

No. 63017-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC EARL HOLZKNECHT

Appellant

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
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SUPPLEMENTAL BRIEF OF APPELLANT

On Appeal from Snohomish County Superior Court,  
The Hon. Larry E. McKeeman, Presiding

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ORIGINAL

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**A. SUPPLEMENTAL ASSIGNMENT OF ERROR**

1. Mr. Holzkecht assigns error to Instruction No. 21, CP 78, attached in App. A.

2. Appellant Eric Holzkecht assigns error to Instruction No. 22, CP 79, attached in Appendix B.

3. Mr. Holzkecht assigns error to Instruction No. 23, CP 80, attached in App. C.

**B. SUPPLEMENTAL ISSUE**

1. Does the second paragraph of Instructions Nos. 21 and 23 and the third paragraph of Instruction No. 22 violate due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3?

**C. SUPPLEMENTAL FACTS**

The trial court instructed the jury in Instruction No. 23 that “[r]ecklessness also is established if a person acts intentionally or knowingly.” CP 80. In Instruction No. 22, the third paragraph read: “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 21’s second paragraph read: “Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.” No exceptions or objections were made to these instructions.

RP II 261.

**D. SUPPLEMENTAL ARGUMENT**

**1. *Instructions Nos. 21, 22 and 23 Violated Due Process of Law***

On October 2, 2009, Division Two of the Court of Appeals published the decision in *State v. Joshua Lee Hayward*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (No. 37770-5-II, published 10/2/09). The Court of Appeals reversed Mr. Hayward’s conviction for second degree assault and held the following instruction defining recklessness to be unconstitutional: “Recklessness also is established if a person acts intentionally.” Slip Op. at 9. Essentially overruling its prior decision in *State v. Keend*, 140 Wn. App. 858, 166 P.3d 1268 (2007), the Court of Appeals held that such an instruction, modeled on former WPIC 10.03 (1994), violated due process of law under U.S. Const. amend. 14 for two reasons.

First, the instruction “impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted Baar. . . . [T]his instruction conflated the intent the jury had to find regarding Hayward’s assault against Barr [sic] with the intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its

burden of proving Hayward recklessly inflicted substantial bodily harm.” Slip Op. at 13. The Court of Appeals agreed with the appellant that the second paragraph of the instruction should have read: “Recklessness is also established if a person acts intentionally *to cause substantial bodily harm.*” Slip Op. at 13 (emphasis in original).

Second, the Court of Appeals held that the recklessness instruction constituted an unconstitutional mandatory presumption and violated due process under U.S. Const. amend. 14 “because it relieved the State of its burden to prove that [Hayward] *recklessly* inflicted substantial bodily harm, a separate element of the charged crime.” Slip Op. at 15 (emphasis in original).

*Hayward* is directly applicable to the instant case where Instructions Nos. 21, 22 & 23 all allowed the jury (1) to find criminal negligence if “a person acts intentionally or knowingly or recklessly,” Inst. No. 21, (2) to find knowledge “if a person acts intentionally,” Inst. No. 22, and (3) to find recklessness “if a person acts intentionally or knowingly.” Inst. No. 23.<sup>1</sup> As in *Hayward*, these instructions violated due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3,

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<sup>1</sup> As in *Hayward*, this issue can be raised for the first time on appeal. Slip Op. at 12 n.4.

by conflating the mental state (intent) the jury had to find regarding Mr. Holzkecht's assault against Grace with the mental state needed to cause substantial bodily harm (recklessness) into a single element, thereby relieving the State of its burden of proving Mr. Holzkecht recklessly inflicted substantial bodily harm. The jury could easily have found that Mr. Holzkecht recklessly inflicted substantial bodily harm simply because it found that he "acted intentionally" when allegedly assaulting Grace.

Similarly, as in *Hayward*, these instructions violated due process of law under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3, by setting up a mandatory presumption and relieving the State of its burden of proving negligence, recklessness or knowledge, separate elements than intent.<sup>2</sup>

These constitutional errors are presumed prejudicial unless the State proves they are "harmless." *Hayward*, Slip Op. at 15. Here, if the jurors concluded that Mr. Holzkecht had caused the child's injuries, the

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<sup>2</sup> Both of these arguments apply to the conviction in Count I for assault of a child in the third degree. While admittedly Instruction No. 20 (CP 77) does not bifurcate the mental states needed for conviction of this crime (requiring only a finding of criminal negligence), it is possible though the jurors could have found criminal negligence for this count by making the determination that Mr. Holzkecht "act[ed] intentionally or knowingly or recklessly," thereby relieving the State of its burden of proof and violating due process under U.S. Const. amend. 14 and Wash. Const. art. 1, § 3.

only issue was Mr. Holzkecht's mental state – whether he intentionally, recklessly or negligently caused the injuries. As in *Hayward*, while there was evidence that Grace suffered from leg fractures, “this evidence only supports the fact that [Grace] suffered substantial injuries not that [Mr. Holzkecht] acted recklessly [or negligently] in inflicting those injuries.” *Hayward*, Slip Op. at 16. Given the dispute at trial over Mr. Holzkecht's mental state, and given the differing interpretations that could be placed to a father's alleged actions of using too much force while changing a diaper, it cannot be said that the error is harmless.

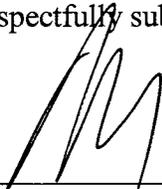
Accordingly, the Court should reverse all three convictions and remand for a new trial.

**E. CONCLUSION**

For the foregoing reasons, this Court reverse the convictions and remand for a new trial.

DATED THIS 7 day of October 2009.

Respectfully submitted,

  
\_\_\_\_\_  
NEIL M. FOX, WSBA NO. 15277  
Attorney for Appellant

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APPENDIX A

INSTRUCTION NO. 21

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

Criminal negligence is also established if a person acts intentionally or knowingly or recklessly.

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## APPENDIX B

INSTRUCTION NO. 22

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstances or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

## APPENDIX C

INSTRUCTION NO. 23

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 the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.

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

STATE OF WASHINGTON,	}	CAUSE NO. 63017-2-I
Respondent,	}	
v.	}	CERTIFICATE OF SERVICE
ERIC HOLZKNECHT,	}	
Appellant	}	

I, Bre Caldwell, certify and declare as follows:

On 7th day of October 2009, I deposited in the United States Mail, with proper first-class postage attached, a copy of the attached Supplemental Brief in this case, addressed to:

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

10/7/09 Seattle, WA  
DATE AND PLACE

  
BRE CALDWELL