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STATE OF WASHINGTON

No. 34330-4-II

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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 H. John Hall

Appellant's Reply Brief

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pm 9-25-06

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ARGUMENT

I. THE INFORMATION CHARGING BAIL JUMPING FAILED TO ALLEGE THAT MR. MEENTS WAS RELEASED “WITH KNOWLEDGE OF A SUBSEQUENT PERSONAL APPEARANCE.”

Respondent first argues that the phrase “knowingly fails to appear” conveys the same meaning as “with knowledge of a subsequent personal appearance... fails to appear.” Brief of Respondent, p. 4. This is incorrect.

The defendant knew that he didn’t go to court on September 8, 2005. He also knew that he didn’t go to court on September 5th, 6th, and 7th, 2005. Thus he knowingly failed to appear on all those dates. But this knowledge (that he didn’t go to court on any of those days) does not equate with knowledge that he was required to appear on those days. Indeed, he wasn’t required to appear on September 5th, 6th, or 7th, yet he still knowingly failed to appear on those days. As this example illustrates, the word “knowingly” in the phrase “knowingly fails to appear” cannot be stretched to include knowledge of every pertinent fact. *See, e.g., State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992)

The failure to correctly charge the Bail Jump charge requires dismissal of Count III without prejudice. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991).

II. THE COURT'S "KNOWLEDGE" INSTRUCTION CONTAINED AN IMPROPER MANDATORY PRESUMPTION.

Respondent next argues that the court's "knowledge" instruction did not affect Mr. Meents' defense on the assault charges. Brief of Respondent, pp. 5-7. Respondent completely neglects Mr. Meents' argument relating the instruction to his bail jumping conviction. *See* Appellant's Opening Brief, p. 5.

The jury quite likely believed that Mr. Meents intentionally did not go to court on September 8, 2005, since there was no indication he was prevented from going by circumstances beyond his control. RP(12/19/05) 12-99; RP(12/20/05) 2-51. Under the court's instruction, he was conclusively presumed to have acted with knowledge of the court appearance, regardless of whether or not he actually knew of the court date. CP 38. Respondent's failure to address this problem requires reversal of the bail jumping conviction. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980).

Respondent attempts to distinguish *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005), arguing that there was no evidence in this case that Mr. Meents acted without knowledge. Brief of Respondent, pp. 6-7. In other words, Respondent argues that the error in the instruction was

harmless. But in order to sustain the conviction, this court must find beyond a reasonable doubt that the error did not contribute to the verdict. *Brown, supra*, at 341. Respondent has not met this burden.

The language of Instruction No. 20 instructed the jury to conclusively presume that Mr. Meents acted knowingly if he took any intentional act. CP 38. None of the instructions guided the jury as to what intentional act could trigger the mandatory presumption. CP 17-41. Accordingly, the prosecution was relieved of establishing knowledge by proof beyond a reasonable doubt.

Because of the erroneous “knowledge” instruction, all three convictions must be reversed, and the case must be remanded for a new trial. *See Goble, supra*.

III. MR. MEENTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

In arguing against a finding of ineffective assistance, Respondent concludes that “[t]he witnesses who observed his conduct testified to very purposeful acts.” By equating purposeful (or intentional) action with knowledge of all relevant facts, Respondent falls into the very trap created by Instruction No. 20.

Mr. Meents stands on the argument made in his opening brief.

IV. THE LEGISLATURE'S FAILURE TO DEFINE THE CORE CRIME OF ASSAULT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.

Division II has recently issued an opinion interpreting *Wadsworth* narrowly:

When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime... It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law. *State v. David*, 2006 Wash. App. LEXIS 1705, pp. 15-16 (2006), *citations and footnotes omitted*.

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 *State v. Chavez*, 2006 Wash. App. LEXIS 1849 (2006), Division II issued a part-published opinion in which it drew an analogy to 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...
Opinion, pp. 9.

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.” Opinion, p. 10, *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. Opinion, p. 10.

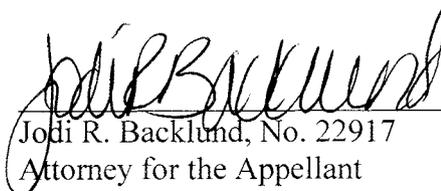
The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution. Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which Mr. Meents was convicted is unconstitutional;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

CONCLUSION

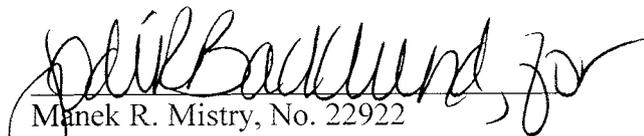
Mr. Meents respectfully requests this court to reverse his convictions, to dismiss Count III without prejudice, and to dismiss Counts I and II with prejudice. In the alternative, the case must be remanded to the Superior Court for a new trial. If any one conviction is reversed, the sentence must be vacated and the case remanded to the trial court for resentencing with an adjusted offender score.

Respectfully submitted on September 25, 2006.

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CERTIFICATE OF MAILING STATE OF WASHINGTON

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

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 September 25, 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 September 25, 2006.



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