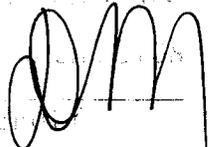


COURT OF APPEALS  
DIVISION II  
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**NO. 40572-5-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**SIDNEY DELANEY,**

**Appellant.**

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**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 due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for felony eluding because substantial evidence does not support this conviction.

2. Trial counsel's failure to request a supplemental instruction following a jury inquiry denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

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

1. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against him for an offense unsupported by substantial evidence?

2. Does a trial counsel's failure to request a supplemental instruction following a jury's inquiry requesting such an instruction deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when defense counsel's proposal of the instruction the jury requested would have been granted by the court and would have resulted in an acquittal?

## STATEMENT OF THE CASE

### *Factual History*

Debra Stoner is a 47-year-old woman who is retired from the railroad with a medical disability arising from an on-the-job injury during which she broke her back. RP 289-291.<sup>1</sup> She is small in stature and weighs about 100 pounds. RP 117. Since retiring, she has suffered a number of injuries including a car wreck and a bad fall, both of which exacerbated her constant back problems. RP 291-293, 367-373. As a result of these injuries, she does not have full movement in her upper body, particularly her right arm, and she suffers from constant pain in her back and arms. *Id.* She also has osteoporosis. RP 291-293. She lives off of her monthly railroad disability payment, which is directly deposited into her checking account. RP 293-298. Occasionally, her disability check is late, which puts her in difficult financial circumstances. *Id.* On these occasions, she goes to a business called “Advance America” which will take her post-dated checks and give her cash in return at an extraordinarily usurious, although not illegal, fee (a \$795.00 check post-dated for a week will get her \$700.00 in cash from Advance America). RP 293-298.

On September 11, 2009, Ms Stoner’s disability check was again late,

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<sup>1</sup>The record on appeal includes six volumes of continuously numbered verbatim reports, referred to herein as “RP [page #].”

and she was in need of cash with which to purchase gas for a planned trip to Nevada and to purchase a birthday gift for a party she and her boyfriend, Defendant Sidney Delaney, were going to attend that evening. RP 293-298. As a result, a little after 5:00 pm, she drove her older red Ford F-150 pickup to an Advance America location not far from the Walmart at Mill Plain and 104<sup>th</sup> Avenue in Vancouver. *Id.* The defendant was with her. RP 356-353. Once at the Advance America, Ms Stoner found out that they would only give her a check as they no longer had cash on hand. RP 293-298. The person at Advance America told her that since all the local banks were closed, she could go to the Walmart on Mill Plain to get the check cashed. *Id.*

Based upon the statement of the Advance America employee, Ms Stoner and the defendant drove over to Mill Plain and 104<sup>th</sup> Avenue in order to cash the check. RP 301-303, 363-366. Once at the Walmart, Ms Stoner went into the store to cash the check and the defendant stayed in the truck as he only anticipated that Ms Stoner would be a few minutes. *Id.* In fact, she ended up in the store for over 20 minutes. RP 367-368. She first went to the check cashing counter and learned that they would not cash that type of check. RP 304-306. At this point, she decided to steal a number of items. RP 306-309. As a result, she went around the store, cut four or five small items out of packaging with a pair of scissors that were for sale, and placed

the items in her purse. *Id.* These items included a bottle of perfume and a fingernail kit. RP 85-87, 306-309.

Unknown to Ms Stoner, four Walmart security officers had been watching her on video the whole time she was shoplifting. RP 81-90. When she walked out of the store, three of these security officers went out and confronted her as she walked towards the parking lot. *Id.* They did not wear uniforms and did not have badges indicating that they were security officers. RP 119. According to these officers, they grabbed her arms, told her that they were store security, and then tried to direct her back into the store. RP 94-101, 148-149, 214-219, 247-252. However, Ms Stoner resisted their attempts to get her back in the store. *Id.* Consequently, they threw her down face first on the asphalt in an attempt to put her hands behind her back and put her in handcuffs. *Id.* As they did this, Ms Stoner complained a number of times to them that they were hurting her arms and shoulder. RP 122.

When the defendant looked over at the door to Walmart, he saw Ms Stoner come out of the building with her purse on her shoulder, and saw three men approach her, grab her, and throw her on the ground. RP 367-368, 381-394. As they did this, the defendant quickly drove the truck over to their location, jumped out, and ran up saying: “What the fuck are you doing; that’s my woman; get the hell off of her!” RP 94-98. One or more of the security guards looked towards the defendant and told him that they were

Walmart Security and that they were arresting Ms Stoner. RP 94-98. However, he appeared not to hear or understand. RP 124. Rather, he ran up to the group of them and started pushing each guard away from Ms Stoner. RP 124-125, 190-194, 214-219. While this was happening, the fourth security guard left the store and joined the melee. RP 247-252.

While the defendant was attempting to extricate Ms Stoner from the bottom of the pile of individuals, one of the security guards took out his cell phone to call the police, and one of the security guards grabbed at Ms Stoner's purse. RP 150-153, 214-219, 247-252. In response, the defendant slapped the phone out of the one guard's hands and then grabbed the purse. RP 150-153. During the "tug of war" over the purse, all of the stolen items fell out on the ground, along with Ms Stoner's identification. RP 150-153, 214-219, 247-252. According to the defendant, this was the first point that he realized that Ms Stoner had been shoplifting and that the people wrestling with her were security guards, in spite of the fact that a number of them had claimed that they had told him who they were. RP 395-396. In any event, at about this time, the defendant got possession of the purse, returned to the truck, and drove out of the parking lot. *Id.*

When the defendant drove out of the parking lot, he turned left onto 104<sup>th</sup> Avenue, drove about one block, and stopped at the light. RP 406-413. Once it turned green, he turned left onto Mill Plain and drove about one block

down and turned right at the on ramp to I-205 South. *Id.* Once on the ramp, he accelerated quickly and entered the highway, driving well in excess of those around him. RP 190-194. Within about two minutes, he crossed the I-205 bridge into Oregon. *Id.* At some point, his speed got up to 90 miles per hour. *Id.* In fact, as the defendant turned onto 104<sup>th</sup> Street, Vancouver Police officer Steven Donahue entered the parking lot responding to the call from the security guard. *Id.* As he did, he saw the red Ford F150 exit. *Id.* Since it matched the description of the suspect vehicle, he drove into the parking lot to the first place he could turn around. *Id.* He then followed the Defendant's path out of the parking lot. *Id.*

Although Officer Donahue was able to get around a number of vehicles, he was never able to catch up to the defendant as he always had at least two vehicles in between them. RP 190-194. It was only at the point that the defendant turned right at the on ramp that Officer Donahue finally turned on his lights and siren. *Id.* By this time, the defendant was already driving down the on ramp onto the highway. *Id.* Once Officer Donahue got to the entrance to the highway he also turned right and accelerated down the ramp. *Id.* However, due to the congestion on the highway and the defendant's high rate of speed, he never got closer to the defendant than about one-fourth of a mile. RP 196-198. Within a couple minutes, Officer Donahue crossed the I-205 bridge into Oregon and stopped the pursuit. RP 193-194. At no point

during his two or three minute attempt to catch up to the defendant did Officer Donahue even get close enough to identify who was driving the truck. RP 196-198.

### ***Procedural History***

By information filed September 17, 2009, and later twice amended, the Clark County Prosecutor charged the defendant Sidney Delaney with one count of second degree robbery, four counts of third degree assault (one for each of the Walmart security guards), and one count of felony eluding. CP 45-46. The case later came to trial, with the state calling six witnesses, including the four Walmart security guards, the officer who attempted to stop the defendant, and the investigating officer. RP 67, 144, 186, 202, 236, 245, 268. The defense then called Debra Stoner, the investigating officer, and the defendant. RP 289, 348, 352. All of these witnesses testified to the facts set out in the preceding factual history. *See Factual History.*

Following the reception of testimony, the court instructed the jury on each count, along with four counts of fourth degree assault as lesser included offenses to the four third degree assault charges. CP 117-151. The court also instructed the jury on defense of others as requested by the defense and argued in answer to the assault charges. CP 143-144. Counsel then presented closing argument, and the jury retired for deliberation. RP 445-506.

During the next afternoon of deliberation, the jury sent out the following written question:

A person is entitled to act on appearance in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury even if the injury is being caused by security during a legal apprehension or detention?

CP 152.

The court responded by writing “Re-read and follow the jury instructions,” under the jury’s question. CP 152. The court did this with the consent of both counsel, and no proposal of a supplemental instruction by the defense. RP 514-516. The jury then continued deliberations, and eventually returned the following verdicts: (1) “not guilty” on the charge of second degree robbery, (2) “not guilty” on the first third degree assault charge, (3) “not guilty” on the second third degree assault charge, (4) “guilty” on the third third degree assault charge, (5) “guilty” to the lesser included offense of fourth degree assault on the fourth third degree assault charge, and (6) guilty of felony eluding. CP 153-160.

The court later sentenced the defendant within the standard range on the felony convictions. CP 280-293. The defendant thereafter filed timely notice of appeal. CP 304.

## ARGUMENT

### **I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT AGAINST HIM FOR FELONY ELUDING BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THIS CONVICTION.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364. If substantial evidence does not support a finding that each and every element of the crime charged is proved beyond a reasonable doubt, then any remedy other than dismissal with prejudice violates a defendant’s right under Washington Constitution, Article 1, § 9 and United States Constitution, Sixth Amendment to be free from double jeopardy. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982); *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). Since this denial of due process constitutes a “manifest error of constitutional magnitude” under RAP 2.5(a)(3), any conviction not supported by substantial evidence may be attacked for the first time on appeal. *Id.* “Substantial evidence” in this context means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant in count 5 with felony eluding under RCW 46.61.024. The first section of this statute states as follows:

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given

by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1).

Under this statute, the state bears the burden of proving the *mens rea* element that the defendant “willfully” refused to bring his vehicle to a stop after a uniformed officer in a marked vehicle gave a visual or audible signal for the defendant to stop. Implicit in this element is the requirement that the defendant actually be aware that the uniformed officer in the marked patrol vehicle was attempting to stop him. *Cf., State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) (failure to propose a diminished capacity instruction constituted ineffective assistance of counsel on a charge of felony eluding under facts in which the defendant’s intoxication could have interfered with his ability to form the required *mens rea* elements of that crime).

In the case at bar, the evidence seen in the light most favorable to the defendant, fails to prove that the defendant was aware that there was a police officer attempting to stop him. The evidence on this point was presented by two witnesses: Officer Steven Donahue and the defendant. For his part, the defendant testified that at no point in time did he see a police officer behind him, see any lights, or hear a siren. His denials are supported by a close examination of Officer Donahue, who testified that he was never able to get directly behind the defendant for the short few blocks to the highway, and

that he only turned on his lights as the defendant accelerated down the on ramp to enter the highway, which was very congested at that point in time.

That the defendant was not looking at what was behind him while entering a congested highway at highway speeds should not be unusual at all, since his attention would have been forward while attempting to safely enter the highway. From that point in time, the officer never got closer than one quarter of a mile from the defendant, and that was with many vehicles in between them. The officer never even got close enough at any point to identify the defendant as the driver and the whole encounter was over in two or three minutes before the defendant drove over the I-205 bridge into Oregon. These facts do not constitute substantial evidence that the defendant knew that there was ever a police officer behind him, even when seen in the light most favorable to the state. Thus, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for felony eluding.

**II. TRIAL COUNSEL'S FAILURE TO REQUEST A SUPPLEMENTAL INSTRUCTION FOLLOWING A JURY INQUIRY DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s professional errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v.*

*Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068)). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to propose a supplemental instruction on the third degree assault charges after the jury sent out an inquiry that explained their need for clarification on the legal right to physically resist a lawful arrest if the defendant reasonably believed that his actions were necessary to prevent physical injury to the person being arrested. In fact, in this case, the defendant had responded to the third degree assault charges with a claim that he had reasonably acted in defense of another person. The trial court agreed that there was sufficient evidence presented at trial to justify giving an instruction on self defense. This instruction stated as follows:

It is a defense to a charge of Assault in the third degree and Assault in the fourth degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by someone lawfully aiding a person who he reasonably believes is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonable prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 143.

The court also gave a companion instruction informing the jury that the defendant was entitled to act upon a reasonable belief that the person he was defending was being injured, even though his belief later turned out to be incorrect. This instruction stated:

A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury, although it afterwards might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

CP 144.

The jury obviously paid close attention to these two instructions, but was still left with the question whether or not the law allowed a defendant to physically intervene in a lawful arrest if the purpose of that intervention was to prevent the persons effecting that arrest from injuring the person they were arresting. This conclusion flows from the inquiry the jury sent out following a number of hours of deliberation. That inquiry stated the following:

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A person is entitled to act on appearances in defending another, if he believes in good faith and on reasonable grounds that another is in actual danger of injury even if the injury is being caused by security during a legal apprehension or detention?

CP 152.

This inquiry indicates that the jury had apparently reached the point when it believed the following: (1) the defendant reasonably believed that the security guards were injuring Debra Stoner when they had her face down on the asphalt with three of them on top of her, (2) that the defendant took reasonable physical action to protect Debra Stoner, but (3) the defendant was aware that the people he shoved were store security guards attempting to lawfully arrest Debra Stoner. What the jury wanted to know was whether the last fact required them to convict the defendant, even though the first two facts would normally compel an acquittal based upon the state's failure to disprove self defense.

In fact, the correct answer to the jury's inquiry is that a person is entitled to resist a lawful arrest in order to defend against conduct that threatens to cause or does cause "actual injury." *State v. Ross*, 71 Wn.App. 837, 843, 863 P.2d 102 (1993) ("actual danger" is the standard for self defense when resisting a lawful assault by a police officer). In this case, defense counsel's failure to propose a supplemental instruction answering this question fell below the standard of a reasonably prudent attorney for

three reasons. First, it correctly stated the law under the facts of a case in which there was substantial evidence that (1) the security guards were making a lawful arrest, and (2) the defendant nonetheless reasonably believed that it was necessary to resist that lawful arrest because he believed that Debra Stoner was in danger of “actual harm.” Given these two facts, it was logical that the jury would ask itself this question.

Second, it was obvious from the jury’s inquiry that it did not understand the law on this point. Thus, in order for the jury to adequately consider the defendant’s theory of the case, defense counsel should have proposed such an instruction. As a review of the decision in *Thomas, supra*, explains, the failure to propose a jury instruction to facilitate argument on the defendant’s theory of the case has previously been held to fall below the standard of a reasonable prudent attorney and form the first prong of a claim of ineffective assistance of counsel.

In *State v. Thomas, supra*, a defendant charged with felony eluding elicited evidence that she was so intoxicated while driving that she was unable to form the requisite intent of wilfully failing to stop and driving in wanton and wilful disregard of the safety of others. In spite of the presentation of evidence on this point, defense counsel failed to propose an instruction explaining the law on diminished capacity. Following conviction, the defendant appealed, arguing that trial counsel’s failure to propose such an

instruction denied her effective assistance of counsel.

After reviewing the facts of the case, the court first noted that under its prior decisions, diminished capacity claim through voluntary intoxication could be used to answer a charge of felony eluding. The court stated as follows on this point:

In [*State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982)], we held that RCW 46.61.024 requires that the defendant both subjectively and objectively act with wanton and willful disregard of others. We concluded that juries should be instructed that the circumstantial evidence of defendant's manner of driving only creates a rebuttable inference of "wanton and wilful disregard for the lives or property of others ..." *Sherman*, at 59, 653 P.2d 612. Therefore, *Sherman* indicates that objective conduct by the defendant indicating disregard is only circumstantial evidence and may be rebutted by subjective evidence pertaining to defendant's mental state.

*State v. Thomas*, 109 Wn.2d at 227.

The court then went on to review evidence presented at trial, including the evidence that supported the defendant's claim that she was highly intoxicated at the time she was driving. Following this review, the court agreed with the defendant's argument. The court stated as follows concerning the question whether or not counsel's failure fell below the standard of a reasonably prudent attorney:

Defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is. Here, defendant's proposed "to convict" instruction did not indicate that there is a subjective component to RCW 46.61.024, nor did any other instruction offered by the defense. Furthermore, the record does not contain a proposed defense instruction on the relevance of

intoxication as to the mental element of the crime charged. The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas' drunkenness caused her mental state. In contrast, defense counsel argued that Thomas' drunkenness negated any guilty mental state. Therefore, in closing argument, opposing counsel argued conflicting rules of law to the jury. Accordingly, we conclude that in failing to offer a Sherman instruction, defense counsel's performance was deficient.

*State v. Thomas*, 109 Wn.2d at 229 (citations omitted).

Similarly, in the case at bar, as in *Thomas*, trial counsel's failure to propose a supplemental instruction that informed the jury that the defendant was entitled to resist even a lawful arrest in order to reasonably avoid "actual injury" to himself or another also prevented the defendant from adequately arguing its theory of the case. Thus, in the same manner that trial counsel's failure to propose a necessary instruction in *Thomas* fell below the standard of a reasonably prudent attorney, so trial counsel's failure to propose a necessary supplemental instruction in the case at bar fell below the standard of a reasonably prudent attorney.

In *Thomas*, the court went on to note that trial counsel's failure to propose a necessary instruction also caused prejudice under the facts of the case. Thus, the court reversed and remanded for a new trial based upon its finding that the defendant had been denied effective assistance of counsel. Similarly, in the case at bar, there are a number of points that strongly support a conclusion that trial counsel's failure to propose a supplemental instruction

caused prejudice. In support of this claim, it should first be noted that the defendant originally faced four separate charges of third degree assault for his conduct which, at worst, involved grabbing and pushing four people off of Ms Stoner. There were no claims that he attempted to strike or kick any of the security guards. In light of the evidence presented, the jury acquitted on two of the counts, convicted on one, and convicted on a lesser included misdemeanor on the fourth. These verdicts indicate that the jury was uncertain on these charges.

Second, there was evidence presented through both Ms Stoner and the defendant that she had previously suffered a substantial back injury, sufficient to force her to quit her employment on a medical disability. There was also evidence that she had later exacerbated that injury in a fall. In addition, there was evidence from the state's witnesses that she had loudly complained of pain when the security guards were taking her down to the ground. Finally, the jury also heard evidence from the defense that it had provided all of Ms Stoner's medical records to the state. In spite of this evidence, the state made no attempts to rebut Ms Stoner's claims of significant injury. Thus, the jury was presented with substantial evidence to support the defendant's claim that he reasonably believed that Ms Stoner was in danger of significant bodily injury at the point the security guards had her face down on the asphalt.

Third, in spite of the fact that the defendant claimed that he was

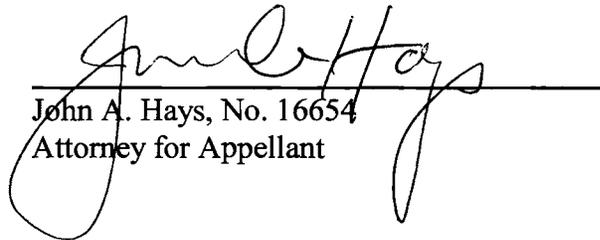
unaware that the person's on top of Ms Stoner were security guards attempting to make a lawful arrest of her person, there was a great deal of evidence from the state to rebut that claim. This evidence came from three of the security guards who testified that they repeatedly told the defendant who they were and what they were doing. In light of this fact, it was natural for the jury to conclude that (1) the defendant acted in a reasonable belief that he had to intervene to prevent substantial injury to Ms Stoner, but (2) at the time he acted, he knew the security guards were effecting a lawful arrest. Thus, it is highly likely that had the jury been correctly instructed that the second fact did not preclude a claim of defense of others, it would have acquitted on all of the assault charges. As a result, trial counsel's failure to propose a supplemental instruction denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. The defendant is entitled to a new trial on these charges.

**CONCLUSION**

The defendant's conviction for felony eluding should be reversed because substantial evidence does not support this charge. The defendant's convictions for assault should be reversed and the case remanded for a new trial because he was denied effective assistance of counsel on these charges.

DATED this \_\_\_\_\_ day of November, 2010.

Respectfully submitted,



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.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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.

