

COURT OF APPEALS
DIVISION II

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No. 35340-7-II

STATE OF WASHINGTON
BY [Signature]
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Ion Velcota,

Appellant.

Grays Harbor Superior Court

Cause No. 06-1-00230-2

The Honorable Judge David Foscue

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Velcota was denied the effective assistance of counsel.
2. Defense counsel was (apparently) unfamiliar with the diminished capacity defense.
3. Defense counsel's argument that Mr. Velcota's PTSD "minimized" his intent, without reference to the appropriate legal standards, deprived Mr. Velcota of the effective assistance of counsel.
4. Defense counsel failed to present available evidence relating to Mr. Velcota's diminished capacity claim.
5. Defense counsel failed to propose an appropriate instruction on diminished capacity.
6. Defense counsel failed to propose an appropriate instruction on voluntary intoxication.
7. The Information was constitutionally deficient as to Count I because it omitted an element of Assault in the Second Degree.
8. The Information was constitutionally deficient as to Count I because it omitted an element of Assault in the Third Degree.
9. Mr. Velcota's conviction of Assault in the Second Degree violated due process because the prosecutor was not required to prove that he acted under circumstances not amounting to Assault in the First Degree.
10. The trial court erred by giving Instruction No. 2, which reads as follows:

The defendant, Ion Velcota, is charged with Assault in the Second Degree – Domestic Violence and Assault in the Third Degree. A separate crime is charged in each count. You must decide each separately. Your verdict on one count should not control your verdict on any other count.

A person commits the crime of Assault in the Second Degree when he intentionally assaults a household or family member with a deadly weapon.

A person commits the crime of Assault in the Third Degree when he intentionally assaults a law enforcement officer who, at the time of the assault, is performing his official duties.
Instruction No. 2., Supp CP.

11. The trial court's "to convict" instruction omitted an element of Assault in the Second Degree.

12. The trial court erred by giving Instruction No. 4, which reads as follows:

To convict Mr. Velcota of the crime of Assault in the Second Degree – Domestic Violence, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about April 1, 2006, the Ion Velcota assaulted Julie Alexander with a deadly weapon;
2. That the assault was intentional;
3. That Julie Alexander was a family or household member;
4. That the acts occurred in Grays Harbor County, 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. 4, Supp. CP.

13. The trial court's instructions as a whole allowed conviction without proof of all essential elements of Assault in the Second Degree.

14. Mr. Velcota was denied his constitutional right to a jury trial in Count I 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 statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

16. The trial court erred by instructing the jury with a definition of “assault” created and expanded by the judiciary.

17. The trial court erred by giving Instruction No. 8, which reads as follows:

An assault is an intentional touching or striking of the person of another that is harmful or offensive. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to create in another apprehension and fear of bodily injury and which, in fact, creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An assault is also an act, with unlawful force, done with the intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied by the apparent present ability to inflict the bodily injury if not prevented.

Instruction No. 8., Supp CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Ion Velcota was charged with one count of Assault in the Second Degree and one count of Assault in the Third Degree. Prior to trial, Mr. Velcota was diagnosed with PTSD. At trial, there was substantial evidence that he was intoxicated and affected by PTSD to the extent that he could not form the intent.

Defense counsel referred to his strategy, prior to and during trial, as “minimizing” intent. Defense counsel did not introduce available evidence relevant to a diminished capacity defense, did not propose a diminished capacity instruction, and did not propose an instruction on voluntary intoxication.

1. Was Mr. Velcota denied the effective assistance of counsel?
Assignments of Error Nos. 1-6.

2. Was defense counsel ineffective by failing to familiarize himself with the relevant legal standards for a diminished capacity defense? Assignments of Error Nos. 1-6.

3. Did defense counsel's failure to reference the legal standards for diminished capacity while arguing that PTSD "minimized" intent deprive Mr. Velcota of the effective assistance of counsel? Assignments of Error Nos. 1-6.

4. Was defense counsel ineffective for failing to propose an instruction on diminished capacity? Assignments of Error Nos. 1-6.

5. Was defense counsel ineffective for failing to propose an instruction on voluntary intoxication? Assignments of Error Nos. 1-6.

Count I did not allege that the assault was committed under circumstances not amounting to Assault in the First Degree. Count II did not allege that the assault was committed under circumstances not amounting to Assault in the First or Second Degree. The court's "to convict" instructions did not require proof of these elements.

6. To obtain a conviction for Assault in the Second Degree, must the state allege and prove that the assault occurred under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 7-14.

7. To obtain a conviction for Assault in the Third Degree, must the state allege and prove that the assault occurred under circumstances not amounting to Assault in the First or Second Degree? Assignments of Error Nos. 7-14.

8. Was the Information constitutionally deficient as to Count I because it failed to allege that the assault was committed under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 7-14.

9. Was the Information constitutionally deficient as to Count II because it failed to allege that the assault was committed under circumstances not amounting to Assault in the First or Second Degree? Assignments of Error Nos. 7-14.

10. Did the trial court's "to convict" instruction as to Count I omit an essential element of that charge? Assignments of Error Nos. 7-14.

11. Did Mr. Velcota's conviction of Count I violate due process because the prosecutor was not required to prove that it occurred under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 7-14.

12. Was Mr. Velcota denied his constitutional right to a jury trial because the jury did not determine each element of Count I beyond a reasonable doubt? Assignments of Error Nos. 7-14.

The Washington legislature has criminalized assault, but has not defined the core meaning of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined and expanded the core meaning of assault without input from the legislature.

13. Does the legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

14. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

15. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

16. Does the separation of powers doctrine require the legislature to define crimes with something more than a bare circular reference to the crime itself? Assignments of Error Nos. 15-17.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Ion Velcota was born in 1960 in Romania. RP (8/23/06) 149, CP

1. In the 10th grade, he was arrested at a demonstration and held in a work camp for three years. At that camp, he worked 12 to 14 hours daily, digging a canal, and was tortured repeatedly. He was beaten unconscious, given electric shocks in his mouth and testicles among other places, cuffed to a chair and beaten with batons on his feet, left hungry, and locked in a small dark cell too small to lie down in. He gave information that was demanded by his guards, and thus feared murder at the hands of other inmates. He knew detainees who had disappeared from the camp, and he presumed they were murdered. He also saw fellow detainees killed in accidents. Mr. Velcota was released and later immigrated to the United States. While in the U.S., he was shot four times, hit in the head with a 2x4 during a home invasion, and experienced beatings and fights while homeless. Supp. CP, Dutro letter.

Mr. Velcota was diagnosed by Jack Dutro, Ph.D., with Post Traumatic Stress Disorder (PTSD). According to Dr. Dutro, Mr. Velcota meets all of the diagnostic criteria: he was exposed to traumatic events, he persistently re-experiences them, he persistently avoids stimuli associated with the events and is generally responsively numb, he has persistent

symptoms of increased arousal, his symptoms have lasted since his release from the work camp, and his symptoms cause distress or impairment in functioning. In particular, Dr. Dutro found that seeing police officers triggers a re-experiencing of the traumatic events at the work camp, resulting in agitation, fear, and mental confusion. Mr. Velcota has responded by avoiding police, and he “snaps” and responds with rage at times. Supp. CP, Dutro letter.

In April of 2006, Mr. Velcota lived with his girlfriend, Julie Alexander, in Grays Harbor County. RP (8/22/06) 106. On April 1, 2006, after drinking wine, he jumped into his girlfriend’s Ford F-150 pickup and drove after her Kia, to block her and stop her from driving, because he feared she was driving while intoxicated. RP (8/22/06) 108-110, 113. According to witnesses, Mr. Velcota drove straight toward his girlfriend, who was driving in the opposite direction. She pulled off the road, and Mr. Velcota hit her car, backed up, went around the car and hit it again, and then sped away. RP (8/22/06) 67-69.

On his way to the scene, Officer Iversen saw a man walking down the street in his underwear, which were stained red. The man, later identified as Mr. Velcota, was barefoot, and his head had been partially shaved. RP (8/22/06) 94. Officer Iversen spoke with him, and then continued on to the scene of the incident. RP (8/22/06) 96.

Officers spoke to Ms. Alexander, who left the interview, got back in her car and drove after Mr. Velcota. After she arrived at their shared residence, she was cited for Driving While Affected by Alcohol. RP (8/22/06) 16, 26-27.

Officers went to Mr. Velcota's home, where they noticed dishes in the yard and a machete stuck into a tree. Officer Iversen knocked on the door but did not announce that he was a police officer. RP (8/22/06) 25, 31, 33, 38. He saw someone through a window next to the door, and then Mr. Velcota pushed the screen out of the way and grabbed at the officer. The officer grabbed his arms and went in through the open window after Mr. Velcota. After a brief struggle, Mr. Velcota was tased twice. He fell into a fetal position and was arrested. RP (8/22/06) 43-46. He was then taken to the hospital, where he lay, unresponsive, for several hours. RP (8/22/06) 128-131.

Mr. Velcota was charged with Assault in the Second Degree and Assault in the Third Degree. CP 1-3. The Information read as follows:

COUNT 1.

That the said defendant, Ion (NMI) Velcota, in Grays Harbor County, Washington, on or about April 1, 2006, did intentionally assault another person, to wit: Julie Alexander, a family or household member under RCW 10.99/26.50, with a deadly weapon, a motor vehicle;
CONTRARY TO RCW 9A.36.021(1)(c) against the peace and dignity of the State of Washington.

COUNT 2.

And I, H. Steward Menefee, Prosecuting Attorney aforesaid, by and through Deputy Prosecuting Attorney Andrea Vingo, further do accuse the defendant of the crime of ASSAULT IN THE THIRD DEGREE, a crime based on a series of acts connected together with Count 1, committed as follows:

That the said defendant, Ion (NMI) Velcota, in Grays Harbor County, Washington, on or about April 1, 2006, intentionally assault 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, to wit: Officer Iversen; CONTRARY TO RCW 9A.36.031(1)(g) against the peace and dignity of the State of Washington.

DATED this 3rd day of April, 2006.

CP 1-2.

Prior to trial, the defense sought an evaluation of the defendant for PTSD. In arguing that the diagnosis was relevant, the defense attorney said that a diagnosis of PTSD “minimized” the intent for the assault charges. RP (8/22/06) 7. Defense counsel told the court that he could not find any authority to argue that PTSD would be a defense, but that the condition “minimized” the specific intent required for assault. RP (8/22/06) 9. Neither the court nor the parties ever mentioned the phrase “diminished capacity.” RP (8/22/06), RP (8/23/06).

During trial, defense counsel called Dr. Dutro to testify about his evaluation of Mr. Velcota. RP (8/23/06) 174. After reviewing his training, and his experience with PTSD, Dr. Dutro told the jury that he had diagnosed Mr. Velcota with the condition, and briefly described some of Mr. Velcota’s life history. RP (8/23/06) 174-179. He testified that Mr.

Velcota had an extreme reaction to officers in uniform but was not asked to elaborate further. RP (8/23/06) 180.

Defense counsel didn't propose any jury instructions relating to voluntary intoxication or to diminished capacity. Supp. CP.

The court instructed the jury, in part, as follows:

The defendant, Ion Velcota, is charged with Assault in the Second Degree – Domestic Violence and Assault in the Third Degree. A separate crime is charged in each count. You must decide each separately. Your verdict on one count should not control your verdict on any other count.

A person commits the crime of Assault in the Second Degree when he intentionally assaults a household or family member with a deadly weapon.

A person commits the crime of Assault in the Third Degree when he intentionally assaults a law enforcement officer who, at the time of the assault, is performing his official duties.

Instruction No. 2., Supp CP.

To convict Mr. Velcota of the crime of Assault in the Second Degree – Domestic Violence, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the April 1, 2006, the Ion Velcota assaulted Julie Alexander with a deadly weapon;
2. That the assault was intentional;
3. That Julie Alexander was a family or household member;
4. That the acts occurred in Grays Harbor County, 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. 4, Supp. CP.

An assault is an intentional touching or striking of the person of another that is harmful or offensive. A touching or striking is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to create in another apprehension and fear of bodily injury and which, in fact, creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An assault is also an act, with unlawful force, done with the intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied by the apparent present ability to inflict the bodily injury if not prevented.

Instruction No. 8., Supp CP.

The jury convicted Mr. Velcota on both charges, and he was sentenced on September 11, 2006. CP 4-10. This timely appeal followed. CP 12.

ARGUMENT

I. MR. VELCOTA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

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)).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004); *see also State v. Pittman*, 134 Wn. App. 376 at 383, ___ P.3d ___ (2007). There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130.

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused's own testimony. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a

crime is nonetheless entitled to a lesser degree instruction if supported by the evidence:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given. *Fernandez-Medina*, at 460-461.

Diminished capacity is established by evidence of a mental condition that could prevent the defendant from forming the intent required to commit the crime. Where an expert testifies in support of the defense, she or he need not testify that the mental disorder actually impaired the accused, only that it could have done so. *State v. Mitchell*, 102 Wn. App. 21, 997 P.2d 373 (2000). This is so because

[i]t is the jury's responsibility to make ultimate determinations regarding issues of fact.... The jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial...The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude. *Mitchell*, at 28-29.

Like diminished capacity, voluntary intoxication is not a defense, but may negate the mental element of a crime. A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a

mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite mental state. *State v. Kruger*, 116 Wn. App. 685 at 691, 67 P.3d 1147 (2003). This standard can be met by showing the effects of alcohol on the defendant's mind and body, such as a blackout, vomiting, slurred speech, and imperviousness to pepper spray. *Kruger*, at 692.

Where the facts support a diminished capacity or intoxication defense, failure to properly present the defense constitutes ineffective assistance. *State v. Tilton*, 149 Wn.2d 775 at 784, 72 P.3d 735 (2003); *see also*

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). Reversal is required if counsel's failure to properly present the defense prejudiced the accused. *Thomas*, *supra*, at 229.

The defense strategy in this case was to cast doubt on Mr. Velcota's ability to form the intent to assault Ms. Alexander and Officer Iversen. Prior to and throughout the trial, defense counsel repeatedly argued to the court that he hoped to show that Mr. Velcota's intent was "minimized" by his Post Traumatic Stress Disorder. At trial, defense counsel presented some evidence that Mr. Velcota suffered from PTSD, a mental condition that could interfere with his ability to form intent. Specifically, Dr. Dutro testified that he'd diagnosed Mr. Velcota with the

condition and that Mr. Velcota had an extreme reaction to officers in uniform. Dr. Dutro was not asked for further details. RP (8/23/06) 174-180.

However, the record establishes that Dr. Dutro had additional information that defense counsel neglected to present. In particular, Dr. Dutro found that Mr. Velcota met each of the criteria for PTSD (exposure to traumatic events, persistently reexperiencing them, persistently avoiding stimuli associated with the events, general numbness and unresponsiveness, persistent symptoms of increased arousal, symptoms lasting for a long period of time, and symptoms causing distress or impairment in functioning). Dr. Dutro also noted in his report that seeing police triggers a re-experiencing of the horrific events Mr. Velcota endured in the Romanian work camp, including torture, beatings, and a fear of being killed. In his report, Dr. Dutro also opined that under these circumstances, Mr. Velcota would experience extreme agitation, fear, and mental confusion. According to Dr. Dutro, Mr. Velcota has responded to his PTSD by avoiding police, and that he can become instantly enraged when triggered. Supp. CP, Affidavit In Support Of Defense.

Defense counsel's failure to offer this information weakened Mr. Velcota's diminished capacity argument. A reasonably competent attorney would have been familiar with the doctor's report and the

standards for a diminished capacity defense, and would have offered the strongest evidence available in support of the defense. Defense counsel's failure to do so constituted deficient performance.

There was evidence introduced at trial suggesting that Mr. Velcota's intoxication and his PTSD interfered with his ability to form intent on April 1. First, he drove erratically to block Ms. Alexander from driving, and apparently was unaware that he had hit her (and a nearby mailbox). RP (8/22/06) 67-69; RP (8/23/06) 163-164. Second, when Officer Iversen first saw him, he had abandoned the truck and was walking down the street barefoot, in underwear stained with red, and his hair was partially shaved off. RP (8/22/06) 94. Third, there were dishes (and other debris) in his yard, a machete in a tree, and a broken chair across the street. RP (8/22/06) 25, 31, 33, 38. Fourth, there was wine dumped on the floor inside the house, Mr. Velcota had a bottle of wine in his hand when the police arrived, and both Mr. Velcota and Ms. Alexander testified that he'd been drinking. RP (8/22/06) 44, (8/23/06) 151, 152, 157, 163. Fifth, when asked to open his front door, he pushed the screen out of the window, apparently without being aware of having done so. RP (8/22/06) 43-46; RP (8/23/06) 160. Sixth, he blacked out during the scuffle with Officer Iversen. RP (8/23/06) 161. Seventh, after he was tased twice and stopped resisting, Mr. Velcota balled himself up into a

fetal position. RP (8/22/06) 45. Eighth, after his arrest, he lay, unresponsive, in a hospital bed. RP (8/22/06) 128-131.

Under these circumstances, taking the evidence (including the testimony of Dr. Dutro and the additional information that defense counsel neglected to present) in a light most favorable to the defense, the jury could have inferred that Mr. Velcota's alcohol consumption and/or PTSD prevented him from forming the required mental state for each crime. Despite this, defense counsel failed to propose a voluntary intoxication instruction or an instruction on diminished capacity. Given that the defense strategy focused on "minimizing" Mr. Velcota's intent, counsel's failure to propose these instructions constituted deficient performance. *Thomas, supra.*

In the absence of a voluntary intoxication instruction, the jury was unaware that Mr. Velcota's intoxication could be taken into account when considering whether or not he intended to assault Ms. Alexander and whether or not he intended to assault Officer Iversen. Similarly, the jury lacked any guidance as to how it should evaluate the expert's testimony regarding Mr. Velcota's PTSD. As the Supreme Court said in *Thomas, supra*, "a proper instruction... was crucial...A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases."

Thomas, at 229. Because of defense counsel's deficient performance, Mr. Velcota was unable to present his theory to the jury. "[W]ithout the instruction[s], the defense was impotent." *Kruger*, at 695. Accordingly, Mr. Velcota was denied the effective assistance of counsel. His convictions must be reversed and his case remanded to the trial court for a new trial.

II. SECOND AND THIRD DEGREE ASSAULT BOTH REQUIRE PROOF THAT THE CIRCUMSTANCES DON'T ESTABLISH A HIGHER DEGREE OF ASSAULT.

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.

In *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000), 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 Supreme Court gave effect to the plain language of the statute, and held that the prosecution was required to allege and prove an assault not amounting to assault in the first or second degree to obtain a conviction for Assault in Violation of a Protection

Order:

[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.

RCW 9A.36.021(1)(c) 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:
...(c) Assaults another with a deadly weapon.

Similarly, under RCW 9A.36.031(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.”

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from each crime any acts that constitute a higher degree of assault. RCW 9A.36.021(1); RCW 9A.36.031(1). Accordingly, the absence of a higher degree assault is an essential element of each crime, which must be alleged in the Information, included in the “to convict” instructions, and proved to a jury beyond a reasonable doubt. *Azpitarte, supra*.

In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court reinterpreted *Azpitarte*, restricting its application in certain limited circumstances. Applying convoluted logic, the Court in *Ward* held that the language at issue in *Azpitarte* (“does not amount to assault in the first or second degree”) was only an essential element of Assault in Violation of a No Contact Order if the defendant was also charged with Assault in the First or Second Degree.

Under *Ward*, if the defendant was not also charged with Assault in the First or Second Degree, the state was not required to allege or prove

that the assault in violation of the no contact order did “not amount to assault in the first or second degree.” The legislature’s goal, according to the Supreme Court, was to punish assault in violation of a no contact order as a felony, but not if the defendant was already charged with another felony assault:

Since the State did not charge Ward or Baker with first or second degree assault, the State was not required to allege that petitioners’ conduct did not amount to assault in the first or second degree... The omitted language is not necessary to find felony violation of a no-contact order because the State did not additionally charge first or second degree assault. Accordingly, all elements of the crime were submitted to the jury for a finding beyond a reasonable doubt. *Ward, supra, at 813-814.*

It is difficult to imagine how *Ward’s* reinterpretation of *Azpitarte* would apply to this case. As the Supreme Court made clear in *Ward*, its holding was based on the assumption that a defendant could be convicted of Assault in the First (or Second) Degree, or of Assault in Violation of a No-Contact Order, but not of both.

RCW 9A.36 cannot be read in the same fashion. Nothing in the statute permits the state to charge a defendant with both a higher degree charge and a lower degree charge for the same conduct.¹ Thus *Ward’s*

¹ The only exception is for alternative charges.

limitation on *Azpitarte* does not affect RCW 9A.36, and has no bearing on Mr. Velcota's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36. 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 single statute defining a base crime of assault and setting varying penalties based on the circumstances of the crime. *See* RCW 9A.36 generally. Instead, the phrase “under circumstances not amounting to assault in the first or second degree” is contained in the very provision defining the substantive crime itself. RCW 9A.36.021. It is not set forth in a separate provision establishing penalties for a base crime.

This structure is identical to the structure used in RCW 9A.36.011, which requires that Assault in the First Degree 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...

[commits one of the acts described in the statute.]
RCW 9A.36.011

Just as the intent to inflict great bodily harm is an element of Assault in the First Degree, the absence of a higher degree assault is an element of both Assault in the Second Degree and Assault in the Third Degree. This court is not free to disregard the legislature's choice of language and read this element out of the statute. *Sutherland, supra*.

A. The Information was deficient as to Counts I and II because it omitted an essential element of each charge.

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).

In this case, the operative language of Count I alleges that Mr. Velcota “did intentionally assault another person... with a deadly weapon, a motor vehicle...” CP 1. It does not allege that the crime occurred “under circumstances not amounting to assault in the first degree,” as required by RCW 9A.36.021. Because of this, the Information is deficient as to Count I and dismissal is required, even in the absence of prejudice. *Kjorsvik, supra.*

Similarly, the operative language of Count II alleges that Mr. Velcota “intentionally assault [sic] a law enforcement officer... who was performing his or her official duties at the time of the assault...” CP 1. It does not allege that the assault was committed “under circumstances not amounting to assault in the first or second degree,” as required under the statute. Because of this, the Information is deficient as to Count II, and reversal is required even in the absence of prejudice. *Kjorsvik, supra.*

B. The “to convict” instruction omitted an essential element of Assault in the Second Degree, as charged in Count I.²

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct.

² The instruction as to Count II was also deficient. However, reversal is not required as to Count II, because the error was likely harmless beyond a reasonable doubt.

1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury 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; 941 P.2d 661 (1997). 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). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

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. *State v. Smith*, 131 Wn.2d

258 at 263, 930 P.2d 917 (1997) (“*Smith I*”). 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).

The “to convict” instruction for Count I 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). Instruction No. 4, Supp. CP. Under the facts of this case, the state cannot show that the error was harmless beyond a reasonable doubt. To convict Mr. Velcota of Count I, the prosecution was required to establish the absence of an Assault in the First Degree. A person commits Assault in the First Degree if, with intent to inflict great bodily harm, he “[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.”³ RCW 9A.36.011(1)(a). Because the state’s case was based on an assault with a deadly weapon, the state was required to produce evidence that Mr. Velcota did not act with intent to inflict great bodily harm. RCW 9A.36.011(1). Witnesses testified that Mr. Velcota intentionally and repeatedly rammed Ms. Alexander’s small Kia with a Ford F-150 pickup truck while she was in

³ The state did present sufficient evidence to prove that the circumstances did not amount to Assault in the First Degree by infection with HIV or by infliction of great bodily harm. RCW 9A.36.011(1)(b) and (c).

the car. Given this evidence, the state cannot establish that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Jones, supra; Brown, supra.*

III. RCW 9A.36.021(1)(C) VIOLATES THE SEPARATION OF POWERS.

A. The legislature has failed to define the core meaning of the crime of assault.

The doctrine of separation of powers is derived 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 the core meaning of that crime. *See, generally*, RCW 9A.36.⁴ Instead, it has employed a circular definition (in effect, an “assault is an assault”), and allowed the judiciary to define the conduct that is criminalized. The

⁴ There are some statutes, not applicable here, which specifically define the elements of certain assault-like crimes, without using the word “assault” in the definition. *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.” *See also, e.g.*, RCW 9A.36.031 (1)(d): “A person is guilty of assault in the third degree if he or she... With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” Because these subsections define the core conduct giving rise to criminal liability, they do not violate the separation of powers.

appellate courts have done so, enlarging the definition to criminalize more and more conduct over a period of many years. This violates the separation of powers. *Moreno, supra*.

- B. The judiciary has enlarged the definition of “assault” to criminalize more and more conduct over the past 100 years.

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 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. Smith*, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 199 (2007) (“*Smith II*”).

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.

- C. Two recent cases incorrectly limit the legislature’s responsibility to define crimes.

Two recent decisions address the legislature’s responsibility to define crimes. In *State v. David*, the Court of Appeals interpreted

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 *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), the court expanded on *David*. 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.

In each of these situations-- bail jumping, protection orders, and contempt-- 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.

Bail jumping, protection order violations, and contempt of court are qualitatively different from the assault statutes, and Division II’s analogy to these crimes is inappropriate. The case-specific facts in these crimes stem from judicial action, but otherwise are no different from other (nonjudicial) facts such as the posted speed limit in a reckless driving case, or the ownership of a building in a burglary case. There are no core terms undefined by the legislature in any of these statutes.

The *Chavez* court 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 the court suggested. *Chavez*, at 667. The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution.

David and *Chavez* should be reconsidered. The two 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.

- D. This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime.

Under *David* and *Chavez*, the legislature need only set forth the elements of the crime without any further guidance. *David, supra, at 481.*

In many cases, this will adequately define the conduct constituting a crime. In fact, two examples of such crimes are found in RCW

9A.36.021:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
...(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child...
...(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
...(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.
RCW 9A.36.021.

Because these subsections adequately define the core conduct giving rise to criminal liability, they do not violate the separation of powers. By contrast, RCW 9A.36.021 (1)(c), the section under which Mr. Velcota was charged, uses a circular definition of assault: a person is guilty of assault in the second degree if he “[a]ssaults another with a deadly weapon.” RCW 9A.36.031(1)(c). The circularity is even more

stark in RCW 9A.36.041: a person is guilty of assault in the fourth degree if “he or she assaults another.”

The problem with such circular formulations is that the core of the crime remains undefined, and the judiciary remains free to expand the crime (as it did in the case of assault.) Indeed, without legislative action, appellate courts could continue to expand the definition of assault to cover more behaviors not currently criminal. Or, again without legislative action, appellate courts could restrict the definition of assault, criminalizing only that conduct that was considered assaultive at the turn of the last century.

This court should adopt a rule that requires 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.

If this court were to adopt a rule requiring offenses to be clearly defined with something more than a circular definition, the legislature could define assault however it chose. By adopting a noncircular definition, the legislature would avoid the separation of powers problem posed by the current statutory scheme.

E. Counts I and II must be reversed and the charges dismissed.

The statutory scheme criminalizing assault violates the constitutional separation of powers. Because Mr. Velcota was convicted under an unconstitutional statute, his assault convictions must be reversed and the charges dismissed with prejudice.

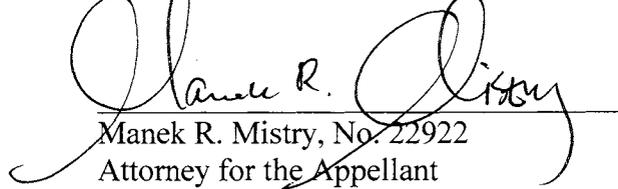
CONCLUSION

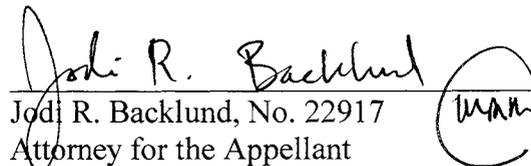
Because Mr. Velcota was convicted under an unconstitutional statutory scheme, his convictions must be reversed and the case dismissed with prejudice. In the alternative, the convictions must be reversed and the case dismissed without prejudice because the Information omitted essential elements.

If the case is not dismissed, it must be remanded to the trial court for a new trial. This is so because Mr. Velcota was denied the effective assistance of counsel and because the Court's "to convict" instruction omitted an essential element of Assault in the Second Degree.

Respectfully submitted on March 28, 2007.

BACKLUND AND MISTRY


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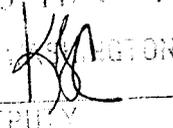

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CERTIFICATE OF MAILING

STATE OF WASHINGTON

BY  DEPUTY

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

Ion Velcota, DOC # 816314
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and to:

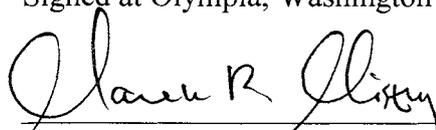
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 28, 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 28, 2007.


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