



**TABLE OF CONTENTS**

**A. ASSIGNMENTS OF ERROR ..... 1**

1. The trial court provided an erroneous definition of recklessness ..... 1

2. The trial court erred by giving Instruction No. 8, which reads as follows:..... 1

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

When recklessness also is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

3. The trial court’s instruction defining recklessness contained an improper mandatory presumption..... 1

4. The court’s instruction defining recklessness impermissibly relieved the State of its burden to establish each element by proof beyond a reasonable doubt. .... 1

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 2**

Assault in the second degree requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. The trial court instructed the jury that recklessness “is established if a person acts intentionally,” without limiting the intentional acts that could be used as proof of recklessness. Did the trial court’s instruction misstate the law and relieve the State of its burden of proof?

**C. STATEMENT OF THE CASE..... 2**

**D. ARGUMENT** ..... 5

**NORDGREN’S CONVICTION VIOLATED HIS FOURTEENTH  
AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE  
COURT’S INSTRUCTION DEFINING RECKLESSNESS  
CREATED A MANDATORY PRESUMPTION AND RELIEVED  
THE STATE OF ITS BURDEN TO PROVE NORDGREN  
RECKLESSLY INFLICTED SUBSTANTIAL BODILY HARM.**

**CERTIFICATE OF MAILING** ..... 16

**TABLE OF AUTHORITIES**

**Cases**

*Carella v. California*, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989)..... 13

*City of Bellevue v. Lorang*, 140 Wn.2d 19, 992 P.2d 496 (2000)..... 9

*Estelle v. McGuire*, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991) ..... 10

*Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985)..... 13

*In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) ..... 5

*Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)..... 6

*Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) ..... 11

*Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) ..... 6, 13

*Seattle v. Gellein*, 112 Wn.2d 58, 768 P.2d 470 (1989)..... 6

*State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002)..... 5

*State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 10

*State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996)..... 6, 11

*State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007) ..... 8

*State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005)..... 7, 8, 9

*State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985) ..... 11

*State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009) ..... 12, 14, 15

<i>State v. Harris</i> , 122 Wn.App. 547, 90 P.3d 1133 (2004).....	5
<i>State v. Keend</i> , 140 Wn. App. 858, 166 P.3d 1268 (2007) .....	9
<i>State v. Mertens</i> , 148 Wn.2d 820, 64 P.3d 633 (2003) .....	6
<i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997) .....	5
<i>State v. Savage</i> , 94 Wn.2d 569, 618 P.2d 82 (1980).....	6, 12
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	5, 11
<i>Yates v. Evatt</i> , 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) .....	10, 11

**Other Authorities**

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, cmt. at 211 (3d ed. 2008) .....	15
WPIC 10.03.....	15, 16
U.S. Const. Amend. XIV .....	5

**Statutes**

RCW 9A.08.010.....	6, 7, 9
RCW 9A.36.021.....	7

**A. ASSIGNMENTS OF ERROR**

1. The trial court provided an erroneous definition of recklessness.
2. The trial court erred by giving Instruction No. 8, which reads as

follows:

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

When recklessness also is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

Instruction No. 8, CP 12.

3. The trial court's instruction defining recklessness contained an improper mandatory presumption.

4. The court's instruction defining recklessness impermissibly relieved the State of its burden to establish each element by proof beyond a reasonable doubt.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Assault in the second degree requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. The trial court instructed the jury that recklessness “is established if a person acts intentionally,” without limiting the intentional acts that could be used as proof of recklessness. Did the trial court’s instruction misstate the law and relieve the State of its burden of proof?

**C. STATEMENT OF THE CASE**

On an October 2009 evening, Jennifer King celebrated her 30<sup>th</sup> birthday with a party at her father’s house. 1RP<sup>1</sup> at 27-28, 57, 78. Jennifer’s sister, Jodi King, is Robert Nordgren’s girlfriend. 1RP at 78; 2RP at 186. Nordgren was at the party. 2RP at 186.

Around 11 p.m., some of the guests were leaving and had gone to the laundry room to grab their purses. 1RP at 81. One woman lifted up her purse and it felt light. 1RP at 111. She looked inside and discovered that her wallet was missing. 1RP at 111. A few other guests also discovered wallets missing from purses left in the laundry room. 1RP at 82.

Most of the guests stopped what they were doing and began to search for the wallets. 1RP at 34. Nordgren and another guest, Jon

---

<sup>1</sup> “1RP” is volume 1 of the verbatim report of proceedings. “2RP” is volume 2 of the verbatim report of proceedings.

Eickstadt, went outside to look in guests' cars. 1RP at 36. Some of the guests used a computer at the house to cancel bank accounts and credit cards. 1RP at 35. A call was made to 911 to alert the police to the thefts. 1RP at 84.

While searching for the missing wallets, Nordgren heard that Eickstadt had been in the laundry room earlier. 2RP at 188. Nordgren thought that Eickstadt might have something to do with the missing wallets. 2RP at 188-91.

While both men were in the dining room, Nordgren confronted Eickstadt about being in the laundry room. 2RP at 188-91. Eickstadt lied and said that he had not been in the laundry room. 1RP at 150. The dining room was small and made smaller still by the placement of furniture. 2RP at 188-90. Nordgren felt uncomfortable. 2RP at 188-92. He was literally backed into a corner and was basically calling Eickstadt, who was much larger than Nordgren, a thief. 2RP at 188-91. Nordgren was only 30 days out of the hospital after breaking his neck, and was on medication to prevent blood clots. 2RP at 186, 191. Nordgren, feeling physically vulnerable and believing that Eickstadt was intoxicated and had taken an aggressive posture, punched Eickstadt in the face causing Eickstadt to fall to the floor. 2RP at 188-93. Another guest described Nordgren getting down on the floor and hitting Eickstadt a second time. 1RP at 41.

Eickstadt had no memory of being punched. 1RP 151-52. He and his wife Shari left the party shortly thereafter. 1RP 130, 136, 153.

By the time Eickstadt got home, he was hurting. 137, 153-54. He called the police and he went to a Vancouver hospital. 1RP at 154-55. Eickstadt had a broken jaw and a broken hyoid bone. 1RP at 153. The Vancouver hospital transferred Eickstadt to a Portland hospital where Eickstadt stayed for two days. 1RP at 155-56.

Nordgren was charged with second degree assault by having intentionally assaulted and recklessly inflicted substantial bodily harm on Eickstadt. CP 1. At trial, Nordgren acknowledged hitting Eickstadt in self defense. 2RP at 186-92. The jury was instructed that the State had the burden to disprove self-defense. CP 14. The court, without objection, gave the following definition of recklessness:

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

When recklessness also is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

Instruction No. 8, CP 12; 2RP at 225.

The jury found Nordgren guilty. CP 19. The court sentenced him to 20 months. CP 23; 2RP at 279. Nordgren made a timely appeal of his conviction.

**D. ARGUMENT**

**NORDGREN’S CONVICTION VIOLATED HIS  
FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS  
BECAUSE THE COURT’S INSTRUCTION DEFINING  
RECKLESSNESS CREATED A MANDATORY  
PRESUMPTION AND RELIEVED THE STATE OF ITS  
BURDEN TO PROVE NORDGREN RECKLESSLY  
INFLICTED SUBSTANTIAL BODILY HARM.**

Under the Fourteenth Amendment’s Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997).

A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the

presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.” RCW

9A.08.010(2). Assault in the second degree requires proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. RCW 9A.36.021. Applying the substitution provisions of RCW 9A.08.010, a person can be convicted of assault in the second degree if he “[i]ntentionally assaults another and thereby [intentionally, knowingly, or recklessly] inflicts substantial bodily harm.” RCW 9A.36.021, *modified*.

Here, the trial court’s instruction defining recklessness included the following language: “When recklessness is required to establish an element of a crime, the elements is also established if a person acts intentionally or knowingly.”<sup>2</sup> Instruction No. 8, CP 12. The instruction did not place any limitation on the intentional acts that could establish the recklessness required by RCW 9A.36.021. Thus the jury could have interpreted Instruction No. 8 to mean that any intentional act (including the assault itself) conclusively established Mr. Nordgren’s recklessness.

Similar language in an instruction defining “knowledge” has previously been found to require reversal. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, the accused was charged with

---

<sup>2</sup> This language was (presumably) intended to convey to jurors that they could convict Nordgren not only if he recklessly inflicted substantial bodily harm, but also if he intentionally or knowingly inflicted substantial bodily harm, in accordance with RCW 9A.08.010(2).

assaulting a person whom he knew to be a law enforcement officer.<sup>3</sup> The trial court's "knowledge" instruction informed the jury that "[a]cting knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

We agree that the instruction is confusing and...allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.

*Goble*, at 203.

The rule set forth in *Goble* has been limited to crimes (such as the assault in the second degree) that include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerds*, 136 Wn. App. 720, 150 P.3d 627 (2007).<sup>4</sup> Furthermore, the problem created by the ambiguous language can be corrected by instructions that are "clear,

---

<sup>3</sup> Although not a statutory element of assault in the third degree, knowledge that the victim was a law enforcement officer performing official duties was included in the "to convict" instruction and thus became an element under the law of the case in *Goble*. *Goble*, at 201.

<sup>4</sup> Interestingly, under *Gerds*, Mr. Goble's conviction would not have been reversed, since he was charged with assaulting another whom he knew to be a police officer; he was not charged with "intentionally" assaulting another whom he knew to be a police officer. *See Goble*, at 200-201.

accurate, and separately listed [sic].” *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).<sup>5</sup>

The flawed language first criticized in *Goble* requires reversal in this case. If interpreted correctly, Instruction No. 8 allowed the jury to convict for intentional, knowing, or reckless infliction of substantial bodily harm, as permitted under the substitution provisions of RCW 9A.08.010(2). However, a reasonable juror might interpret the language as creating a mandatory presumption, permitting conviction upon proof of any intentional or knowing act, even in the absence of recklessness. Since juries lack the tools of statutory construction, the trial court’s failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury

---

<sup>5</sup> The instructions in *Keend*, which were upheld by this Court, did not differ significantly from those in *Goble*, which led this Court to reverse. Compare *Goble*, at 200-202 with *Keend*, at 863-864, 867. Thus *Keend* appears to have overruled *Goble sub silentio*.

would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that 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 by Estelle v. McGuire*, 502 U.S. 62, 12 S.Ct. 475, 116 L.Ed.2d 385 (1991). In other words,

a court must take two quite distinct steps. 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...[I]t 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...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

*Yates*, at 403-405 (footnotes and citations omitted). A court must examine the proof actually considered, and ask:

[W]hether 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...that the presumption did not contribute to the verdict rendered.

*Yates*, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness 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.” *Yates*, at 405-406.<sup>6</sup>

Even if this Court decides not to apply the more stringent *Yates* standard, reversal is still required under the less stringent standard harmless error test. “[A]n erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis.” *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (citing *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). “Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless.” *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In cases involving “omissions or misstatements of elements in jury instructions, ‘the error is harmless if that element is supported by uncontroverted evidence.’”

---

<sup>6</sup> In *Deal*, *supra*, the Court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal*, at 703.

*Thomas*, 150 Wn.2d at 845, (quoting *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

This Court has already acknowledged this same instructional error and, in doing so, reversed a second degree assault conviction. *State v. Hayward*, 152 Wn.App. 632, 646-647, 217 P.3d 354 (2009). The facts of Hayward are remarkably similar to the facts in Nordgren's case. Like Nordgren, defendant Hayward, while at a party, punched a person, Baar, in the face and broke Baar's jaw. The *Haywood* court instructed the jury in essentially the same manner as the court instructed the jury in Nordgren.

[J]ury instruction 6 stated, "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP at 29 (emphasis omitted). Jury instruction 10 defined "recklessness" and stated, "Recklessness also is established if a person acts intentionally." CP at 33.

*Hayward*, 152 Wn.App. at 643.

By comparison, in Nordgren's case, Jury instruction 3 stated, "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP 7. Jury instruction 8 defined "recklessness" and stated, "When recklessness is required to establish an element of a crime, the

element is also established if a person acts intentionally or knowingly. CP 12.

In *Hayward*, the conclusive presumption required the jury to find Hayward *recklessly* inflicted substantial bodily harm upon proof that he acted *intentionally*. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Hayward acted recklessly). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume recklessness from proof of *any* intentional act, including the intentional act of assault itself.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette, supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266,

109 S.Ct. 2419, 105 L.Ed.2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

Like *Hayward*, the lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Nordgren was reckless when he inflicted substantial bodily harm. Jurors could have focused on evidence of *any* intentional act (including the assault itself), and disregarded all other evidence bearing on Nordgren’s mental state *vis-a-vis* the infliction of substantial bodily injury. Because it is impossible to make the determination required by the harmless error standard it cannot be said that the error was harmless beyond a reasonable doubt.

The *Hayward* court also found that the instructional error allowed the jury to improperly conflate the separate intent and reckless mens rea and relieved the State of its burden to prove all elements of assault in the second degree.

We agree with Hayward that the jury instruction here impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted Baar. As in *Goble*, this instruction conflated the intent the jury had to find regarding Hayward's assault against Barr with a 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 Hayward recklessly inflicted substantial bodily harm. [*Goble*] 131 Wn.App. at 203, 126 P.3d 821.

Furthermore, we hold that the presumption created by the second paragraph of jury instruction 10 violated Hayward's due process rights because it relieved the State of its burden to prove that he *recklessly* inflicted substantial bodily harm, a separate element of the charged crime. *Thomas*, 150 Wn.2d at 844.

*Hayward*, 152 Wn.App. at 645.

As the Hayward court pointed out, the instructional error in Hayward may have been due in part to the use of former WPIC 10.03, which stated in part, “[Recklessness also is established if a person acts [intentionally] [or] [knowingly].]” 11 WPIC, at 153 (2d ed.1994) (alterations in original). In July 2008, WPIC 10.03 was revised “to more closely follow the statutory language.” 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, cmt. at 211 (3d ed. 2008); *see also* WPIC 10.03, note on use at 209 (2008). The revised WPIC 10.03 states: “[When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established

if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact].]]” WPIC 10.03, at 209. (alterations in original).

MAR 21 2011  
BY [Signature]

Nordgren’s case suffers from the same flaw as in *Hayward*. As such, the same remedy applies. Nordgren’s conviction should be reversed and remanded for further proceedings.

**E. CONCLUSION**

Nordgren’s second degree assault conviction should be reversed and his case remanded to the trial court for further proceedings.

Respectfully submitted this 18<sup>th</sup> day of March 2011.

[Signature]  
\_\_\_\_\_  
LISA E. TABBUT/WSBA #21344  
Attorney for Robert Nordgren

**CERTIFICATE OF MAILING**

I certify that on March 18, 2011, I deposited in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Anne M. Crusier, Clark County Prosecutor’s Office, P.O. Box 5000, Vancouver, WA 98666-5000; (2) Robert Nordgren/DOC#726338, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520; and (3) the original, plus one copy, to the Court of Appeals, Division 2.

[Signature]  
\_\_\_\_\_  
LISA E. TABBUT, WSBA #21344