

No. 35222-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Mark Thomas Keend,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

Clallam County Superior Court

Cause No. 06-1-00130-2

The Honorable Judge George L. Wood

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court erred by giving Instruction No. 9, which reads as follows:

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.
Instruction No. 9, Supp. CP.

2. Instruction No. 9 contained an improper mandatory presumption.
3. Instruction No. 9 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
4. The trial court erred by instructing the jury with an erroneous definition of knowledge.
5. The trial court erred by giving Instruction No. 11, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances 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, Instruction 11.

6. Instruction No. 11 contained an improper mandatory presumption.

7. Instruction No. 11 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.
8. Mr. Keend was denied the effective assistance of counsel when his attorney failed to object to Instruction No. 9.
9. Mr. Keend was denied the effective assistance of counsel when his attorney failed to object to Instruction No. 11.
10. The trial court erred by failing to instruct the jury on the lesser offense of Assault in the Fourth Degree.
11. Mr. Keend was denied the effective assistance of counsel if his attorney waived the lesser offense issue.
12. The Information was constitutionally deficient because it omitted an essential element of Assault in the Second Degree.
13. The court's "to convict" instruction omitted an essential element of Assault in the Second Degree.
14. Mr. Keend was denied his constitutional right to a jury trial because the jury did not determine whether or not he acted under circumstances not amounting to Assault in the First Degree, an essential element of Assault in the Second Degree.
15. The trial court erred by giving Instruction No. 6, which reads as follows:

To convict the Defendant of the crime of ASSAULT IN THE SECOND DEGREE as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 31st day of March, 2006, the Defendant intentionally assaulted Daniel Reeves;
2. That the Defendant thereby recklessly inflicted substantial bodily harm on Daniel Reeves; and
3. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.
Instruction No. 6. Supp. CP.

16. The statutory and judicial scheme criminalizing assault in the second degree violates the separation of powers doctrine.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Mark Keend was charged with Assault in the Second Degree. The state alleged that he intentionally assaulted Daniel Reeves, and thereby recklessly inflicted substantial bodily harm. The court's instructions conflated the two *mens rea* requirements, and allowed the jury to presume that Mr. Keend acted recklessly if they believed he intentionally assaulted Reeves. Defense counsel did not object to the erroneous instructions.

1. Did the trial court's instructions create an impermissible mandatory presumption? Assignments of Error Nos. 1-7.
2. Did the trial court's instructions misstate the law and mislead the jury by conflating the two *mens rea* elements? Assignments of Error Nos. 1-7.
3. Did the trial court's instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 1-7.
4. Was Mr. Keend denied the effective assistance of counsel by his lawyer's failure to object to the erroneous instructions? Assignments of Error Nos. 8-9.

Mr. Keend asked the court to instruct the jury on the lesser offense of Assault in the Fourth Degree. The trial court refused on the grounds that there was no factual basis for the instruction. Defense counsel agreed with the court's analysis.

5. Did the trial court err by refusing Mr. Keend's lesser offense instructions on Assault in the Fourth Degree? Assignments of Error Nos. 10-11.

6. If defense counsel waived the lesser offense issue, was Mr. Keend denied the effective assistance of counsel? Assignments of Error Nos. 10-11.

The Information charging Mr. Keend with Assault in the Second Degree did not allege that he acted "under circumstances not amounting to assault in the first degree." Similarly, the "to convict" instruction did not instruct the jury to determine whether or not Mr. Keend acted under circumstances not amounting to assault in the first degree.

7. Did the Information omit an essential element of Assault in the Second Degree? Assignment of Error No. 12.

8. Did the court's "to convict" instruction omit an essential element of Assault in the Second Degree? Assignments of Error Nos. 13-15.

9. Was Mr. Keend denied his constitutional right to a jury determination of all the essential elements of Assault in the Second Degree? Assignments of Error Nos. 13-15.

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.

10. Does legislature's failure to define the core elements of the crime of assault violate the separation of powers doctrine? Assignment of Error No. 16.

11. Does the judicially created definition of the elements of the crime of assault violate the separation of powers doctrine? Assignment of Error No. 16.

STANDARDS OF REVIEW

1. Jury instructions are reviewed *de novo*. *Joyce v. Dept. of Corrections*, 155 Wn.2d 306 at 323, 119 P.3d 825 (2005).
2. A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).
3. A defendant is entitled to a lesser offense instruction if the elements of the lesser offense are necessary elements of the greater offense (the legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong.) *State v. Pittman*, 134 Wn. App. 376 at 384, ___ P.3d ___ (2006). When analyzing the factual prong, the evidence is viewed in a light most favorable to the defendant. *State v. McDonald*, 123 Wn. App. 85 at 89, 96 P.3d 468 (2004)
4. An Information challenged for first time on appeal is construed liberally, and is sufficient if the necessary facts appear or can be found by fair construction in the charging document. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991).
5. The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003).
6. Statutes are presumed constitutional, and the burden is on the party challenging the statute to prove its unconstitutionality beyond a reasonable doubt. *State v. Clinkenbeard*, 130 Wn. App. 552 at 560, 123 P.3d 872 (2005).

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On March 31, 2006, Mark Keend approached Daniel Reeves and confronted him about having an inappropriate relationship with Keend's underage sister. The confrontation ended with Mr. Keend punching Reeves in the jaw, causing a fracture. RP (7-18-06) 24, 30-31, 81.

Mr. Keend was charged with Assault in the Second Degree. In an Information filed April 3, 2006, the state alleged that Mr. Keend "did intentionally assault another person, to wit: Daniel Reeves, and thereby did recklessly inflict substantial bodily harm..." CP 18.

A jury trial commenced on July 18, 2006. The trial judge instructed the jury on the elements of Assault in the Second Degree:

To convict the Defendant of the crime of ASSAULT IN THE SECOND DEGREE as charged, each of the following elements of the crime must be proved beyond a reasonable doubt:

4. That on or about the 31st day of March, 2006, the Defendant intentionally assaulted Daniel Reeves;
5. That the Defendant thereby recklessly inflicted substantial bodily harm on Daniel Reeves; and
6. That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 6, Supp. CP.

The court provided a definition of assault based on WPIC 35.50:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
Instruction No. 7, Supp. CP.

The court also defined recklessness as follows:

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.
Instruction No. 9, Supp. CP.

Although not an element of the offense, the court also instructed the jury on the definition of knowledge, apparently because the word “knowingly” appears in Instruction No. 9. Knowledge was defined in Instruction No. 11:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances 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, Instruction 11.

No objection was made to any of these instructions. RP (7-18-06) 92-99. Defense counsel proposed a set of instructions on the lesser offense of Assault in the Fourth Degree. Defendant's Proposed Instructions, Supp. CP. The court refused to give the instructions, commenting that "certainly it's the lesser included legally, but factually I don't see any basis upon which the jury could find an Assault Four." RP (7-18-06) 92. Defense counsel responded as follows:

Yeah, it would be even clearer if I were asking as a lesser included but I'm asking as a lesser degree. I think the standards still apply that there has to be a legal factual basis. I think we've got the legal basis but it's pretty clear that there was a fracture so at this point I don't see that we probably should get the Assault Four. RP (7-18-06) 93.

Mr. Keend was convicted as charged, and sentenced to 15 months in prison. CP 11. He appealed. CP 5.

ARGUMENT

I. THE COURT'S INSTRUCTIONS VIOLATED DUE PROCESS BY CREATING A MANDATORY PRESUMPTION AND BY RELIEVING THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT BEYOND A REASONABLE DOUBT.

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).

Furthermore, 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).

Under RCW 9A.36.021(1)(a), Assault in the Second Degree requires proof of that the defendant acted both intentionally and recklessly:

- (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
 - (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm...

In this case, the state was required to prove that Mr. Keend intentionally assaulted Reeves, and thereby recklessly inflicted substantial bodily harm. Instructions 5 and 6, Supp. CP. The court defined recklessness as follows:

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.
Instruction No. 9, Supp. CP.

Under the circumstances of this case, this instruction conflated the two mental states and unconstitutionally relieved the prosecution of its burden of establishing the recklessness element. *See State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.¹ The trial court's "knowledge" instruction included language that closely paralleled the language in Instruction 9: "Acting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. The Court of Appeals

¹ Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

reversed the conviction because this language 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:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.
Goble, at 203.²

Here, as in *Goble*, Mr. Keend was charged with an offense that included two mental states: the prosecution was required to prove that Mr. Keend acted both intentionally and recklessly. As in *Goble*, the inclusion of the final sentence in Instruction 9 was erroneous; it allowed the jury to presume that Mr. Keend acted recklessly, based on his intentional act in striking Reeves.³ This unconstitutionally relieved the prosecution of its

² In *State v. Gerds*, ___ Wn.App. ___, ___ P.3d ___, 2007 Wash. App. LEXIS 75 (2007), the court clarified that *Goble* applies to crimes with more than one *mens rea* element. In such cases, use of the instruction creates the possibility that a jury will conflate the mental elements, thereby relieving the state of its burden.

³ The instruction was also confusing and misleading; 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. 10, 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.")

burden to prove that Mr. Keend acted recklessly. *Goble*. Because of this, the conviction must be reversed and the case remanded for a new trial.⁴

Goble, supra.

II. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE COURT'S IMPROPER INSTRUCTIONS.

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

⁴ The same problem is created indirectly through the combined operation of Instructions 9 and 11, under which recklessness is established whenever a person acts knowingly. Supp. CP.

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.

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, recklessness was an essential element of the crime charged. CP 18; Instruction Nos. 5-6, Supp. CP. Despite this, Mr. Keend's attorney failed to object to the court's instructions, which contained a mandatory presumption. This failure to object was deficient performance. A reasonably competent attorney would have been familiar with the two mental elements of the offense, and would also have been aware (from the *Goble* case) of the danger that a jury would conflate the two elements under the instructions as given.⁵ *Goble, supra*. 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. Keend was prejudiced by the error. The instructions were misleading and contained an illegal mandatory presumption. As a result, the jury would not have been able to properly interpret the “to convict” instructions, and improperly imputed recklessness to Mr. Keend based on his intentional act of striking Reeves. Defense counsel's failure to object to the improper instructions denied Mr. Keend the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial.

⁵ Trial commenced on July 18, 2006, nearly six months after *Goble* was published.

III. THE TRIAL COURT SHOULD HAVE INSTRUCTED THE JURY ON THE LESSER OFFENSE OF ASSAULT IN THE FOURTH DEGREE.

A defendant is entitled to a lesser offense instruction if each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong), and the evidence supports an inference that only the lesser offense was committed (the factual prong.) *State v. Pittman*, 134 Wn. App. 376 at 384, ___ P.3d ___ (2006). To satisfy the factual requirement, the defendant must show that the evidence, viewed in the light most favorable to him, would allow the jury could find the defendant not guilty of the charged offense but guilty of the lesser offense. *State v. McDonald*, 123 Wn. App. 85 at 89, 96 P.3d 468 (2004). In this case, the trial court should have given the instructions on the lesser offense of Assault in the Fourth Degree.

First, the elements of Assault in the Fourth Degree (intentional assault) are necessary elements of Assault in the Second Degree. Second, when taken in a light most favorable to Mr. Keend, the evidence supports an inference that only the lesser offense was committed. The evidence was undisputed that Mr. Keend struck a single blow, without a weapon. Taken in a light most favorable to Mr. Keend, this evidence supports an inference that even though he assaulted Reeves he was not acting “recklessly” with regard to the potential for substantial bodily harm.

Pittman, supra. A reasonable jury could conclude that a single punch does not create a “substantial risk” of a broken jaw. Instruction No. 11. Thus, taking the evidence in a light most favorable to Mr. Keend, a reasonable jury could have found him guilty of Assault in the Fourth Degree and not guilty of Assault in the Second Degree.

Because the lesser offense satisfies both the legal and factual prongs of the test, the trial court should have given the proposed instructions. *Pittman.* The conviction must be reversed and the case remanded for a new trial. *Pittman.*

IV. IF THE LESSER OFFENSE ISSUE IS WAIVED, MR. KEEND WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

The failure to request a lesser offense instruction can constitute ineffective assistance. *Pittman, supra.* In this case, counsel requested the instruction, but agreed with the court’s erroneous analysis of the factual prong when it came time to discuss the instructions. RP (7-18-06) 92-93. If this expression of agreement waived the issue, then Mr. Keend was denied the effective assistance of counsel under the *Strickland* test, outlined above.

First, a reasonable attorney would not have conceded the issue. There was no legitimate strategic basis for defense counsel’s position, which was based on an erroneous analysis of the factual prong: counsel’s

comments focused only on the injuries sustained by Reeves, rather than the mental state (“recklessness”) that the prosecution was required to prove with regard to the infliction of those injuries. RP (7-18-06) 93. Furthermore, fourth degree assault is a gross misdemeanor, punishable by up to a year in jail, while Assault in the Second Degree is a Class B Felony and a strike offense, punishable by up to ten years in prison. Finally, Mr. Keend’s defense to both charges would have been the same (self-defense), and was not sufficiently strong to warrant an all-or-nothing strategy. *See Pittman, supra*. No reasonable attorney would have abandoned the strategy of pursuing the lesser offense under the circumstances of this case.

Second, there is a reasonable probability that the jury would have convicted Mr. Keend of Assault in the Fourth Degree, rather than Assault in the Second Degree, had the instructions been given. As noted above, a jury could reasonably concluded that Mr. Keend intentionally assaulted Reeves, and that the assault caused substantial bodily harm, but that the nature of the assault (a single blow with a fist) was insufficient to create a *substantial risk* of substantial bodily harm. *See* Instructions 6, 11. Accordingly, confidence in the outcome is undermined, and Mr. Keend was prejudiced by his attorney’s erroneous concession.

Both prongs of the *Strickland* test are met. Accordingly, if the lesser offense issue is waived, Mr. Keend was denied the effective assistance of counsel. *Bradley, supra; Saunders, supra; In re Fleming, supra; Pittman, supra.* The conviction must be reversed and the case remanded for a new trial.

V. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF ASSAULT IN THE SECOND DEGREE.

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).

RCW 9A.36.021(1)(a) defines Assault in the Second Degree as

follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm...

When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction. *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000). In *Azpitarte*, the Supreme Court examined *former* RCW 10.99.040(4)(b), which punished as a class C felony any assault in violation of a no contact order “that [did] not amount to assault in the first or second degree.” *Former* RCW 10.99.040(4)(b). The Court of Appeals concluded that *any* assault could be punished under this section; the Supreme Court disagreed:

[W]ithout a showing of ambiguity, we derive the statute's meaning from its language alone.... By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault “not amount to assault in the first or second degree.” We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. *Azpitarte*, at 142.

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the second-degree assault statute any acts that constitute

Assault in the First Degree. RCW 9A.36.021 (1). Accordingly, the absence of a higher degree of assault is an essential element of the crime that must be alleged in the Information.

In this case, the operative language of the Information alleges that Mr. Keend, “did intentionally assault another person, to wit: Daniel Reeves, and thereby did recklessly inflict substantial bodily harm...” CP 18. It does not allege that the crime occurred “under circumstances not amounting to assault in the first degree,” as required under the statute. Because of this, the Information is deficient, and dismissal is required even in the absence of prejudice. *Kjorsvik, supra*. The conviction must therefore be reversed and the case dismissed. *Kjorsvik*.

VI. THE TRIAL COURT’S “TO CONVICT” INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF ASSAULT IN THE SECOND DEGREE.

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the charged offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005). A “to convict” instruction must contain all the elements of the crime, because it serves as a “yardstick” by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the “to

convict” instruction as a complete statement of the law. Any conviction based on an incomplete “to convict” instruction must be reversed. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). The adequacy of a “to convict” instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). Furthermore, the failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005).

Here, the “to convict” instruction was set forth in Instruction No. 6, Supp. CP. The court did not require the jury to find that the assault was committed “under circumstances not amounting to assault in the first degree,” as required by RCW 9A.36.021 (1).

Instructional error of this type is harmless only if the state can establish beyond a reasonable doubt that the error did not contribute to the verdict. *Mills*, at 15 n.7. Under the facts of this case, this showing cannot be made; accordingly, the conviction must be reversed and the case remanded for a new trial. *Mills, supra*.

VII. MR. KEEND WAS CONVICTED UNDER A STATUTE THAT VIOLATES THE CONSTITUTIONAL 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.36.⁶ 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 “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

⁶ 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.”

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.*

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*, 134 Wn. App. 470 at 481, 141 P.3d 646 (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.

David is thus distinguishable.

In *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), Division II addressed the precise issue here. In a part-published opinion, the court drew an analogy between the assault statute and those statutes defining 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. *Chavez, at 667.* For these reasons, the holding in *Chavez* should be revisited.

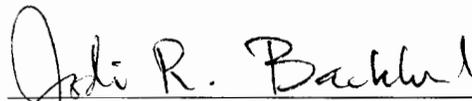
The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution. Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which Mr. Keend was convicted is unconstitutional;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

CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, if the case is not dismissed, it must be remanded to the trial court for a new trial.

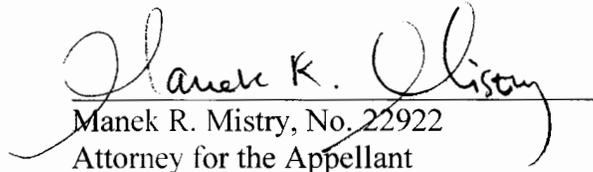
Respectfully submitted on January 24, 2007.

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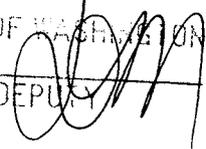



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CERTIFICATE OF MAILING

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

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and to:

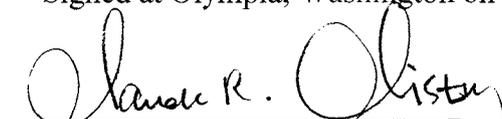
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 24, 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 24, 2007.


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