

PN 4-21-08

NO. 36931-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KENNETH EUGENE ASHMAN,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
08-APR 28 AM 9:23  
STATE OF WASHINGTON  
DEPUTY

BRIEF OF APPELLANT

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ORIGINAL

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it admitted two photographs into evidence that were more prejudicial than probative. RP 70-72.

2. The trial court erred when it sentenced the defendant under the persistent offender act because one of the defendant's prior Oregon convictions was not comparable to a Washington strike offense. Sentencing Exhibits 4a & 4b.

### ***Issues Pertaining to Assignment of Error***

1. Does the trial court violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if it admits photographs into evidence that are so prejudicial that they denied the defendant a fair trial?

2. Does the trial court err if it sentences the defendant under the persistent offender act when one of the two prior strikes was an Oregon conviction for an offense that is not comparable to a Washington strike offense?

## STATEMENT OF THE CASE

### *Factual History*

During the afternoon of August 28, 2006, the defendant Kenneth Eugene Ashman was standing in the alley behind the Community House in the City of Longview. RP 21, 48-49, 83<sup>1</sup>. Community House is a homeless shelter that provides daily meals. RP 81-83. The defendant, who has been homeless for many years, ate there on a regular basis. *Id.* While out in the alley, the defendant saw a small plastic bag on the ground with what he assumed was trash in it. RP 86-87. As he went to pick it up, a person by the name of Joe Galleon walked towards the defendant and accused him of taking the bag out of a dumpster. RP 86-87. Mr. Galleon was also a homeless person who stayed and ate at the community house. RP 83. The defendant denied the claim. *Id.* Mr. Galleon then reached down with his foot to pull the bag to him. RP 86-88. As he did, he doubled up his fists as if to hit the defendant. *Id.*

At this point, the defendant pulled a knife out of his vest and yelled at Mr. Galleon to stop threatening him. RP 48, 87-88. Upon seeing the knife, Mr. Galleon started to run away. RP 48, 100-101. The defendant, knife in hand, ran after him, still yelling "don't threaten me." RP 48-49, 50-

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<sup>1</sup>The record in this case includes two volumes of continuously numbered verbatim report, referred to herein as "RP."

51. After running a few feet, Mr. Galleon tripped over his own feet and fell to the ground. RP 24, 48. As the defendant ran up, he continued to yell “don’t threaten me.” RP 50-51. A witness from a local business saw the incident, and stated that the defendant made a couple of “flinching” movements with the knife towards Mr. Galleon, although it was obvious that the defendant did not intend to stab Mr. Galleon. RP 48-49, 52-53. The defendant then walked away and another witness took Mr. Galleon into her office so they could call the police. RP 27, 53.

Once the police arrived, they took a statement from Mr. Galleon and the witnesses. RP 66-69. They then looked for the defendant, and found him sitting on a bench about two blocks away. RP 41. The officers arrested the defendant, but did not find a knife on his person. *Id.* At trial, the defendant testified that he threw it away after the incident. RP 97-98.

### ***Procedural History***

By information filed June 29, 2006, the Cowlitz County Prosecutor charged the defendant with one count of second degree assault with a deadly weapon, along with a deadly weapon enhancement. CP 1-2. The case later came on for trial with the state calling the two witnesses who had seen the incident, as well as two police officers who had responded to the scene and arrested the defendant. RP 19, 37, 46, 66. The state also called a third police officer who had later taken some pictures of Mr. Galleon and looked for the

knife. RP 56; Trial Exhibits 3 & 4. These witnesses testified to the facts from the preceding *Factual History*. RP 16-69. However, the state did not call Mr. Galleon as it was apparently not able to find him. 105. After the close of the state's case, the defendant took the stand and testified that Mr. Galleon had physically threatened him, and that the only reason he pulled the knife was to avoid a fist fight. RP 81-104.

After the defendant testified, the defense closed its case. RP 105. The court then instructed the jury on both second degree assault, as well as on unlawful display of a weapon, which both parties apparently argued was a lesser included offense to second degree assault. RP 105-112; CP 48-72. Although the court did instruct the jury on lawful use of force, the defense took exception to the court's decision to separate this instruction from the elements instruction. RP 111-112. After argument from counsel and deliberation, the jury returned verdicts of guilty on both counts. CP 75-76. The jury also answered "yes" to the special verdict on the deadly weapon enhancement. CP 77.

As the record in this case reveals, the defendant has significant mental health issues and has been diagnosed with "chronic undifferentiated schizophrenia with paranoid component." CP 90-120, 130-137. Before sentencing in this case, the defendant was found to be incompetent and remanded for a lengthy stay at Western State Hospital for competency

restoration. *Id.* After a regime of forced medication, the court eventually found the defendant competent again and held a sentencing hearing. *Id.* At this hearing, the state argued that the defendant should be sentenced under the persistent offender act as he had an Oregon conviction for third degree robbery and an Oregon conviction for attempted second degree assault, and that these two crimes were comparable to Washington Strike offenses. RP 153-155, 156-214. The latter of these two offenses arose out of a Washington County, Oregon, information filed August 30, 1990. *See* Sentencing Exhibits 4a & 4b. The information in that case charged three crimes, the first of which read as follows:

That the above named defendant(s) on or about 1<sup>st</sup> day of August, 1990, in Washington County, Oregon, did unlawfully and knowingly cause physical injury to Kirk R. Norfolk by means of a dangerous weapon, to-wit: a 1981 Ford Mustang automobile by throwing the said Kirk R. Norfolk from the automobile and causing the said Kirk R. Norfolk to be dragged beside the moving automobile.

Sentencing Exhibit 4a.

In an attempt to prove this offense, the state also offered a copy of the "Judgment Upon Plea(s) of Guilty" from the Oregon case. Exhibit 4B. This document states the following in part:

It appearing to the Court that defendant has been informed against, arraigned and upon guilty plea(s), duly convicted of the crime(s) of Attempted Assault in the Second Degree (Class B Felony-crime seriousness 6 . . . a lesser and included crime of that charged in the information in Count 1, and Reckless Driving (Class A Misdemeanor) in Count 3.

Sentencing Exhibit 4b.

The state's comparability evidence on the attempted assault conviction did not include a copy of the statement of defendant on plea of guilty, or any other evidence other than the information and the judgement. Sentencing Exhibits 4a and 4b. After consideration of this evidence, the court found that the defendant's Oregon attempted second degree assault and the Oregon third degree robbery were comparable to Washington strike offenses. *See* verbatim of 10-25-07 sentencing hearing. As a result, the court sentenced the defendant to life without the possibility of release. CP 140-151. The defendant thereafter filed timely notice of appeal. CP 153.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ADMITTED TWO PHOTOGRAPHS INTO EVIDENCE THAT WERE MORE PREJUDICIAL THAN PROBATIVE.**

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative

value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the

determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’” (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

*State v. Carlin*, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog

handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

Under this rule, the fact of an arrest is not evidence because it constitutes the arresting officer's opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant's vehicle hit the plaintiff's vehicle. Following a defense verdict the plaintiff appealed arguing that defendant's argument in closing that the attending officers' failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. The court agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent's negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant's vehicle falls into this category.

Therefore, the witness' opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

*Warren v. Hart*, 71 Wn.2d at 514.

Although *Warren* was a civil case, the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In this case, the court admitted exhibits 3 and 4 at trial over the defendant's objection that they were more prejudicial than probative. These two eight and one-half by eleven inch color blowups show the defendant in handcuffs, standing in a parking garage in front of a marked police car with other police cars present, with a uniformed officer holding on to him. In the second photograph, the officer has turned the defendant and pulled up his vest as if to display the fact that the defendant is handcuffed behind his back.

Had the defendant in this case denied that he was the second man that the witnesses saw holding the knife and chasing after Mr. Galleon, then there would have been significant relevance to the photographs because they would have shown that the defendant's person, clothing and gloves were all very similar to the descriptions the two witnesses gave to the police. Under these circumstances, it would well have been within the trial court's discretion had it found the photographs more probative than prejudicial. However, the

defense in this case did not make a claim that the defendant had been misidentified as the second man. Rather, at pretrial in its omnibus form, and at trial, the defense admitted that the defendant was the second person and argued that he acted in self-defense. Thus, identity was never at issue in this case.

Since identity was not at issue in this case, one is left to ask the question: What was the relevance of the two photographs showing a handcuffed defendant standing in front of a police car in the custody of a police officer? The answer is that there was no relevance. These photographs made no issue at trial either slightly more likely or less likely. Since there was no relevance, one might then ask a follow up question: Why would the prosecutor offer two exhibits that had no relevance to a fact at issue at the trial? The answer is that the state sought and obtained the admission of these two photographs solely for their prejudicial effect. They leave with jury with the indelible impression that in the opinion of the police officer in the photograph, the defendant was guilty of the offense charged.

The unfairly prejudicial effect of the two photographs in the case at bar was exacerbated by the fact that in this case the defendant did not dispute the state's claims of what his conduct had been. Rather, he argued that he had acted in self defense, a claim that the evidence shows that the officer in the photograph knew at the time the photograph was taken. After all, he had

already spoken with the witnesses, and heard one of them state that the defendant was yelling "don't threaten me." Thus, these two photographs also had the effect of telling the jury that in the officer's opinion, the defendant did not act in defense of self or property. Consequently, the trial court abused its discretion when it admitted these two photographs into evidence.

In the case at bar, the testimony of Mr. Jackson was illustrative of how weak the state's evidence was on the charge of second degree assault. His testimony emphasized two points: (1) that the defendant believed that Mr. Galleon had threatened him, and (2) that the defendant had no intent of stabbing Mr. Galleon with the knife. Given this evidence, it is likely that but for the improperly admitted prejudicial photographs, the jury would have returned a verdict of acquittal on the assault charge in favor of a guilty verdict of the charge of unlawful display. Thus, the admission of these two photographs caused prejudice. Consequently, the admission of these two exhibits denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, and the defendant is entitled to a new trial.

**II. THE TRIAL COURT ERRED WHEN IT SENTENCED THE DEFENDANT UNDER THE PERSISTENT OFFENDER ACT BECAUSE ONE OF THE DEFENDANT'S PRIOR OREGON CONVICTIONS WAS NOT COMPARABLE TO A WASHINGTON STRIKE OFFENSE.**

The inclusion of foreign convictions in a defendant's offender score is controlled by RCW 9.94A.525(3), which states:

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3) (formerly codified as RCW 9.94A.360(3)).

Washington case law interpreting this statute indicates that in determining the effect of a foreign conviction, the sentencing court must first compare the elements of the foreign conviction to elements of any comparable Washington statute. *State v. Ford, supra*. If the elements are identical, then the analysis ends. *State v. Bush*, 102 Wn.2d 372, 9 P.3d 219 (2000). However, if the foreign statute defines the offense in broader terms, the sentencing court must then look to the actual conduct to determine the equivalent Washington offense. *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998).

Evidence setting out the conduct that led to the foreign conviction can

be found in supporting documents such as the Indictment, the Statement of Defendant on Plea of Guilty (if the defendant pled guilty), the Jury Instruction (if the defendant went to a jury trial), or the Judgment and sentence. Upon determining the conduct proven, the court should then determine what crime, if any, it would constitute under Washington law. *State v. Morley, supra*. The state had the burden of producing sufficient evidence to prove by a preponderance of the evidence that the actual conduct constituted a particular offense in Washington. *State v. Ford, supra*. The appellate courts conduct a de novo review of this determination by the trial court. *State v. McCraw*, 127 Wn.2d 281, 898 P.2d 838 (1995).

For example, in *State v. Cameron*, 80 Wn.App. 374, 909 P.2d 309 (1996), the defendant pled guilty to delivery of heroin. At sentencing, the defendant stipulated that he had a prior federal conviction for conspiracy to possess marijuana with intent to deliver. However, he argued that it had washed because he subsequently spent more than five consecutive years in the community crime free. The state agreed with the defendant's factual assertion, but argued that the conviction counted toward the defendant's offender score because (1) a ten year wash out period applied, and (2) the defendant had not spent ten years crime free (which fact the defendant conceded). The trial court agreed with the state's analysis, counted the prior federal conviction as three points, and sentenced the defendant to 36 months

on a range of 36 to 48 months. The defendant then appealed, arguing that the correct range was from 21 to 27 months in prison.

In its analysis, the Court of Appeals first noted that in determining the applicability of a foreign conviction under RCW 9.94A.360(3), the court was required to analyze the elements of the foreign offense and compare it to the comparable Washington crime. Upon doing this, the court held that the federal conviction had the same elements as conspiracy to possess marijuana with intent to deliver under RCW 69.50.401(a)(1)(ii), which is a class C felony with a maximum term of five years in prison.

The Court of Appeals then addressed the state's argument that the prior federal conviction was a second drug offense, and that under RCW 69.50.408, the maximum applicable term was doubled to ten years in prison. The Court of Appeals responded that it agreed with the state's legal analysis. However, it disagreed with the state's factual analysis, finding that the record indicated that the prior federal conviction had not been treated as a subsequent offense. Thus, the court held that the trial court should have applied the five year period, thus washing out the federal conviction. As a result, the court reversed and remanded for resentencing.

In the case at bar, the state argued that the defendant should be sentenced under the persistent offender act as he had an Oregon conviction for third degree robbery and an Oregon conviction for attempted second

degree assault, and that these two offenses were comparable to Washington Strike offenses. The defense denied both the existence of the offenses, as well as their comparability. The latter of these two offenses arose out of a Washington County, Oregon, information filed August 30, 1990. It charged three offenses, including second degree assault under ORS 163.175(1)(b). Sentencing Exhibits 4a & 4b. It stated as follows:

That the above named defendant(s) on or about 1<sup>st</sup> day of August, 1990, in Washington County, Oregon, did unlawfully and knowingly cause physical injury to Kirk R. Norfolk by means of a dangerous weapon, to-wit: a 1981 Ford Mustang automobile by throwing the said Kirk R. Norfolk from the automobile and causing the said Kirk R. Norfolk to be dragged beside the moving automobile.

Sentencing Exhibit 4a.

In an attempt to prove this offense, the state also offered a copy of the "Judgment Upon Plea(s) of Guilty" from the Oregon case. Exhibit 4B. This document states the following in part:

It appearing to the Court that defendant has been informed against, arraigned and upon guilty plea(s), duly convicted of the crime(s) of Attempted Assault in the Second Degree (Class B Felony-crime seriousness 6 . . . a lesser and included crime of that charged in the information in Count 1, and Reckless Driving (Class A Misdemeanor) in Count 3.

Sentencing Exhibit 4b.

The Oregon statute under which the defendant was charged states as follows:

163.175 Assault in the second degree.

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another;

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.

ORS 163.175.

The (1)(b) section of this statute, under which the defendant was charged, is similar to, but not identical to the (1)(c) section of RCW 9A.36.021(1). This statute states as follows:

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

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(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; or

(c) Assaults another with a deadly weapon; or

(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

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

RCW 9A.36.021(1).

The legislature's failure to include a specific mental intent under the (1)(c) alternative is certainly incongruent. However, our case law is clear that the term "assault" as used in our criminal statute implicitly carries the requirement of an "intentional" mental state. Indeed, the failure in a charging document to include the language "intentionally" is not fatal to the notice requirement under the constitution because "assaults" are universally known to be "intentional" acts. *State v. Davis*, 119 Wn.2d 657, 835 P.2d 1039 (1992). Thus, while the legislature did not state "intentionally assaults another with a deadly weapon" under the (1)(c) alternative, the *mens rea* of intent none the less exists as an element of the crime.

For example, in *State v. Sample*, 52 Wn.App. 52, 757 P.2d 539 (1988), this court addressed the issue of what *mens rea* elements were required in the different degrees of assault. In this case, the state had charged the defendant with third degree assault, alleging that he had, with criminal negligence, caused physical injury to another by means of an instrument or thing likely to produce bodily harm. Following a bench trial, the court acquitted the defendant of third degree assault, but convicted him of fourth

degree assault, which the court believed was a lesser included offense. The defendant appealed, arguing that fourth degree assault was not a lesser included offense because fourth degree assault required a higher mental state. This court agreed, and reversed, stating as follows.

Simple assault is a true or common law assault and requires proof of intent. This State's classic definition of an assault is contained in *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 505, 125 P.2d 681 (1942), thusly: "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." *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983). Former RCW 9A.36.030(1)(b), however, eliminates the element of intent and takes conduct - negligence- that would not be an assault under common law, and makes it an assault. *Cf. State v. Foster*, 91 Wn.2d 466, 475, 589 P.2d 789 (1979) (criminal negligence statute not unconstitutional because it eliminates intent). Thus, the crime of simple assault requires a more culpable mental state than assault in the third degree by criminal negligence. *See RCW 9A.08.010(1)(a); RCW 9A.08.010(2)*. Here, in arriving at a finding of guilty, the trial court specifically found that [the defendant] intentionally struck (assaulted) [the victim].

Thus, it is possible to commit assault in the third degree by criminal negligence without committing simple assault. If it is possible to commit the greater offense without committing the lesser, the latter is not a lesser included offense.

*State v. Sample*, 52 Wn.App. at 54-55. *See also State v. Jones*, 34 Wn.App. 848, 850, 664 P.2d 12 (1983) (intent is an element of assault); *State v. Robinson*, 58 Wn.App. 599, 606, 794 P.2d 1293 (1990) (intent is an element of simple assault).

As a comparison of the Oregon and Washington statutes reveals, not

every second degree assault under ORS 165.175(1)(b) would necessarily be a second degree assault under RCW 9A.36.021(1)(c) because the former allows for convictions when one “knowingly” assaults another person with a deadly weapon, while the latter requires the higher mental state of “intentionally.” In fact, the absence of the “knowing” mental state from the definition of second degree assault in Washington is no accident. Rather, as the following explains, the legislature specifically deleted this mental element in 1988.

Under former RCW 9A.36.020(1)(c), a person was guilty of second degree assault if he or she were to “knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm. . . .” Under this provision, the culpable mental state was “knowledge” as the term is defined in RCW 9A.08.010. Furthermore, in order to convict under this provision, the state did not have to prove that the defendant assaulted another with a “deadly weapon,” if the state could prove that the defendant used an “other instrument or thing likely to produce bodily harm.” However, effective July 1, 1988, the legislature adopted the current definition for this crime, which requires the state to prove that the defendant “assaults another with a deadly weapon.” RCW 9A.36.021(1)(c). Thus, while one may commit second degree assault in Oregon by “knowingly” assaulting another with a deadly weapon, one must “intentionally” assault another with a deadly weapon

before this conduct is a second degree assault in Washington.

In this case, the state may argue that under Oregon law, “intentionally” and “knowingly” are the same mental element. However, any such argument would be incorrect, because under ORS 161.085(6)-(10), the Oregon legislature adopted a *mens rea* hierarchy strikingly similar to the *mens rea* hierarchy the Washington legislature adopted in RCW 9A.080.010(1). The former statute provides:

(6) “Culpable mental state” means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) “Intentionally” or “with intent,” when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) “Knowingly” or “with knowledge,” when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

(9) “Recklessly,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) “Criminal negligence” or “criminally negligent,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the

circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

ORS 161.085(6)-(10)

The Washington Statute on levels of culpability states as follows:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010(1).

Although the language of the two statutes is not identical in words, it

is identical in meaning, particularly as it relates to the mental states of “intentional” and “knowing.” Under the Oregon statute, one acts “intentionally” when one “acts with a conscious objective to cause the result.” Under the Washington statute, one acts “intentionally” when one “acts with the objective or purpose to accomplish a result.” Under the Oregon statute, one acts “knowingly” when one “acts with an awareness that the conduct of the person is of a nature so described. . . .” Under the Washington statute, one acts “knowingly” when one “is aware of a fact, facts, or circumstances or result. . . .” In Oregon, “knowingly” is a less culpable mental state while “intentionally” is a more culpable mental state. *State v. Crosby*, 342 Or. 419, 154 P.3d 197 (2007). In Washington, “knowingly” is also a less culpable mental state and “intentionally” is a more culpable mental state. *State v. Thomas*, 98 Wn.App. 422, 989 P.2d 612 (1999). Thus, second degree assault in Oregon is not the equivalent to second degree assault in Washington when the criminal liability in Oregon arose from “knowingly” assaulting a person with a deadly weapon because in Washington second degree assault requires that one “intentionally” assault another with a deadly weapon.

Normally, under comparability analysis, this court should now determine whether the state met its burden of proving that the conduct that led to the Oregon second degree assault conviction would necessarily have

constituted the crime of second degree assault under Washington law. The reason is that since the two statutes are not identical in elements and some Oregon convictions for second degree assault would not be second degree assaults under Washington law, the second step in the analysis is required. *See Morley, supra.* However, this second step is not required in the case at bar because the language of the Oregon information shows that in this case, the state only charged the defendant under the "knowing" mental state. This information stated:

That the above named defendant(s) on or about 1<sup>st</sup> day of August, 1990, in Washington County, Oregon, did unlawfully and knowingly cause physical injury to Kirk R. Norfolk by means of a dangerous weapon, to-wit: a 1981 Ford Mustang automobile by throwing the said Kirk R. Norfolk from the automobile and causing the said Kirk R. Norfolk to be dragged beside the moving automobile.

Sentencing Exhibit 4a.

The only other document the state offered to prove the facts of this conviction is the judgment and sentence, which simply states that the defendant pled guilty to the lesser included attempt. Thus, even if one accepts the claim, in spite of the failure to include the guilty plea in the record, that the defendant "did knowingly cause physical injury" to a person by "throwing the said [person] from [an] automobile and causing the said [person] to be dragged beside the moving automobile," these acts were not performed "with intent." Thus, while some second degree assaults under

ORS 163.175(1)(b) could be the equivalent of a second degree assault under RCW 9A.36.021(1)(c), if the defendant “intentionally” assaults another person with a deadly weapon, the Oregon second degree assault in the case at bar cannot be seen as the equivalent to a Washington second degree assault because the defendant in the case at bar only committed a “knowing” act in Oregon.

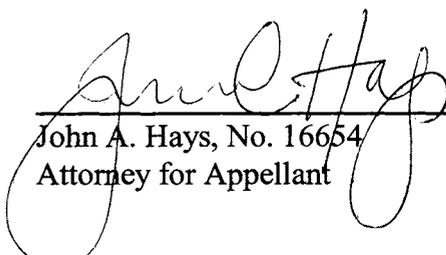
Finally, even if the Oregon information in this case had alleged that the defendant “intentionally or knowingly” assaulted another person with a deadly weapon, the state failed to meet its burden of proof by presenting sufficient evidence from which the court could conclude that the defendant’s conduct was “intentional” as opposed to “knowing.” Thus, even absent the missing element of “intentionally” in the Oregon information, the state in this case failed to prove that the defendant’s Oregon attempted assault conviction was the equivalent of second degree assault under Washington law. Thus, the record in this case does not show that the defendant had two prior convictions for strike offenses, and the court erred when it sentenced the defendant under the persistent offender act.

## CONCLUSION

The defendant is entitled to a new trial because the court's erroneous admission of two exhibits that were more prejudicial than probative denied the defendant a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. In the alternative, this court should vacate the defendant's sentence under the persistent offender act because the state failed to prove that the defendant had two prior strike convictions.

DATED this 21<sup>st</sup> day of April, 2008.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**RCW 9.94A.525(3)**

(3) Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

**RCW 9A.08.010(1)**

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

**RCW 9A.36.021(1)**

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

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(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; or

(c) Assaults another with a deadly weapon; or

(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

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

**ORS 161.085(6)-(10)**

(6) "Culpable mental state" means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) "Intentionally" or "with intent," when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) "Knowingly" or "with knowledge," when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

(9) "Recklessly," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) "Criminal negligence" or "criminally negligent," when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

**ORS 163.175**

(1) A person commits the crime of assault in the second degree if the person:

(a) Intentionally or knowingly causes serious physical injury to another;

(b) Intentionally or knowingly causes physical injury to another by means of a deadly or dangerous weapon; or

(c) Recklessly causes serious physical injury to another by means of a deadly or dangerous weapon under circumstances manifesting extreme indifference to the value of human life.

(2) Assault in the second degree is a Class B felony.

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
Respondent )  
vs. )  
ASHMAN, Kenneth Eugene )  
Appellant )

NO. 06-1-00824-1  
COURT OF APPEALS NO:  
36931-1-II  
AFFIDAVIT OF MAILING

STATE OF WASHINGTON )  
COUNTY OF COWLITZ ) ss.

CATHY RUSSELL, being duly sworn on oath, states that on the 21<sup>st</sup> day of APRIL, 2008, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

SUSAN I. BAUR  
COWLITZ COUNTY PROSECUTING ATTY  
312 S.W. 1ST STREET  
KELSO, WA 98626

KENNETH E. ASHMAN #967523  
MONROE CORRECTIONAL CTR.  
SPECIAL OFFENDER UNIT  
P.O. BOX 514  
MONROE, WA 98272-0514

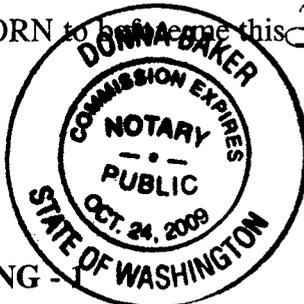
and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
- 3. AFFIDAVIT OF MAILING

DATED this 21<sup>ST</sup> day of APRIL, 2008.

*Cathy Russell*  
\_\_\_\_\_  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 21<sup>st</sup> day of APRIL, 2008.



*Donna Baker*  
\_\_\_\_\_  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: LONGVIEW/KELSO  
Commission expires: 10-24-09

AFFIDAVIT OF MAILING -

John A. Hays  
Attorney at Law  
1402 Broadway  
Longview, WA 98632  
(360) 423-3084