

No. 41443-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Margie Derenoff,

Appellant.

Clallam County Superior Court Cause No. 09-1-00311-3

The Honorable Judge George Wood

Appellant's Reply Brief

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ARGUMENT

MS. DERENOFF’S CONVICTION VIOLATED HER FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S “TO CONVICT” INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME AS CHARGED.

A conviction for third-degree assault requires proof of intent.¹ *See, e.g., State v. Williams*, 159 Wash.App. 298, 307, 244 P.3d 1018 (2011).

Intent is therefore an essential element of the charge. *See State v. Sanchez*, 122 Wash.App. 579, 590, 94 P.3d 384 (2004) (citing *State v. Eastmond*, 129 Wash.2d 497, 502, 919 P.2d 577 (1996); *State v. Byrd*, 125 Wash.2d 707, 713-14, 887 P.2d 396 (1995)). Here, the “to convict” instruction omitted this element. This left the jury without a “yardstick” by which to measure Ms. Derenoff’s guilt or innocence. *State v. Lorenz*, 152 Wash.2d 22, 31, 93 P.3d 133 (2004). The omission creates automatic reversible error. *State v. Sibert*, 168 Wash.2d 306, 312, 230 P.3d 142 (2010).

Respondent erroneously contends that “it is unnecessary to identify intent as a separate and distinct element.” Brief of Respondent, p. 10 (citing *State v. Davis*, 119 Wash.2d 657, 835 P.2d 1039 (1992)). But *Davis* is inapposite. In *Davis*, the Supreme Court liberally construed a charging document, and found that the word “assault” was sufficient to

¹ Unless the crime is charged under RCW 9A.36.031(1)(d) and (f), which require proof of criminal negligence.

apprise the defendant of the intent element. *Davis*, at 661. *Davis* did not involve the sufficiency of a “to convict” instruction.

Nor does *Brown* support the Respondent’s position. Brief of Respondent, p. 10 (citing *State v. Brown*, 140 Wash.2d 456, 470, 998 P.2d 321 (2000)). In *Brown*, the Supreme Court held that the prosecution was not required to prove that a person accused of third-degree assault knew s/he was assaulting a police officer. *Brown* did not address the other elements of the offense.² The only relevant case cited by Respondent is *Hall*. Brief of Respondent, p. 10 (citing, *inter alia*, *State v. Hall*, 104 Wash.App. 56, 14 P.3d 884 (2000)). But *Hall* was wrongly decided, as outlined in Ms. Derenoff’s Opening Brief.

The error cannot be “cured” by the court’s other instructions. An appellate court may not “look to other jury instructions to supply a missing element from a ‘to convict’ jury instruction.” *Sibert*, at 311 (citing *State v. Smith*, 131 Wash.2d 258, 262-63, 930 P.2d 917 (1997)). Respondent’s argument to the contrary relies on cases that predate *Sibert* and *Smith*. Brief of Respondent, pp. 11-12.

² However, the *Brown* Court did note that intent is an element of third-degree assault: “To obtain a conviction for assault under that subsection, the State must prove that a defendant intended to commit and did commit an assault against another person.” *Brown*, at 470.

The error was prejudicial, because Ms. Derenoff's intent was the crux of the case. As Respondent points out, "the parties' closing arguments focused the jury's attention on the issue of intent." Brief of Respondent, p. 14. And while it's true that the "jury's verdict demonstrates it rejected [the defense] argument," their decision was based on the court's flawed "to convict" instruction. Accordingly, Respondent's contention that the error was harmless is without merit. Brief of Respondent, pp. 13-14.

The Court's "to convict" instruction omitted an essential element of third-degree assault. Accordingly, Ms. Derenoff's conviction must be reversed, and the case remanded for a new trial. *Sibert*, at 312.

CONCLUSION

The conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 4, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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postage prepaid, on October 4, 2011.

and that I filed it electronically with the Court of Appeals, Division II,
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on October 4, 2011.



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October 04, 2011 - 12:08 PM

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