

No. 34796-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

Edwin Blatt,

Appellant.

Lewis County Superior Court

Cause No. 06-1-00156-1

The Honorable Judge Nelson E. Hunt

Appellant's Reply Brief

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ARGUMENT

I. **MR. BLATT'S CONVICTION WAS BASED ON AN UNCONSTITUTIONAL STATUTE.**

Respondent argues that the legislature's delegation to the judiciary of the power to define assault is constitutional, relying on *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006). Brief of Respondent, p. 1.

The *Chavez* decision should be re-examined.

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. [991 P.2d 80 (2000)]. 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. Blatt was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

II. THE INFORMATION DID NOT ALLEGE THE ESSENTIAL ELEMENTS OF ASSAULT IN THE THIRD DEGREE.

Respondent argues that the missing language (“under circumstances not amounting to assault in the first or second degree”) is not an element of Assault in the Third Degree. Brief of Respondent, pp. 5-8. 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 Assault in the Third Degree is as follows:

Assault in the third degree

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

...

(2) Assault in the third degree is a class C felony.

RCW 9A.36.031

Applying the plain language rule, the state was required to allege and prove that Mr. Blatt acted “under circumstances not amounting to assault in the first or second degree.” RCW 9A.36.031; *Sutherland, supra*; *Christensen, supra*; *Punsalan, supra*.

Respondent relies primarily on WPIC 35.20 and the comments thereto, pointing out that the pattern instructions, while not binding, are persuasive authority. Brief of Respondent, pp. 5-8. Respondent’s reliance on the WPIC is misplaced, because persuasive authority must yield to controlling authority: the plain language of the statute and the rule in *Sutherland* trump the state’s WPIC-based argument. Furthermore, even if considered persuasive authority, the WPICs are not very convincing: pattern instructions are routinely found to be incorrect. *See, e.g., State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000) (pattern instruction on

accomplice liability erroneous); *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999) (WPIC 16.02 “clearly erroneous,” *Studd*, at 545); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (knowledge is an element of Unlawful Possession of a Firearm; standard instruction omitting that instruction erroneous); *State v. Warfield*, 103 Wn. App. 152, 5 P.3d 1280 (2000) (although not before the court, validity of WPIC 39.16 is doubtful).

Respondent also relies on *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003). Brief of Respondent, pp. 7-8. Respondent’s reliance on *Ward* is misplaced.

The Court’s holding in *Ward* was simply that a sentencing provision need not be pled, since sentencing provisions are not substantive elements of an offense. 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.

By contrast, there is no statute defining a base crime of assault, and setting varying penalties based on the circumstances of the crime. *See* RCW 9A.36 generally. Instead, RCW 9A.36.011 defines Assault in the

First Degree and sets the penalties for that crime, RCW 9A.36.021 defines Assault in the Second Degree and sets the penalties for that crime, and RCW 9A.46.031 defines Assault in the Third Degree and sets the penalties for that crime. The structure of RCW 9A.36 is very different from the statute at issue in *Ward*. In RCW 9A.36.031, the language is clear: the language “under circumstances not amounting to assault in the first or second degree” 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, these circumstances are an element of Assault in the Third Degree. This court is not free to disregard the legislature’s choice of language.

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 all of the essential elements of the crime.

III. THE “TO CONVICT” INSTRUCTION OMITTED AN ESSENTIAL ELEMENT.

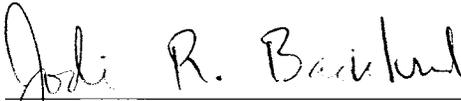
Respondent’s arguments relating to the “to convict” instruction are identical to those addressed in the previous section. Brief of Respondent, pp. 13-14. Accordingly, no additional argument is presented here.

CONCLUSION

For the foregoing reasons, Mr. Blatt's conviction must be reversed and his charge of Assault in the Third Degree dismissed with prejudice. If the case is not dismissed with prejudice, it must be dismissed without prejudice because of deficiencies in the information. In the alternative, the case must be remanded for a new trial with proper instructions.

Respectfully submitted on January 4, 2007.

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CERTIFICATE OF MAILING

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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 January 4, 2007.

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 January 4, 2007.

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