

FILED
COURT OF APPEALS

05 JUN -1 AM 11:56
STAT. CLERK
BY [Signature]
CITY

No. 34330-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Matthew Meents,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00477-5

The Honorable Judge

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
(360) 740-4445
FAX: 740-1650

pm 5-31-06

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR v

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR vi

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 2

I. The Information was deficient as to Count III because it omitted an essential element of the crime of Bail Jumping... 2

II. The court’s “knowledge” instruction violated Mr. Meents’s constitutional right to due process. 3

 A. The improper mandatory presumption and confusing language of Instruction No. 20 require reversal of Mr. Meents’s conviction for Bail Jumping. 6

 B. The improper mandatory presumption and confusing language of Instruction No. 20 require reversal of the Mr. Meents’s convictions for Assault in the Third Degree. 7

III. Defense counsel was ineffective for failing to object to the court’s defective “knowledge” instruction. 8

IV. The judicially created definition of assault violates the separation of powers..... 11

CONCLUSION 17

TABLE OF AUTHORITIES

FEDERAL CASES

| | |
|---|---------|
| <i>Carella v. California</i> , 491 U.S. 263, 109 S.Ct. 2419 (1989)..... | 4, 6, 8 |
| <i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) | 3 |
| <i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)..... | 9 |
| <i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)..... | 4 |
| <i>Morrison v. Olson</i> , 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) | 12 |
| <i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) | 4 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 9, 11 |
| <i>U.S. v. Bass</i> , 404 U.S. 336, 92 S.Ct. 515 (1971)..... | 12 |
| <i>United States v. Rizzo</i> , 409 F.2d 400 (7th Cir. 1969), <i>cert. denied</i> , 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969)..... | 15 |

STATE CASES

| | |
|---|--------|
| <i>Howell v. Winters</i> , 58 Wash. 436, 108 Pac. 1077 (1910)..... | 13, 14 |
| <i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001)..... | 10 |
| <i>Joyce v. Dept. of Corrections</i> , 155 Wn.2d 306, 119 P.3d 825 (2005)..... | 4 |
| <i>Peasley v. Puget Sound Tug & Barge Co.</i> , 13 Wn.2d 485, 125 P.2d 681 (1942)..... | 14 |
| <i>State v. Bradley</i> , 141 Wn.2d 731, 10 P.3d 358 (2000) | 9 |

| | |
|--|------------|
| <i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) | 4, 7 |
| <i>State v. DiLuzio</i> , 121 Wn.App. 822, 90 P.3d 1141 (2004) | 11 |
| <i>State v. Douglas</i> , 128 Wn.App. 555, 116 P.3d 1012 (2005)..... | 4 |
| <i>State v. Franks</i> , 105 Wn.App. 950, 22 P.3d 269 (2001)..... | 2 |
| <i>State v. Frazier</i> , 81 Wn.2d 628, 503 P.2d 1073 (1972)..... | 14, 15 |
| <i>State v. Garcia</i> , 20 Wn.App. 401, 579 P.2d 1034 (1978)..... | 15 |
| <i>State v. Goble</i> , 131 Wn.App. 194, 126 P.3d 821 (2005) | 5, 6, 7, 8 |
| <i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998)..... | 7, 10 |
| <i>State v. Holm</i> , 91 Wn.App. 429, 957 P.2d 1278 (1998) | 9 |
| <i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991)..... | 2, 3 |
| <i>State v. Lopez</i> , 107 Wn.App. 270, 27 P.3d 237 (2001)..... | 9 |
| <i>State v. McFadden</i> , 42 Wash. 1, 84 P. 401 (1906) | 13 |
| <i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002) | 11, 12, 16 |
| <i>State v. Nicholson</i> , 119 Wn.App. 855, 84 P.3d 877 (2003)..... | 15 |
| <i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997)..... | 4 |
| <i>State v. Rush</i> , 14 Wn.2d 138, 127 P.2d 411 (1942)..... | 14 |
| <i>State v. S.M.</i> , 100 Wn.App. 401, 996 P.2d 1111 (2000)..... | 10 |
| <i>State v. Saunders</i> , 91 Wn.App. 575, 958 P.2d 364 (1998) | 10 |
| <i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980)..... | 4 |
| <i>State v. Shaffer</i> , 120 Wash. 345, 207 P. 229 (1922) | 14 |
| <i>State v. Simon</i> , 120 Wn.2d 196, 840 P.2d 172 (1992)..... | 3 |
| <i>State v. Strand</i> , 20 Wn.App. 768, 582 P.2d 874 (1978)..... | 15 |

| | |
|--|--------|
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) | 10 |
| <i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) | 4 |
| <i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000)..... | 12, 16 |

CONSTITUTIONAL PROVISIONS

| | |
|--|------|
| U.S. Const. Amend. VI | 8 |
| Wash. Const. Article I, Section 2..... | 2, 8 |
| Wash. Const. Article I, Section 3..... | 2 |
| Wash. Const. Article II, Section 1 | 11 |
| Wash. Const. Article III, Section 2..... | 11 |
| Wash. Const. Article IV, Section 1 | 11 |

STATUTES

| | |
|--------------------------------|------|
| RCW 9A.08.010..... | 5 |
| RCW 9A.36.011..... | 12 |
| RCW 9A.76.170..... | 2, 3 |
| Rem. & Bal. Code SS 2746 | 13 |

OTHER AUTHORITIES

| | |
|-----------------|------|
| WPIC 10.02..... | 4, 5 |
| WPIC 35.50..... | 15 |

ASSIGNMENTS OF ERROR

1. The Information was deficient as to Count III because it omitted an essential element of Bail Jumping.
2. The trial court erred by instructing the jury with an erroneous definition of knowledge.
3. The trial court erred by giving Instruction No. 6, which reads as follows:

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.
Supp. CP, Instruction 20.

4. The court's "knowledge" instruction contained an improper mandatory presumption.
5. The court's "knowledge" instruction impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
6. Mr. Meents was denied the effective assistance of counsel when his attorney failed to object to the improper "knowledge" instruction.
7. The absence of a legislative definition of Assault violates the separation of powers doctrine.
8. The judicially created definition of Assault violates the separation of powers doctrine.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Matthew Meents was charged with two counts of Assault in the Third Degree and with Bail Jumping. The operative language of the Information did not allege that he knew of the requirement of a subsequent personal appearance in court.

1. Was the Information deficient because it failed to allege an essential element of Bail Jumping?

To obtain a conviction for Bail Jumping under the court's instructions, the prosecution was required to prove that Mr. Meents "knowingly failed to appear," and that he "knew of the requirement to subsequently appear."

To obtain convictions for Assault in the Third Degree, the state was required to prove that Mr. Meents acted with knowledge that the victim was a law enforcement officer performing official duties.

The court instructed the jury that "Acting knowingly or with knowledge also is established if a person acts intentionally." In addition, the court's "knowledge" instruction included the following language: "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime..."

Defense counsel did not object to the court's "knowledge" instruction.

2. Using a *de novo* standard of review, did the trial court's "knowledge" instruction create an impermissible mandatory presumption? Assignments of Error Nos. 2-6.
3. Using a *de novo* standard of review, did the trial court's "knowledge" instruction misstate the law and mislead the jury? Assignments of Error Nos. 2-6.
4. Using a *de novo* standard of review, was Mr. Meents denied the effective assistance of counsel by his lawyer's failure to object to the erroneous "knowledge" instruction? Assignments of Error Nos. 2-6.

The Washington legislature has criminalized assault, but has not defined the elements of that crime. In the absence of a legislative

definition, the judiciary has, over the course of more than a century, defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

5. Does the lack of a legislative definition of the elements of the crime of assault violate the separation of powers doctrine?
Assignments of Error Nos. 7-8.

6. Does the judicially created definition of the elements of the crime of assault violate the separation of powers doctrine?
Assignments of Error Nos. 7-8.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Matthew Meents was charged with two counts of Assault in the Third Degree and one count of Bail Jumping in Lewis County Superior Court. CP 14-15. The operative language of the Amended Information charged Bail Jumping as follows:

[D]efendant on or about September 08, 2005, in Lewis County, Washington, then and there, having been charged with Assault in the Third Degree, two counts, class C felony, and having been released by court order and having been admitted to bail with a requirement of a subsequent appearance before the Lewis County Superior Court did knowingly fail to appear as required contrary to the peace and dignity of the State of Washington.
CP 15.

At the close of trial, the court gave the following instruction defining "knowledge:"

A person knows or acts knowingly or with knowledge when he or she is aware of the a fact, circumstance or result 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.
Supp. CP.

The defense did not object to this instruction. Mr. Meents was convicted as charged and sentenced to 20 months in prison; he appealed the judgment and sentence. RP (12-20-05) 52; CP 3, 4.

ARGUMENT

I. THE INFORMATION WAS DEFICIENT AS TO COUNT III BECAUSE IT OMITTED AN ESSENTIAL ELEMENT OF THE CRIME OF BAIL JUMPING.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State Constitution.

A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

The crime of Bail Jumping is defined in RCW 9A.76.170(1), which reads (in relevant part) as follows: "Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this

state... who fails to appear... as required is guilty of bail jumping.” The statute thus requires an allegation and proof that the accused had “knowledge of the requirement of a subsequent personal appearance...” RCW 9A.76.170(1). The statute does not actually require proof that the accused “knowingly” failed to appear.

An allegation of knowledge cannot be transferred from one element to another. *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992) (allegation that defendant “did knowingly advance and profit” by compelling victim to engage in prostitution was not sufficient to allege that the defendant knew the victim was less than 18 years old).

The Information in this case accused Mr. Meents of “knowingly fail[ing] to appear as required...” CP15. It did not allege that he had “knowledge of the requirement of a subsequent personal appearance,” as required by the statute. Because of this, the conviction must be reversed and Count III dismissed without prejudice. *Kjorsvik, supra*.

II. THE COURT’S “KNOWLEDGE” INSTRUCTION VIOLATED MR. MEENTS’S CONSTITUTIONAL RIGHT TO DUE PROCESS.

The Due Process Clause of the Fourteenth Amendment requires that convictions be based on proof beyond a reasonable doubt of every element of the charged offense. *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a

whole, must properly inform the trier of fact of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67 at 76, 941 P.2d 661 (1997). Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952); *see also Carella v. California*, 491 U.S. 263 at 265, 109 S.Ct. 2419 (1989).

Here, “knowledge” was defined by Instruction No. 20 (based on WPIC 10.02), which included the following optional language (bracketed

in WPIC 10.02): “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 20, Supp. CP.¹ This language allowed the jury to presume that Mr. Meents acted knowingly if he took any intentional act, but did not give any guidance as to what intentional act could trigger the mandatory presumption. Accordingly, the prosecution was relieved of establishing knowledge by proof beyond a reasonable doubt. *See, e.g., State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

The instruction was also confusing and misleading for another reason. The court told the jury that a person “acts knowingly” when he “is aware of a fact, circumstance or result described by law as being a crime...” This language differed from the statutory language of RCW 9A.08.010(1)(b); under Instruction No. 20, the information at issue—the “fact, circumstances or result”—must itself be described by law as a crime. This is nonsensical. *See* RCW 9A.08.010 (which requires that the fact be described by a criminal statute, not that the fact itself be described as a crime). The *Goble* court criticized WPIC 10.02 on this basis as well. *See Goble at* 203 (“We agree that the instruction is confusing.”)

¹ The final sentence is bracketed in the WPIC because it is to be used only where applicable.

- A. The improper mandatory presumption and confusing language of Instruction No. 20 require reversal of Mr. Meents's conviction for Bail Jumping.

To obtain a conviction for Bail Jumping in this case, the state was required to prove that Mr. Meents "knowingly failed to appear before a court," and that he "knew of the requirement to subsequently appear before the court on September 08, 2005 during the time [he] was released or admitted to bail..." Instruction No. 16, Supp. CP. Under the last sentence of the court's "knowledge" instruction, Mr. Meents' knowledge was conclusively established if the state proved that he did any intentional act, whether it related to the elements of the offense or not. Instruction No. 20, Supp. CP. Furthermore, the jury was left to puzzle over the meaning of "knowledge," since the instruction included language that did not make sense, and that differed from the statutory definition of knowledge. *Compare* Instruction No. 20 and RCW 9A.08.010.

Because the instruction contained an unconstitutional mandatory presumption, and because it was confusing and misleading, the conviction for Bail Jumping must be reversed and the case remanded for a new trial. *Goble, supra; Carella, supra.*

- B. The improper mandatory presumption and confusing language of Instruction No. 20 require reversal of the Mr. Meents's convictions for Assault in the Third Degree.

Under the "law of the case" doctrine, surplus language in the "to convict" instruction may add elements to an offense. Where the state acquiesces to such language, it must present sufficient evidence to prove the additional elements beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97 at 100, 954 P.2d 900 (1998). If the state fails to present sufficient evidence, the conviction must be reversed and the case dismissed with prejudice. *Hickman, supra*.

Here, the "to convict" instructions for the Assault in the Third Degree charges included an extra element: that Mr. Meents "knew at the time of the assault that [the victim] was a law enforcement officer... who was performing his official duties."²

This court reversed a conviction under identical circumstances in *State v. Goble, supra*. In *Goble*, as in this case, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.³ The trial court's "knowledge" instruction was the same as that given in

² Knowledge is ordinarily not an element of the offense. *State v. Brown*, 140 Wn.2d 456, 998 P.2d 321 (2000).

³ As in this case, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble at 201*.

this case. The Court of Appeals reversed the conviction because the last sentence of the instruction could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer. *Goble, at 203.*

Here, as in *Goble*, the jury was permitted to conclude that any intentional act by Mr. Meents conclusively established his knowledge that he was assaulting a law enforcement officer performing official duties. Instruction No. 20, Supp. CP. Furthermore, because of the erroneous language in Instruction No. 20, the jury was unable to determine what was meant by the knowledge element of the "to convict" instruction. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Goble, supra; Carella, supra.*

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S DEFECTIVE "KNOWLEDGE" INSTRUCTION.

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of

counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn.App. 429, 957 P.2d 1278 (1998), citing *Strickland*, *supra*. The defendant must show a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *Holm*, *supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong.

To establish deficient performance, a defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must

show that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Here, ‘knowledge’ was an essential element of the crime under the law of the case. *Hickman, supra*. Despite this, Mr. Meents’s attorney failed to object to the court’s “knowledge” instruction, which contained a mandatory presumption and which distorted the statutory definition found in RCW 9A.08.010(1)(b). This failure to object was deficient performance; a reasonably competent attorney would have been familiar with the statute, and would have known that the language of the instruction differed from the language of the statute. *See, e.g., State v. Thomas*, 109 Wn.2d 222 at 229, 743 P.2d 816 (1987) (“[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an [appropriate] instruction.”)

Mr. Meents was prejudiced by the error. The “knowledge” instruction was confusing and misleading, and it misstated the law. As a result, the jury would not have been able to properly interpret the “to

convict” instructions. Defense counsel’s failure to object to the improper “knowledge” instruction denied Mr. Meents the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

IV. THE JUDICIALLY CREATED DEFINITION OF ASSAULT VIOLATES THE SEPARATION OF POWERS.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The State Constitution divides political power into legislative authority (article II, section 1), executive power (article III, section 2), and judicial power (article IV, section 1). *Moreno*, at 505. Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that

are more properly accomplished by other branches. *Moreno at 506, citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized assault; however it has not defined that crime. *See, generally*, RCW 9A.36.⁴ Instead, it has allowed the judiciary to define the core meaning of the crime; the judiciary has done so, enlarging the definition over a period of many years. This violates the separation of powers. *Moreno, supra*.

At the turn of the last century, Washington’s criminal code included a definition of assault. In 1906 the Supreme Court noted that

⁴ There are some sections of the statute, not applicable here, which specifically define the elements of certain types of assaults. *See, e.g.*, RCW 9A.36.011(1)(b): “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance.”

“An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution.” *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) “was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act.” *Howell v. Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

“An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; ‘A right to live in society without being put in fear of personal harm.’” Cooley, *Torts* (3d ed.), p. 278
Howell v. Winters, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

Howell v. Winters was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra*. *State v. Rush*, at 140.

Thirty years later, the core definition of "assault" expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court's opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .

The second concept is that an assault is ‘committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.’ The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

State v. Frazier, at 630-631.

Following *Frazier*, Washington’s judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). *See, e.g., State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. *See* WPIC 35.50; *see also State v. Nicholson*, 119 Wn.App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime. This violates the separation of powers because it encroaches on a core legislative function. *Moreno, supra; Wadsworth, supra.* The statutory and judicial scheme under which Mr. Meents was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

CONCLUSION

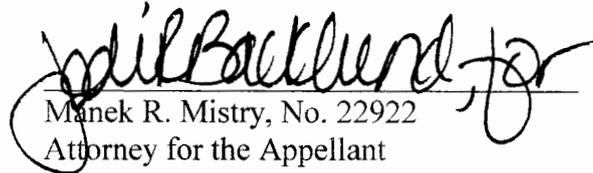
For the foregoing reasons, the convictions must be reversed.
Count III must be dismissed without prejudice; Counts I and II must be
dismissed with prejudice. In the alternative, the case must be remanded to
the Superior Court for a new trial.

Respectfully submitted on May 31, 2006.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

FILED
COURT OF APPEALS
SEATTLE

06 JUN -1 AM 11:56

STATE OF WASHINGTON

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to: _____
DEPUTY

Matthew Meents, DOC# 836882
Clallam Bay Correctional Center
1830 Eagle Crest Way
Clallam Bay, WA 98326-9723

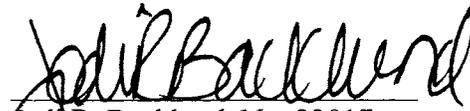
and to the Lewis County Prosecuting Attorney.

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 31, 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 May 31, 2006.



Jodi R. Backlund, No. 22917
Attorney for the Appellant