

No. 35222-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Mark Thomas Keend,**

Appellant.

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BY: [Signature] DATE: 07/11/14  
STATE OF WASHINGTON  
CLERK OF COURT  
COMMUNICATIONS SECTION

Clallam County Superior Court

Cause No. 06-1-00130-2

The Honorable Judge George L. Wood

**Appellant's Reply Brief**

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## 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.**

The state attempts to distinguish this case from the facts in *State v. Goble*, arguing that the conclusion in that case should not apply here. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005); Brief of Respondent, p. 2-4. This is incorrect.

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. This unconstitutionally relieved the prosecution of its 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. *Goble, supra*.

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

The appellant stands by the argument made in the Opening Brief.

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

The state asserts that the facts of the case did not support a conviction for Assault in the Fourth Degree, arguing that if the jury found an intentional assault then it would necessarily be in the second degree, given the injuries. Brief of Respondent, p.5. But taking the evidence in a light most favorable to Mr. Keend, the evidence supports an inference that only the lesser offense was committed: he struck a single blow without a weapon. The jury could find 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.<sup>1</sup> Accordingly, the lesser offense instruction should have been given.

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

The state alleges that defense counsel was ethically required to withdraw the proposed instruction, as it would have been clearly frivolous. Brief of Respondent, p. 6-7. As argued in the Appellant’s Opening Brief, counsel incorrectly focused only on the injuries sustained by Reeves,

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<sup>1</sup> The state argues that the defense proposed and then withdrew the lesser-included instruction regarding Assault in the Fourth Degree. Brief of Respondent, p. 6-7. This argument is addressed in the following section addressing ineffective assistance of counsel.

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.

The error was not harmless. 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. A jury could reasonably conclude that while Mr. Keend intentionally assaulted Reeves causing substantial bodily harm, the nature of the assault was not sufficient to create a *substantial risk* of substantial bodily harm, and was therefore not reckless. *See* Instructions 6, 11. 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.**

The state argues that the language “under circumstances not amounting to Assault in the First Degree” is merely introductory language and not an element of the crime. Brief of Respondent, p. 8. Nothing about the form of the statute suggests this:

- (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...  
RCW 9A.36.021(1)(a).

This “so called” introductory language in RCW 9A.36.021(1) follows the same form as the requirement that a first degree assault be committed with intent to inflict great bodily harm:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm...  
RCW 9A.36.011

In the alternative, the state suggests that if the language is an element of the crime, while the language may have been vague, it still served to fully inform the defendant of the charge against him. Brief of Respondent, p. 9. This argument, effectively that the error is harmless, is inappropriate as lack of notice of a legal element is error regardless of prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.2d 269 (2001).

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

The state fails in their brief to point to any facts or analysis that would render this error harmless. Brief of Respondent, p. 11.

**VII. MR. KEEND WAS CONVICTED UNDER A STATUTE THAT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.**

This court should revisit *David* and *Chavez*, because those cases improperly limit the legislature’s responsibility, allow the judiciary to determine what conduct constitutes the core of a crime, and give the appellate courts the power to criminalize more and more conduct, as has

occurred with the crime of assault over the past century. *State v. David*, 134 Wn. App. 470 at 481, 141 P.3d 646 (2006); *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006). Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which Mark Keend was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

This court should adopt a rule that requires the essential elements of a crime to be defined with something more than a bare circular reference to the crime itself. For example, the problems with RCW 9A.36 could be ameliorated with a statutory definition of the term “assault.” The legislature has done just that in the theft statute. Like the assault statutes, the statutes criminalizing theft (RCW 9A.56.030 *et seq.*) declare that a person is guilty of theft if he or she commits theft. *See, e.g.*, RCW 9A.56.030, .040, .050. Unlike the assault statutes, however, the legislature has defined the term “theft.” *See* RCW 9A.56.020. In the context of the theft statutes, this definition solves the circularity problem and complies with the constitutional separation of powers.

### **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 March 26, 2007.

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DIVISION II

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STATE OF WASHINGTON  
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CERTIFICATE OF MAILING

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

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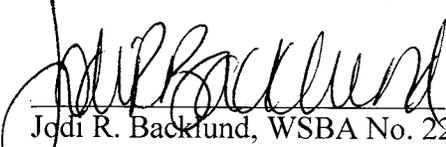
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 23, 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 March 26, 2007.

  
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