

APPEALS  
FILED  
BY: *YN*

No. 36326-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Lora Ann Haselman,**

Appellant.

---

Clallam County Superior Court

Cause No. 05-1-00013-8

The Honorable Judge George L. Wood

**Appellant's Opening Brief**

Manek R. Mistry  
Jodi R. Backlund  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 352-5316  
FAX: (866) 499-7475

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... iv**

**ASSIGNMENTS OF ERROR ..... ix**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... xi**

1. Did the trial court’s knowledge instructions create an impermissible mandatory presumption? Assignments of Error Nos. 1-4. .... xi

2. Did the trial court’s knowledge instructions misstate the law and mislead the jury by conflating two *mens rea* elements? Assignments of Error Nos. 1-4. .... xi

3. Did the trial court’s knowledge instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 1-4..... xi

4. Was Ms. Haselman denied the effective assistance of counsel when her lawyer failed to object to the court’s instructions defining knowledge? Assignments of Error Nos. 1-5..... xii

5. 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 first or second degree assault? Assignments of Error Nos. 6-11. xii

6. Was the Information constitutionally deficient as to Count I because it failed to allege that the assault was committed under circumstances not amounting to first or second degree assault? Assignments of Error Nos. 6-11. xii

7. Did the trial court’s “to convict” instruction as to Count I omit an essential element of that charge? Assignments of Error Nos. 6-11. .... xii

8. Did Ms. Haselman’s conviction of Count I violate due process because the prosecutor was not required to prove that it occurred under circumstances not amounting to first or second degree assault? Assignments of Error Nos. 6-11. .... xii

9. Was Ms. Haselman denied her 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. 6-11. .... xii

10. Does the legislature’s failure to define “assault” violate the constitutional separation of powers? Assignments of Error Nos. 12-14. .... xiii

11. Does the judicially created definition of “assault” violate the constitutional separation of powers? Assignments of Error Nos. 12-14. .... xiii

12. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 12-14. .... xiii

13. 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. 12-14. .... xiii

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1**

**ARGUMENT..... 3**

**I. The court’s knowledge instructions created a mandatory presumption and relieved the state of its burden of proving knowledge. .... 3**

A.	Assault in the Third Degree .....	5
B.	Obstructing.....	7
<b>II.</b>	<b>Defense counsel should have objected and taken exception to the court’s erroneous “knowledge” Instructions.....</b>	<b>8</b>
<b>III.</b>	<b>RCW 9A.36.031 violates the separation of powers.....</b>	<b>10</b>
A.	The legislature has failed to define the core meaning of the crime of assault. ....	10
B.	The judiciary has enlarged the definition of “assault” to criminalize more and more conduct over the past 100 years. ....	12
C.	Two recent cases incorrectly limit the legislature’s responsibility to define crimes. ....	16
D.	This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime. ....	18
E.	Count I must be reversed and the charge dismissed. ....	20
<b>IV.</b>	<b>The state failed to allege and the instructions failed to require proof that the assault occurred under circumstances not amounting to Assault in the First Degree.....</b>	<b>21</b>
A.	The Information was deficient as to Count I because it omitted an essential element of the charge. ....	25
B.	The “to convict” instruction omitted an essential element of Assault in the Second Degree, as charged in Count I. ....	26
	<b>CONCLUSION .....</b>	<b>28</b>

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	26
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....	8
<i>Morissette v. United States</i> , 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952).....	4
<i>Morrison v. Olson</i> , 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) .....	11
<i>Neder v. United States</i> , 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999).....	27
<i>Pope v. Illinois</i> , 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).	27
<i>Sandstrom v. Montana</i> , 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) .....	4
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	8, 10
<i>U.S. v. Bass</i> , 404 U.S. 336, 92 S.Ct. 515 (1971).....	11
<i>United States v. Rizzo</i> , 409 F.2d 400 (7th Cir. 1969), <i>cert. denied</i> , 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).....	14

### WASHINGTON CASES

<i>Howell v. Winters</i> , 58 Wash. 436, 108 Pac. 1077 (1910) .....	13, 14
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	8

<i>Peasley v. Puget Sound Tug &amp; Barge Co.</i> , 13 Wn.2d 485, 125 P.2d 681 (1942).....	14
<i>Seattle v. Gellein</i> , 112 Wn.2d 58, 768 P.2d 470 (1989) .....	4
<i>State Owned Forests v. Sutherland</i> , 124 Wn. App. 400, 101 P.3d 880 (2004).....	21, 25
<i>State v. Azpitarte</i> , 140 Wn.2d 138, 995 P.2d 31 (2000) .....	21, 22, 23, 24
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002) .....	4, 27
<i>State v. Chavez</i> , 134 Wn. App. 657, 142 P.3d 1110 (2006) .....	16, 17, 18
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004).....	21
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	8
<i>State v. David</i> , 134 Wn. App. 470, 141 P.3d 646 (2006) .....	15, 16, 18
<i>State v. Deryke</i> , 149 Wn.2d 906 , 73 P.3d 1000 (2003).....	27
<i>State v. DiLuzio</i> , 121 Wn.App. 822, 90 P.3d 1141 (2004) .....	11
<i>State v. Douglas</i> , 128 Wn.App. 555, 116 P.3d 1012 (2005).....	26
<i>State v. Franks</i> , 105 Wn.App. 950, 22 P.3d 269 (2001).....	25
<i>State v. Frazier</i> , 81 Wn.2d 628, 503 P.2d 1073 (1972).....	14, 15
<i>State v. Garcia</i> , 20 Wn.App. 401, 579 P.2d 1034 (1978).....	15
<i>State v. Gerdts</i> , 136 Wn.App. 720, 150 P.3d 627 (2007) .....	5
<i>State v. Goble</i> ,131 Wn.App. 194, 126 P.3d 821 (2005) .....	4, 5, 6, 8, 9
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	8
<i>State v. Jones</i> , 106 Wn. App. 40, 21 P.3d 1172 (2001).....	27
<i>State v. Kiehl</i> , 128 Wn. App. 88, 113 P.3d 528 (2005).....	26
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	25, 26

<i>State v. Leyda</i> , 157 Wn.2d 335, 138 P.3d 610 (2006) .....	20
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004).....	27
<i>State v. McFadden</i> , 42 Wash. 1, 84 P. 401 (1906) .....	12
<i>State v. Mertens</i> , 148 Wn.2d 820, 64 P.3d 633 (2003).....	4, 7, 8
<i>State v. Mills</i> , 154 Wn.2d 1, 109 P.3d 415 (2005).....	26
<i>State v. Moreno</i> , 147 Wn.2d 500, 58 P.3d 265 (2002) .....	10, 11, 12, 15
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	9
<i>State v. Punsalan</i> , 156 Wn.2d 875, 133 P.3d 934 (2006).....	21
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997).....	3, 26
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	9, 10
<i>State v. Reid</i> , 74 Wn. App. 281, 872 P.2d 1135 (1994).....	7
<i>State v. Roberts</i> , 142 Wn.2d 471, 14 P.3d 713 (2000).....	8
<i>State v. Rush</i> , 14 Wn.2d 138, 127 P.2d 411 (1942).....	14
<i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	4
<i>State v. Shaffer</i> , 120 Wash. 345, 207 P. 229 (1922) .....	13, 14
<i>State v. Smith</i> , ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 199 (2007).....	15
<i>State v. Smith</i> , 131 Wn.2d 258, 930 P.2d 917 (1997).....	27
<i>State v. Stevens</i> , 127 Wn. App. 269, 110 P.3d 1179 (2005) .....	20
<i>State v. Strand</i> , 20 Wn.App. 768, 582 P.2d 874 (1978).....	15
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004) .....	3, 26
<i>State v. Wadsworth</i> , 139 Wn.2d 724, 991 P.2d 80 (2000).....	11, 15, 16
<i>State v. Ward</i> , 148 Wn.2d 803, 64 P.3d 640 (2003) .....	22, 23, 24

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V ..... 25

U.S. Const. Amend. VI ..... 8

U.S. Const. Amend. XIV ..... 25, 26

Wash. Const. Article I, Section 22 ..... 8, 25

Wash. Const. Article I, Section 3 ..... 25

Wash. Const. Article II, Section 1 ..... 10

Wash. Const. Article III, Section 2 ..... 10

Wash. Const. Article IV, Section 1 ..... 10

**STATUTES**

*Former* RCW 10.99.040 ..... 21, 24

*Former* RCW 10.99.050 ..... 24

RCW 9A.04.060 ..... 17

RCW 9A.36.011 ..... 24, 25

RCW 9A.36.021 ..... 23, 24, 26, 27

RCW 9A.36.031 ..... 19

RCW 9A.36.041 ..... 19

RCW 9A.36.140 ..... 22

RCW 9A.56.020 ..... 20

RCW 9A.56.030 ..... 19

RCW 9A.56.040 ..... 19

RCW 9A.56.050 ..... 19

RCW 9A.76.170..... 16

Rem. & Bal. Code SS 2746 ..... 12

**OTHER AUTHORITIES**

Cooley, Torts (3d ed.)..... 13

*State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000)..... 8

*State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000)..... 8

WPIC 35.50..... 15

## ASSIGNMENTS OF ERROR

1. The trial court erred by providing both juries with an erroneous definition of knowledge.
2. The trial court erred by giving both juries the following instruction:

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.

Instruction 13 (2005 trial), Instruction 9 (2007 trial), Supp. CP.
3. The court's knowledge instructions each contained an improper mandatory presumption.
4. Each of the court's knowledge instructions impermissibly relieved the state of its burden of establishing an element of each offense by proof beyond a reasonable doubt.
5. Ms. Haselman was denied the effective assistance of counsel by her attorney's failure to object to the court's knowledge instructions.
6. The Information was constitutionally deficient as to Count I because it omitted an element of Assault in the Third Degree.
7. Ms. Haselman's conviction of Assault in the Third Degree violated due process because the prosecutor was not required to prove that she acted under circumstances not amounting to first or second degree assault.
8. The trial court's "to convict" instruction omitted an element of Assault in the Third Degree.

9. The trial court erred by giving Instruction No. 6 (2007 trial), which reads as follows:

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

(1) That on or about the 8<sup>th</sup> of January, 2005, the Defendant assaulted Deputy John Keegan;

(2) That at the time of the assault Deputy John Keegan was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and

(3) That the Defendant knew at the time of the assault that Deputy John Keegan was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and

(4) 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 (2007 trial), Supp. CP.

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

11. Ms. Haselman was denied her constitutional right to a jury trial in Count I because the jury did not determine whether or not she acted under circumstances not amounting to first or second degree assault, an essential element of Assault in the Third Degree.

12. The statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

13. The trial court erred by instructing the jury with a definition of "assault" created and expanded by the judiciary.

14. The trial court erred by giving Instruction No. 7 (2007 trial), which reads as follows:

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.

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

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.  
Instruction No. 7 (2007 trial), Supp CP.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Lori Ann Haselman was charged with Assault in the Third Degree and Obstructing a Law Enforcement Officer. At her first trial, the jury convicted her of obstructing but was unable to reach a verdict on the assault charge. For both charges, the state was required to prove that Ms. Haselman acted with specific knowledge. At each trial, the court's instructions allowed the jury to convict if Ms. Haselman committed an intentional act, even if she did not act with the requisite knowledge.

1. Did the trial court's knowledge instructions create an impermissible mandatory presumption? Assignments of Error Nos. 1-4.
  
2. Did the trial court's knowledge instructions misstate the law and mislead the jury by conflating two *mens rea* elements? Assignments of Error Nos. 1-4.
  
3. Did the trial court's knowledge instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 1-4.

4. Was Ms. Haselman denied the effective assistance of counsel when her lawyer failed to object to the court's instructions defining knowledge? Assignments of Error Nos. 1-5.

Count I did not allege that the assault was committed under circumstances not amounting to first or second degree assault. The court's "to convict" instruction did not require proof of this element.

5. 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 first or second degree assault? Assignments of Error Nos. 6-11.

6. Was the Information constitutionally deficient as to Count I because it failed to allege that the assault was committed under circumstances not amounting to first or second degree assault? Assignments of Error Nos. 6-11.

7. Did the trial court's "to convict" instruction as to Count I omit an essential element of that charge? Assignments of Error Nos. 6-11.

8. Did Ms. Haselman's conviction of Count I violate due process because the prosecutor was not required to prove that it occurred under circumstances not amounting to first or second degree assault? Assignments of Error Nos. 6-11.

9. Was Ms. Haselman denied her 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. 6-11.

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.

10. Does the legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 12-14.

11. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 12-14.

12. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 12-14.

13. 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. 12-14.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Lora Haselman was the passenger in a car whose driver was arrested for Driving Under the Influence. RP (4-13-05) 43-46; RP (4-3-07) 29-31. After arguing with officers, not following their directions, and resisting being cuffed “for her own safety and the safety of the officers”, she was taken to the ground. RP (4-13-05) 46-64; RP (4-3-07) 32-43, 56, 59, 127. Her lip was cut and she was bleeding. RP (4-13-05) 89, 103-106; RP (4-3-07) 43, 71-73. At the patrol car, as the officers tried to put her into the car while in cuffs despite the fact that she was not under arrest, she swung her leg at an officer and spit blood and saliva. RP (4-13-05) 65-68, 90, 107-110; RP (4/3/07) 41, 44-45, 56, 63.

Ms. Haselman was charged with Obstructing an Officer and Assault in the Third Degree. CP 18-19. The Information with respect to the assault read as follows:

...Defendant did 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: Deputy Keegan, of the Clallam County Sheriff's Department; contrary to Revised code of Washington 9A.36.031(1)(g).  
CP 18.

The case proceeded to a jury trial. RP (4/13/05) 2-125; RP (4/14/05) 2-84. The court gave the following instruction, without defense objection:

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.  
Instruction 13 (2005 trial), Instruction 9 (2007 trial), Supp. CP.

That trial resulted in a conviction for Obstructing, and a hung jury on the assault. RP (4/14/05) 84-89.

At the retrial on the assault two years later, the court gave the same instruction regarding knowledge, again without defense objection. Supp. CP. The court also gave the following instructions on assault:

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

- (1) That on or about the 8<sup>th</sup> of January, 2005, the Defendant assaulted Deputy John Keegan;
- (2) That at the time of the assault Deputy John Keegan was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
- (3) That the Defendant knew at the time of the assault that Deputy John Keegan was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties; and
- (4) 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 (2007 trial), Supp. CP.

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.

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

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.  
Instruction No. 7 (2007 trial), Supp CP.

The second jury convicted Ms. Haselman of Assault in the Third Degree. CP 6. She was sentenced and timely appealed. CP 6-17, 5.

### **ARGUMENT**

#### **I. THE COURT'S KNOWLEDGE INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN OF PROVING KNOWLEDGE.**

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). 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). A conclusive presumption is one which requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Furthermore, conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

A. Assault in the Third Degree

This Court has previously held that the combination of instructions used in Ms. Haselman's second trial is unconstitutional. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). This combination of instructions conflates two mental states and relieves the state of its burden to establish every element beyond a reasonable doubt. In *Goble*, the accused was charged with assaulting a person whom he knew to be a law enforcement officer.<sup>1</sup> The trial court's "knowledge" instruction included the contested language at issue here: "Acting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. This Court reversed Mr. Goble's 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.

---

<sup>1</sup> Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble* at 201.

*Goble*, at 203.<sup>2</sup>

Here, as in *Goble*, the state was required to prove that Ms. Haselman assaulted a law enforcement officer, and that she “knew at the time of the assault that Deputy John Keegan was a law enforcement officer or other employee of a law enforcement agency who was performing his official duties...” Instruction No. 6 (2007 trial), Supp. CP. The state did not object to this instruction, and it is therefore the law of the case.<sup>3</sup> As in *Goble*, the court also instructed the jury that “[a]cting knowingly or with knowledge... is established if a person acts intentionally.” Instruction 9 (2007 trial), Supp. CP.

Under *Goble*, this combination of instructions is unconstitutional. It permitted the jury to conclude that Ms. Haselman acted with knowledge (that Keegan was a law enforcement officer performing official duties) if it found that she intentionally assaulted him. Accordingly, Ms. Haselman’s assault conviction must be reversed and the case remanded for a new trial.

---

<sup>2</sup> In *State v. Gerds*, 136 Wn. App. 720, 150 P.3d 627 (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.

<sup>3</sup> See *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005).

B. Obstructing

Similarly, the erroneous knowledge instruction tainted Ms. Haselman's obstructing conviction. The state was required to prove that Ms. Haselman "willfully hindered, delayed, or obstructed a law enforcement officer in the discharge of [his] official powers or duties..." and that she "knew that the law enforcement officer was discharging official duties at the time..." Instruction No. 10 (2005 trial), Supp. CP. As in *Goble*, the inclusion of the final sentence (allowing the jury to presume knowledge from any intentional act) conflated the two mental states and relieved the state of its obligation to prove every element beyond a reasonable doubt.

Furthermore, Instruction No. 13 (2005 trial) runs afoul of the rule against conclusory presumptions. *Mertens, supra*. The instruction requires the elemental fact ("Acting knowingly or with knowledge" that Keegan was a law enforcement officer performing official duties) to be conclusively presumed from the predicate fact ("if a person acts intentionally" by acting obstructively) Instruction No. 13 (2005 trial), Supp. CP. Given the general verdicts in this case, there is no way of knowing how the jury used the "knowledge" instruction, with its conclusive presumption. Accordingly, the improper instructions were prejudicial. *See, e.g., State v. Reid*, 74 Wn. App. 281 at 289, 872 P.2d

1135 (1994) (where jury may have relied solely on a permissive inference instruction to establish element of fraudulent intent, reversal is required because “[t]here is no way of knowing beyond a reasonable doubt whether the jury relied on the improper basis.”) For these reasons, the obstructing conviction must be reversed and the case remanded for a new trial. *Goble, supra; Mertens, supra; State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000).

**II. DEFENSE COUNSEL SHOULD HAVE OBJECTED AND TAKEN EXCEPTION TO THE COURT’S ERRONEOUS “KNOWLEDGE” 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)).

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). An appellant claiming ineffective assistance 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), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, 166 P.3d 720 (2006).

To prevail on both charges, the state was required to prove that Ms. Haselman knew Keegan was a law enforcement officer performing official duties. Instruction No. 14, Supp. CP. Despite this, Ms. Haselman's attorney failed to object to the court's erroneous knowledge instruction, which contained an unconstitutional mandatory presumption. RP (4/4/07) 97-110. This failure to object was deficient performance. A reasonably competent attorney would have been familiar with the mental states for each offense, would have been aware (from the *Goble* case) of the danger that the erroneous knowledge instruction could mislead the jury to

presume knowledge from an intentional act,<sup>4</sup> and would have objected and taken exception to the erroneous instructions. *Goble, supra*.

Ms. Haselman 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 consider the knowledge element of each offense, and improperly imputed knowledge to Ms. Haselman based on her intentional acts. Defense counsel's failure to object to the improper instruction denied Ms. Haselman the effective assistance of counsel. *Strickland*. The convictions must be reversed, and the case remanded for a new trial. *Reichenbach, supra*.

### **III. RCW 9A.36.031 VIOLATES THE SEPARATION OF POWERS.<sup>5</sup>**

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

---

<sup>4</sup> Trial commenced in April of 2007, 16 months after *Goble* was published.

<sup>5</sup> The Supreme Court heard argument on this issue on October 23, 2007. *State v. Chavez*, 134 Wn. App 657, 142 P.3d 1110.

(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-- the verb "assault." *See, generally*, RCW 9A.36.<sup>6</sup> 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 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

---

<sup>6</sup> 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.

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*, 159 Wn.2d 778, \_\_\_ P.3d \_\_\_, (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, an example of such a crime is found in 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: ... (f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering...  
RCW 9A.36.031.

Because this subsection adequately defines the core conduct giving rise to criminal liability, they do not violate the separation of powers. By contrast, RCW 9A.36.031(1)(g), the section under which Ms. Haselman was charged, uses a circular definition of assault: a person is guilty of Assault in the Third Degree if she “[a]ssaults a law enforcement officer” RCW 9A.36.031(1)(g). 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-- hostile and insulting gestures, for example. 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. Count I must be reversed and the charge dismissed.

The statutory scheme criminalizing assault violates the constitutional separation of powers. Because Ms. Haselman was convicted under an unconstitutional statute, her assault conviction must be reversed and the charge dismissed with prejudice.

**IV. THE STATE FAILED TO ALLEGE AND THE INSTRUCTIONS FAILED TO REQUIRE PROOF THAT THE ASSAULT OCCURRED UNDER CIRCUMSTANCES NOT AMOUNTING TO ASSAULT IN THE FIRST DEGREE.**

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.36.031(1)(g) defines Assault in the Third Degree as follows:

(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...

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the crime any acts that constitute a first or second degree assault. RCW 9A.36.031(1). Accordingly, the absence of a first or second degree assault is an essential element of the 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.36.031(1)(g) 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.<sup>7</sup>

Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.36.031, and has no bearing on Ms. Haselman's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36.031. 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

---

<sup>7</sup> The only exception is for alternative charges.

second degree” is contained in the very provision defining the substantive crime itself. RCW 9A.36.031. 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 first or second degree assault is an element of 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 Count I because it omitted an essential element of the 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 does not allege that the crime occurred “under circumstances not amounting to assault in the first or second degree,” as required by RCW 9A.36.031. CP 18 Because of this, the Information is deficient as to Count I and dismissal 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.

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. 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).

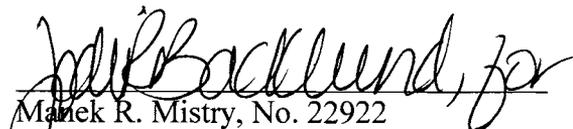
The “to convict” instruction for Count I did not require the jury to find that the assault was committed “under circumstances not amounting to assault in the first or second degree,” as required by RCW 9A.36.031(1). Supp. CP. Because the instruction omitted an essential element, the assault conviction must be reversed and the case remanded for a new trial with proper instructions. *Jones, supra; Brown, supra.*

**CONCLUSION**

For the foregoing reasons, Ms. Haselman’s convictions must be reversed. Count I must be dismissed with prejudice, and Count II must be remanded for a new trial. In the alternative, if Count I is not dismissed with prejudice, it must either be dismissed without prejudice or remanded for a new trial.

Respectfully submitted on November 1, 2007.

**BACKLUND AND MISTRY**

  
Manek R. Mistry, No. 22922  
Attorney for the Appellant

  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

