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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

Instruction 13 relieved the State of its burden of proof every element of the offense of second degree assault beyond a reasonable doubt and violated Jay McKague's right to due process under the Fourteenth Amendment.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Where a jury is instructed that proof of one element conclusively establishes another, the State is relieved of its burden of proof and the defendant is denied the due process. In a prosecution for second degree assault, where the State alleged Mr. McKague intentionally assaulted another and thereby recklessly caused injury, was the State relieved of its burden of proof the when the jury was instructed that the proof of intent necessarily proves recklessness?

C. ARGUMENT

INSTRUCTION 13 CREATED A MANDATORY PRESUMPTION ON THE ISSUE OF RECKLESSNESS RELIEVING THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF SECOND DEGREE ASSAULT AND DEPRIVING MR. MCKAGUE OF DUE PROCESS.

1. A jury instruction which creates a mandatory presumption violates the Due Process Clause of the Fourteenth Amendment. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.’” U.S. Const. amend. VI; U.S. Const. XIV; Apprendi, 530 U.S. at 476-77.

To convict Mr. McKague of second degree assault the State was required to prove he intentionally assaulted Mr. Chang and

“thereby recklessly inflict[ed] substantial bodily harm.” RCW 9A.36.021(1)(a). CP 45.

Jury Instruction 13 created a mandatory presumption that if the jury found Mr. McKague intentionally assaulted Mr. Chang, Mr. McKague necessarily “recklessly inflict[ed] substantial bodily harm” upon Mr. Chang. That presumption improperly relieved the State of its obligation to prove the second element of this crime in violation of Mr. McKague’s right to due process. See;

A mandatory presumption is a presumption, created by jury instructions, that requires the jury “to find a presumed fact from a proven fact.” State v. Hayward, 152 Wn.App. 632, 642, 126 P.3d 354 (2009) (citing State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). A mandatory presumption exists if a reasonable juror would interpret the presumption to be mandatory. Sandstrom v. Montana, 442 U.S. 510, 514, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Hayward, 152 Wn.App. at 642.

Because they relieve the State’s of its obligation to prove every element of a charged crime, such presumptions violates a defendant’s right to due process as they. Sandstrom, 442 U.S. at 522 (citing Morissette v. United States, 342 U.S. 246, 274-75, 72 S.Ct. 240, 96 L.Ed. 288 (1952)) (impermissible presumption in jury

instructions conflicts with presumption of innocence for each element of charged crime)); Hayward, 152 Wn.App. at 642 (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)); Deal, 128 Wn.2d at 699. A reviewing court must examine the jury instructions as a whole to determine if the mandatory presumption unconstitutionally relieves the State's obligation. Deal, 128 Wn.2d at 701; State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

2. Instruction 13 created an improper mandatory presumption. The court's "To Convict" instruction accurately defined the elements of assault in the second degree as:

- (1) That on or about October 17, 2008, the defendant intentionally assaulted KEE HO CHANG;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on KEE HO CHANG; and
- (3) That this act occurred in the State of Washington.

CP 49 (Instruction 15), compare RCW 9A.36.021. The jury was further instructed: "When recklessness as to a particular fact is required to establish an element of a crime, *the element is also established if a person acts intentionally or knowingly.*" CP 47. (emphasis added) (Instruction 13).

A reasonable juror who found that Mr. McKague intentionally assaulted Mr. Chang (element one) would understand Instruction 13 to mean that the 'recklessness element' (element two) was also

automatically established, because Mr. McKague had “act[ed] intentionally or knowingly.” See Jury Instruction 13. This confusion would naturally arise because Jury Instruction 13 does not inform the jury that the ‘intentional act’ must be specifically related to element two. Jury Instruction 13 thus created a mandatory presumption. Sandstrom, 442 U.S. at 514; Hayward, 152 Wn.App. at 642, citing Deal, 128 Wn.2d at 701.

This conclusion is precisely the result this Court recently reached). Just as in the present case, the first two elements in the “To Convict” in Hayward’s provided:

- (1) That on or about the 25th day of March, 2007, the Defendant intentionally assaulted [the victim];
- (2) That the Defendant thereby recklessly inflicted substantial bodily harm on [the victim].

152 Wn.App. at 640. The instructions stated further “Recklessness also is established if a person acts intentionally.” Id. This Court found the instructions created a mandatory presumption which

conflated the intent the jury had to find regarding Hayward’s assault against [the victim] with a [sic] intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its burden of proving [the defendant] recklessly inflicted substantial bodily harm.

Id., at 645 (internal citations omitted) The Court concluded

Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), [the jury instructions] violated [the defendant's] constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove [the defendant] recklessly (or intentionally) inflicted substantial bodily harm.”

Id. at 646.¹

The instructions in Hayward are similar to those in the present case. Both instructions state that ‘recklessness’—or the ‘recklessness element’—is “established if a person acts intentionally”. Furthermore, neither instruction specifies that “intention” must be related to the element at issue. Just as in Hayward, Instruction 13 violated Mr. McKague’s right to due process.

Because the conclusive presumption required the jury to find the second element was established whenever the first was, the State was relieved of its obligation to prove all elements of assault in the second degree. This violated Mr. McKague’s right to due

¹ The language of RCW 9A.08.010(2) does not limit the substituted mental states (‘intent’ or ‘knowledge’) to a specific element of a crime. However, RCW 9A.08.010(2) does not exist within the confines of a specific crime and could not, therefore, specify which element ‘intent’ must relate to. More importantly, this Court recognized in Hayward that RCW 9A.08.010(2) clearly intends to “limit[] the substituted mental states...to the specific element at issue.” Hayward 152 Wn.App at 646.

process. U.S. Const. amend XIV; Sandstrom, 442 U.S. at 520 (citing In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); Hayward, 152 Wn.App. at 642; Deal, 128 Wn.2d at 699. This Court should thus hold that Jury Instruction 13 violated Mr. McKague's right to due process.

3. This Court must reverse Mr. McKague's sentence. A constitutional error is presumed prejudicial unless the government can show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Applied to instructions which create a mandatory presumption, this standard requires reversal unless the error was "unimportant in relation to everything else the jury considered on the issue in question..." Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in part on other grounds, Estelle v. McGuire, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in two-step analysis.

First, it must ask what evidence the jury actually considered in reaching its verdict. . . [I]t must then weigh the probative force of that evidence as against

the probative force of the presumption standing alone. To satisfy Chapman's reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman's words, that the presumption did not contribute to the verdict rendered

Yates, 500 U.S. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id. at 405-06.

Here, the effect of the presumption was not "comparatively minimal." The presumption narrowed the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact

presumed. Id., at 405-06. Instruction 13 told the jury that if they found Mr. McKague had a mens rea of intent he also necessarily had acted recklessly. CP 47. The instruction did this without limitation of which acts those mens reas were to apply to; i.e., jurors could presume guilty knowledge from proof of *any* intentional act. CP 47. A straightforward application of the instruction would require jurors to conclude that if it conclude Mr. McKague had intentionally assaulted Mr. Chang and Mr. Chang was injured, Mr. McKague necessarily did so recklessly.

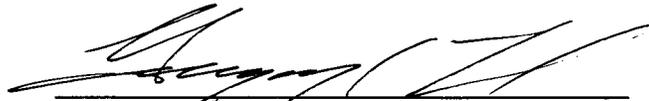
The absence of a limitation on which intentional act the jury could rely upon to find recklessness makes it impossible to know what act the jury relied upon, much less whether that act was independent of the predicate for presumption. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Under Yates and Chambers, the State cannot show the presumption was harmless beyond a reasonable doubt; i.e., that it did not contribute the verdict obtained in this case.

D. CONCLUSION

For the reasons above, and those in Mr. McKague's prior brief, the Court must reverse Mr. McKague's conviction of second

degree assault. Alternatively, the court must reverse Mr. McKague's sentence and remand for imposition of a standard range sentence.

Respectfully submitted this 26th day of February, 2010.

A handwritten signature in black ink, appearing to read 'Gregory C. Link', written over a horizontal line.

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