that's what happened. Now, there are a lot of instructions in this packet. I note some of them are pretty confusing. I want to take a few minutes to walk through them with you