

No. 33961-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Dwight Feeser,

Appellant.

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Grays Harbor County Superior Court

Cause No. 05-1-00278-9

The Honorable Judge David Foscue

Appellant's Reply Brief

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ARGUMENT

I. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF SECOND DEGREE INTENTIONAL MURDER.

Respondent argues that the absence of premeditation is not an element of Second Degree Intentional Murder. Brief of Respondent, pp. 3-8. This is incorrect.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn. App. 400 at 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction." *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

The plain language of the statute defining Second Degree Intentional Murder designates the absence of premeditation as an element of the offense: “A person is guilty of murder in the second degree when [w]ith intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person.” RCW 9A.32.050. Applying the plain language rule, the state was required to allege and prove that Mr. Feeser acted “without premeditation.” RCW 9A.32.050; *Sutherland, supra*; *Christensen, supra*; *Punsalan, supra*.

Respondent’s reliance on *State v. Williams*, 133 Wn.App. 714, 136 P.3d 792 (2006), *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003) and *State v. Tinker*, 155 Wn.2d 219, 118 P.3d 885 (2005) is misplaced. Brief of Respondent, pp. 4-6. A review of the statutes addressed in each of those cases show that the *Williams*, *Ward*, and *Tinker* courts each held that a sentencing provision need not be pled, since sentencing provisions are not substantive elements of an offense. The bail jumping statute (addressed by the Court of Appeals in *Williams*) is bifurcated: one section defines the substantive offense, while another establishes the penalty. See RCW 9A.76.170. Similarly, the substantive crime addressed in *Ward* was the “[w]illful violation of a court order issued under [certain provisions authorizing such orders].” Former RCW 10.99.040(4) (1997) and former

RCW 10.99.050(2) (1997). Other provisions of each statute varied the penalty depending on the circumstances; these provisions did not create separate crimes, but instead enhanced the sentence for the base crime. *Ward, supra*, at 812-813. As in *Ward* and *Williams*, a base crime of “theft” is defined in RCW 9A.56.020, and varying penalties are separately imposed for conduct that elevates the base crime. RCW 9A.56.030-RCW 9A.56.050. *Tinker, supra*.

By contrast, there is no statute defining a base crime of murder, and setting varying penalties based on the circumstances of the crime. *See* RCW 9A.32 generally. Instead, RCW 9A.32.030 defines the crime of Murder in the First Degree (a Class A felony), and RCW 9A.32.040 sets forth the penalty for that crime. RCW 9A.32.050 defines the crime of Murder in the Second Degree (also a Class A felony). The structure of the murder statute is very different from the statutes at issue in *Williams*, *Ward*, and *Tinker*. In RCW 9A.32.050, the language is clear: the absence of premeditation is contained in the very provision defining the substantive crime itself. It is not set forth in a separate provision establishing penalties for a base crime. Accordingly, the absence of premeditation is an element of Second-Degree Murder. Regardless of how “awkward” this might be for the defendant (Brief of Respondent, p. 5, 6), this court is not free to disregard the legislature’s choice of language.

Respondent's reliance on the *Workman* test is equally unpersuasive. See Brief of Respondent at pp. 6-7, citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). The cases cited by Respondent support Mr. Feeser's position. For example, in *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990), the Court noted that "[s]econd degree murder is intentional murder without premeditation. *Bowerman*, at 806. In *State v. Ortiz*, 119 Wn.2d 294, 831 P.2d 1060 (1992), the Court held that "[m]urder in the second degree contains these elements: (1) the defendant caused the death of the victim; (2) the defendant intended to cause the death of the victim, but without premeditation." *Ortiz*, at 313-314.

For all these reasons, the Information was defective. The conviction must be reversed and the case dismissed without prejudice. The state is free to file a new charging document that includes the absence of premeditation as an element.

II. THE TRIAL COURT'S INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF SECOND DEGREE INTENTIONAL MURDER.

Respondent does not separately address issues relating to the jury instructions. Respondent apparently agrees with the legal standards set forth in Mr. Feeser's Opening Brief, and relies on arguments relating to the sufficiency of the Information.

Since Respondent has failed to provide additional argument, Mr. Feeser rests on the argument made in the Opening Brief.

III. THE CONVICTION FOR SECOND DEGREE FELONY MURDER MUST BE REVERSED AND THE CASE DISMISSED BECAUSE THE LEGISLATURE'S FAILURE TO DEFINE THE UNDERLYING CRIME OF ASSAULT IN THE SECOND DEGREE VIOLATES THE SEPARATION OF POWERS AND IS UNCONSTITUTIONAL.

Respondent argues that the legislature's delegation to the judiciary of the power to define assault is constitutional, relying on *State v. David*, 134 Wn.App. 470, 141 P.3d 646 (2006) and *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006). Brief of Respondent, p. 9-11. Respondent's reliance on *David* and *Chavez* is misplaced.

In *David*, Division II addressed the legislature's failure to define proximate cause, an element of vehicular homicide. Here, by contrast, the legislature has failed to define the core meaning of the crime of assault. Although the legislature has listed factors that elevate the core crime to felony status, the legislature hasn't designated a single element to delimit the core offense. *David* is thus distinguishable.

In *Chavez*, Division II drew an analogy between assault and the crimes of bail jumping, protection order violations, and criminal contempt:

Although the legislature's function is to define the elements of a crime, the "legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics." *Wadsworth*, 139 Wn.2d at 743. For example, the bail-jumping statute

criminalizes the failure to appear before a court, RCW 9A.76.170, but the courts determine the dates on which the defendant must appear. *Wadsworth*, 139 Wn.2d at 736-37. In protection-order legislation, the legislature specifies when the orders may be issued and the criminal intent necessary for a violation, but the courts determine the specific prohibitions. *Wadsworth*, 139 Wn.2d at 737. The legislature has broadly defined the elements of criminal contempt as intentional disobedience to a judgment, decree, order, or process of the court, but the courts declare the specific acts of disobedience. *Wadsworth*, 139 Wn.2d at 737. The legislature's history of delegating to the judiciary how statutes will be specifically applied demonstrates that the practice does not offend the separation of powers doctrine...
Chavez, at 667.

But in each of these situations, the legislature has defined the general crime, and the remaining terms are case-specific. For example, a bail-jumping defendant is charged with failing to appear on a specific court-ordered date applicable to her or his case only. A protection order violation is proved with reference to a specific court order that applies only to the defendant charged. A contempt charge rests on a specific "judgment, decree, order, or process of the court," applicable to the defendant. These statutes, cited in *Wadsworth*, are qualitatively different from the assault statute, in which the legislature has failed to define the core crime even in general terms.

Division II also found the statute constitutional because the legislature "has instructed that the common law must supplement all penal statutes." *Chavez*, at 667, citing RCW 9A.04.060. While this is true, it

does not absolve the legislature of performing its essential function in defining the core meaning of a crime. Nor does the legislature's acquiescence render an unconstitutional division of labor constitutional, as Division II suggests in *Chavez, supra*.

The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution. Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which Mr. Feeser was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

IV. THE SENTENCING COURT'S UNCHALLENGED FINDINGS OF FACT REQUIRE THAT MR. FEESER BE SENTENCED WITH AN OFFENDER SCORE OF ZERO.

Relying on documents that are not part of the record on appeal, including some documents that were not part of the record in the trial court, Respondent argues that Mr. Feeser's offender score was properly calculated. Brief of Respondent, p. 11-16; *see also* Appendices 1-3 to Brief of Respondent.

Respondent's arguments should be disregarded, because "[a]n appeal must stand or fall on the record made in the trial court." *State v. Emerson*, 43 Wn.2d 5 at 14, 259 P.2d 406 (1953); *see also State v.*

Warnick, 121 Wn. App. 737 at 746, 90 P.3d 1105 (2004) (an appellate court “does not consider arguments that depend upon matters outside the appellate record”); and *State v. Beasley*, 126 Wn. App. 670 at 694, 109 P.3d 849 (2005) (“matters referred to in the brief but not included in the record cannot be considered on appeal.”) Respondent has not filed a designation of clerk’s papers (RAP 9.6), a motion to correct or supplement the appellate record (RAP 9.10), or a motion for additional evidence on review (RAP 9.11). The Court of Appeals should disregard those arguments made by Respondent that are based on matters outside the record on appeal. *Emerson, supra*.

Even if the cited documents were part of the record on appeal, they would not sustain Respondent’s arguments. First, Respondent cites the “Statement of Prosecuting Attorney”¹ and the defendant’s failure to object to the prosecutor’s calculation of the offender score. Brief of Respondent, p. 12-13. But a failure to object constitutes acknowledgment only where the defendant fails to object to “information stated in the presentence reports.” RCW 9.94A.530(2). Presentence reports are documents prepared by the Department of Corrections at the court’s request under RCW 9.94A.500. No presentence report was requested or filed by DOC

¹ This document is not part of the record on appeal.

in this case. The “Statement of Prosecuting Attorney” relied upon by Respondent contains nothing more than allegation. As the Supreme Court made clear in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.
State v. Ford, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

Accordingly, Respondent’s reliance on the prosecuting attorney’s bare assertions is misplaced. Although the written statement prepared by the prosecuting attorney is undoubtedly helpful to both parties and to the court, it does not constitute proof under RCW 9.94A or under *Ford, supra*.

Second, Respondent cites defense counsel’s written “Recommendation on Sentence.”² Brief of Respondent, p. 12. But this document does not acknowledge any prior convictions; instead, it references a standard range that is inconsistent with the sentencing court’s findings on criminal history. *See* Brief of Respondent, Appendix 3.

Third, Respondent blames Mr. Feeser for “failing to put the court on notice as to any apparent defects in the calculation of his offender score,” and suggests that the proper remedy is remand for an evidentiary

² This document is not part of the record on appeal.

hearing. Brief of Respondent, p. 14-15. This is incorrect. Under RCW 9.94A.530, the burden of establishing criminal history rests with the state. Furthermore, the trial court made findings of fact on Mr. Feeser's criminal history. CP5. The state did not cross-appeal pursuant to RAP 5.1(d). Nor did the state assign error to any findings, as required under RAP 10.3(b).

Unchallenged findings are verities on appeal. *Sorenson v. Pyeatt*, 158 Wn.2d 523 at 528 n. 3, ___ P.3d ___ (2006). Because the state failed to challenge the sentencing court's findings on Mr. Feeser's criminal history, those findings constitute a final judgment, and are not properly the subject of this appeal. Remand for an evidentiary hearing is inappropriate.

Instead, the sole question is whether the trial court's factual findings on Mr. Feeser's criminal history support the sentence imposed. Under RCW 9.94A.525, RCW 9.94A.510, and RCW 9.94A.515, the trial court's factual findings on Mr. Feeser's criminal history require that he be sentenced with an offender score of zero and a standard range of 123-220 months.

V. MR. FEESER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent relies on matters outside the record to address Mr. Feeser's ineffective assistance claim: "counsel was aware of the defendant's criminal history... had represented the defendant during the

1998 case... [and] was aware [that] raising objections to the use of the 1997 conviction... would simply result in the State's submission to the court of proof of the defendant's subsequent criminal violations." Brief of Respondent, p. 15-16. This court should disregard arguments based on matters outside the appellate record. *Emerson, supra; Warnick, supra; Beasley, supra.*

In effect, Respondent asks this court to read counsel's mind and divine his intentions from matters outside the record ("Clearly, counsel made a considered judgment not to fight a battle over convictions which he knew existed...." Brief of Respondent, p. 16.) This is inappropriate. If the court reaches Mr. Feeser's ineffective assistance claim, it should decide the issue based on the facts in the record rather than speculations lacking any basis in the record.

CONCLUSION

For the foregoing reasons, Mr. Feeser's conviction must be reversed. The case must be dismissed with prejudice because the statutory and judicial scheme under which Mr. Feeser was convicted is unconstitutional. In the alternative, the case must be dismissed without prejudice because the Information was deficient.

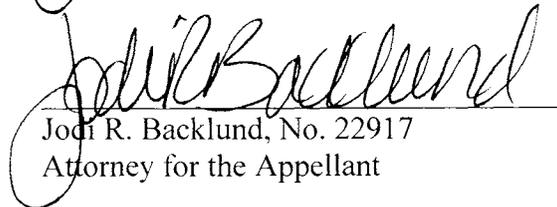
If the case is not dismissed, the conviction must be reversed and the case remanded for a new trial with proper instructions. If reversal is

not warranted, the sentence must be vacated and the case remanded for resentencing with an offender score of zero.

Respectfully submitted on December 28, 2006.

BACKLUND AND MISTRY


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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

Grays Harbor Prosecuting Attorney
102 West Broadway Ave, Room 102
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 28, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 28, 2006.



Jodi R. Backlund, No. 22917
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