

69517-7

69517-7

NO. 69517-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROBERT DEAN, III

Appellant.

REC'D

MAR 27 2013

King County Prosecutor
Appellate Unit

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

The Honorable Bruce E. Heller, Judge

BRIEF OF APPELLANT

CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

2013 MAR 27 PM 4:30

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	3
THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION DEFINING RECKLESSNESS REQUIRES REVERSAL.....	3
D. <u>CONCLUSION</u>	8

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Gamble</u> 154 Wn.2d 457, 114 P.3d 646 (2005).....	6
<u>State v. Harris</u> 164 Wn. App. 377, 263 P.3d 1276 (2011).....	5
<u>State v. O Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009).....	3
<u>State v. Stein</u> 144 Wn.2d 236, 27 P.3d 184 (2001).....	3
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RAP 2.5.....	3
RCW 9A.08.010	4
RCW 9A.36.021	3, 5
RCW 9A.36.120	5

A. ASSIGNMENT OF ERROR

The trial court erred in defining recklessness for the jury. CP 34 (Instruction 10).

Issue Pertaining to Assignment of Error

Must Appellant's second degree assault conviction be reversed because the trial court defined recklessness in a manner that relieved the State of proving an element of the crime beyond a reasonable doubt?

B. STATEMENT OF THE CASE

The State charged appellant Robert E. Dean, III with second degree assault. CP 1. The State alleged Dean "intentionally assaulted Ibrahim Al-Sebah with a deadly weapon, to-wit: a knife; and did intentionally assault another and thereby recklessly inflict substantial bodily harm upon Ibrahim Al-Sebah[.]" Id.

At trial, Al-Sebah, a grocery store security guard, described confronting Dean at a Safeway store for placing items in his backpack without paying for them, and that in response Dean cut him with a "small knife" and then fled. 4RP 18, 21-27, 34-37.¹ The doctor who treated Al-Sebah's wounds described them as an eight-centimeter laceration to the

¹ There are six volumes of verbatim report of proceedings referenced as follows: 1RP - 9/25/12; 2RP - 10/4/12; 3RP - 10/8/12; 4RP - 10/9/12; 5RP - 10/10/12; and 6RP - 10/19/12.

left side of his head requiring 15 sutures, and a five to six-centimeter laceration to one of his wrists requiring four stitches. 5RP 11-12.

Dean, through counsel in closing argument, conceded assaulting Al-Sebah, but argued the State failed to prove it was a second degree assault. Counsel urged the jury to instead convict Dean of the lesser included offense of fourth degree assault. 5RP 30-31. The prosecutor argued the jury should find Dean guilty of second degree assault under either the deadly weapon prong or the reckless infliction of substantial bodily harm prong, noting it need not be unanimous as to which prong applied. 5RP 29-30.

The jury found Dean guilty of second degree assault, but did not indicate whether it was unanimous as to which prong applied. CP 20; 5RP 39. The trial court imposed a 15-month sentence. CP 52-60; 6RP 14. Dean appeals. CP 122-31.

C. ARGUMENT

THE TRIAL COURT'S ERRONEOUS JURY INSTRUCTION
DEFINING RECKLESSNESS REQUIRES REVERSAL.²

The trial court's instructions misstated the law by giving the jury an incorrect definition of "recklessness," thereby relieving the State of its burden of proving an essential element of the crime of second degree assault as charged. This requires reversal of Dean's conviction.

RCW 9A.36.021(1) lists several alternative ways of committing second degree assault. The State charged Dean under the use of a deadly weapon and reckless infliction of substantial bodily harm alternatives. CP 1. The basis for the deadly weapon alternative was Dean's alleged use of a knife. The basis for the recklessly inflicts substantial bodily harm alternative were the lacerations to Al-Sebah's head and wrist. The defense contested both prongs, noting the lack of clear evidence that Dean wielded a knife against Al-Sebah, and arguing the lacerations did not constitute substantial bodily harm beyond a reasonable doubt. 5RP 33-35.

² Dean may raise this issue for the first time on appeal despite not objecting below because it involves manifest constitutional error. RAP 2.5(a)(3); State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001) (finding manifest constitutional error reviewable for the first time on appeal because instructions relieved State of burden to prove essential element); accord State v. O Hara, 167 Wn.2d 91, 95, 217 P.3d 756, 759 (2009) (no manifest constitutional error in self-defense instruction where State was not relieved of its burden to disprove self-defense). Any claim by the State to the contrary should be rejected.

The "to convict" instruction provides:

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

- (1) That on or about July 21, 2012, the defendant:
 - (a) intentionally assaulted Ibrahim Al-Sebah and thereby recklessly inflicted substantial bodily harm; or
 - (b) assaulted Ibrahim Al-Sebah with a knife; and that such knife constituted a deadly weapon: and
- (2) That the acts occurred in the State of Washington.

CP 38 (Instruction 14, emphasis added).

RCW 9A.08.010(1)(c), in addressing general levels of culpability, states "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Instruction 10 defined "recklessness" as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular fact or result is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly as to that fact or result.

CP 42 (emphasis added).

The underlined portion of Instruction 10 misstates the law. It does not adequately convey the mental state required to convict Dean of second degree assault under the "substantial bodily harm prong (RCW 9A.36.021(1)(a)). To accurately hold the State to its burden of proof, the instruction should have replaced the term "a wrongful act" with "great bodily harm." See State v. Harris, 164 Wn. App. 377, 385, 263 P.3d 1276 (2011).

In State v. Harris, the defendant was charged with first degree assault of a child, which required the State to prove "the person . . . [i]ntentionally assaults the child and . . . [r]ecklessly inflicts great bodily harm." 164 Wn. App. at 383 (quoting RCW 9A.36.120(1)(b)(i)). The first paragraph of the instruction defining recklessness was identical to the one used in Dean's case. 164 Wn. App. at 384.

To convict Harris of first degree assault of a child, the jury needed to find he recklessly disregarded the substantial risk that "great bodily harm" would occur as a result of his actions under RCW 9A.36.120(1)(b)(i), not that "a wrongful act" would occur. Id. at 385. The instruction defining recklessness relieved the State of its burden to prove Harris acted with disregard that a substantial risk of great bodily harm would result when he shook the child. Id. at 385-86. A jury instruction

defining the recklessness requirement must account for the specific risk contemplated under that statute, i.e., "great bodily harm" rather than some undefined "wrongful act." Id. (citing State v. Gamble, 154 Wn.2d 457, 468, 114 P.3d 646 (2005)) ("the risk contemplated per the assault statute is of 'substantial bodily harm'").

Instruction 10 given to Dean's jury is flawed for the same reason. It needed to account for the specific risk contemplated by the second degree assault statute, i.e., "substantial bodily harm" as opposed to a generic "wrongful act." The instruction relieved the State of its burden of proving Dean acted with a disregard that a substantial risk of substantial bodily harm would result when he assaulted Al-Sebah.

The error was not harmless. Defense counsel argued in closing that the State failed to prove the deadly weapon prong beyond a reasonable doubt. The evidence at trial supported this argument. For example, the only testifying eye-witness to the assault beside Al-Sebah, Safeway stock clerk Mike Fritschy, admitted he never actually saw Dean with a knife. 4RP 54, 69. And although Al-Sebah testified Dean used a "small knife" to cut him, he also admitted telling police shortly after the incident that he did not know whether Dean had a knife. 4RP 34-37. Thus, some jurors may have concluded the State failed to prove the deadly weapon alternative because there was insufficient evidence Dean had a knife, or

there was insufficient proof the "small knife" Dean had constituted a "deadly weapon" as defined by Instruction 12.³

Similarly, some jurors may have concluded the State failed to prove the substantial bodily harm prong, even without having to make the otherwise required finding beyond a reasonable doubt that Dean acted with a disregard that a substantial risk of substantial bodily harm would result when he assaulted Al-Sebah. As counsel noted in closing, whether the injuries to Al-Sebah constituted "substantial bodily harm" was not clear because what constituted "substantial" was left to the discretion of the jurors, and some could conclude Al-Sebah's injuries were not. 5RP 34-35.

The trial court's instruction defining "recklessness" relieved the State of its burden to prove an essential element of the crime of second degree assault as charged. This denied Dean his constitutional right to a fair trial, and the error was not harmless. This Court should therefore reverse Dean's conviction.

³ Instruction 12 provides:

Deadly weapon also [sic] means any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

CP 36.

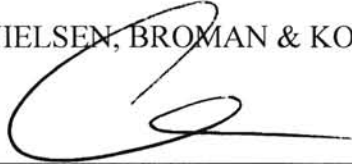
D. CONCLUSION

For the reasons stated, Dean requests reversal of his conviction.

DATED this 27th day of March, 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CHRISTOPHER GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 69517-7-I
)	
ROBERT DEAN, III)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF MARCH 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT DEAN
NO. 353327
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF MARCH 2013.

X *Patrick Mayovsky*