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Court of Appeals  
Division II  
State of Washington  
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**NO. 52649-2-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**KENNETH HANSEN,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Gregory M. Gonzales, Judge

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred by giving Instruction No. 8.
2. Instruction No. 8 included an unconstitutional judicial comment on the evidence in violation of Wash. Const. art. IV, § 16.
3. Instruction No. 8 violated due process by relieving the State of its burden to prove an unlawful touching.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A judge may not comment on the evidence. Did the trial court's nonstandard instruction defining assault include a judicial comment in violation of Washington State Constitution art. IV, § 16?
2. If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. Did Instruction 8 relieve the State of its burden to prove an unlawful touching?

### **C. STATEMENT OF THE CASE**

In Vancouver, Washington, a citizen can contract with the City police department to keep unwanted persons off their property. The Vancouver Police Department enforces the resulting "trespass agreements." RP 44-45.

Officer Ken Suvada contacted Kenneth Hansen on one such property, a large privately-owned field. RP 43-44, 48. Officer Suvada told Hansen he had no permission or authority to be on the property and that he needed to leave. RP 45-46.

The next day, Officer Suvada returned to the field and saw Hansen sitting by his tent. RP 47-48, 59. He placed Hansen under arrest for trespassing, put handcuffs on him, and started to walk him to his patrol car. RP 49-50. Hansen took issue with the arrest. He expressed his displeasure with the arrest by calling Officer Suvada names such as “punk ass bitch.” RP 50. Vancouver Officer Millard arrived to assist. RP 72.

Hansen’s anger continued when they got to Officer Suvada’s patrol car. RP 52. Officer Suvada testified that while he was trying to unlock his car, Hansen spit a whole mouthful of spit in his face and alongside the door of the car. RP 52-53. Officer Millard saw Hansen spit and responded by pushing Hansen’s face into the car door. RP 78-79.

The officers took a picture of the spit on the car door but did not take a picture of any spit on Officer Suvada’s face. RP 56, 83-84. Officer Suvada remembered having wiped the spit from his face. RP 56. Officer Suvada was offended by being hit by spit. RP 54. He did not think Mr. Hansen spit accidentally. RP 58.

Both officers wore standard Vancouver Police uniforms. RP 42, 84.  
Officer Suvada's police SUV had standard police car markings. RP 43.

Mr. Hansen elected not to testify and presented no witnesses. RP 91. In closing, Hansen argued the evidence showed he intended to spit on the police car window, but that the spit hitting Officer Suvada on the face was unintentional and it was the State's burden to prove otherwise. RP 115-16. The sole contested issue at trial was whether Mr. Hansen intentionally spat on Officer Suvada. RP 112, 114-15.

Hansen's only proposed jury instruction told the jurors they could give Hansen's out-of-court statements whatever weight and credibility they saw fit. RP 93, 104-05. The State proposed a non-standard jury instruction that defined assault as follows:

An assault is an intentional touching or spitting upon another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or spitting is offensive if the touching or spitting would offend any ordinary person who is not unduly sensitive.

Supplemental Designation of Clerk's Paper's, Plaintiff's Proposed Instructions; RP 93 (WPIC 35.50 modified).

The jury found Mr. Hansen guilty. CP 2; RP 122. After sentencing, Mr. Hansen timely appealed. CP 20-21.

#### **D. ARGUMENT**

**The trial court improperly commented on the evidence, tipping the jury toward conviction and relieving the State of its burden to prove an intentional touching.**

- A. The trial court should not have endorsed the State's theory by providing a nonstandard definition of assault.

The Washington constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon. . ." Art. IV, § 16. In this case, the court gave a nonstandard instruction that violated both of these rules. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

Under Washington's common law definition, an assault is "an intentional touching of another person, that is harmful or offensive ... 11 Wash. Prac., Pattern Instr. Crim WPIC 35.50 (4th Ed) (certain bracketed material deleted). Here, the court added to this language, instructing jurors that an assault is "an intentional touching *or spitting on* another person, that is harmful or offensive..." . Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

This was improper. The court's nonstandard instruction favored conviction. By emphasizing that the jury *could* convict based on spitting, the court tipped the balance in favor of a guilty verdict. Supplemental

Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

The court's instructions favored the prosecution and improperly commented on the evidence. Such comments are presumed prejudicial. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006). A comment on the evidence requires reversal unless the record affirmatively shows that no prejudice could have resulted.

This is a higher standard than that normally applied to constitutional errors. *Levy*, 156 Wn.2d at 725. Here, the record does not affirmatively show an absence of prejudice. The comment went directly to the contested facts at trial: whether Mr. Hansen intentionally spat on Officer Suvada.

A comment on the evidence "invades a fundamental right" and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997).

The judicial comment infringed Mr. Hansen's right to a fair trial, free of improper influence, and a decision by an impartial jury. *Levy*, 156 Wn.2d at 725. Mr. Hansen's assault conviction must be reversed and the charge remanded for a new trial. *Id.*

B. The court's nonstandard instructions relieved the State of its burden to prove an intentional touching.

Due process prohibits a trial judge to instruct jurors in a manner that relieves the state of its burden of proof. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). Here, the court's nonstandard instruction relieved the State of its burden to prove an intentional touching. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

Jury instructions must make the relevant legal standard manifestly apparent to the average person. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). The instructions in the case did not make the requirements for conviction manifestly clear. The court's instructions did not make clear the State's burden of proving an intentional touching. The nonstandard language allowed for a conviction based on a showing that Mr. Hansen's spat intentionally regardless of whether or not he intended his spit to touch Officer Suvada. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

If a jury can construe a court's instructions to allow conviction without proof of an element, any resulting conviction violates due process. U.S. Const. Amend. XIV; *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184

(2001). The court's instructions in this case can be construed to allow conviction based on an intentional spitting, even if Mr. Hansen did not intend to spit on Officer Suvada. Because of this, the conviction violated due process. *Id.*

Such an error requires reversal unless the State shows beyond a reasonable doubt that it did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). This requires proof that the element is supported by uncontroverted evidence. *Id.*

Here the error went to the very heart of the case. Mr. Hansen argued a reasonable interpretation of the evidence is he sought to avoid hitting the officer with his spit. RP 115-16. The court's instruction allowed conviction based on intentional spitting, even if the State failed to prove Mr. Hansen intended contact with Officer Suvada. Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 8.

Although Mr. Hansen did not object to the instruction, the improper instruction created a manifest error affecting Mr. Hansen's right to due process. The issue can be addressed for the first time on review. RAP 2.5(a)(3). The court should review the error even if it does not qualify under RAP 2.5(a)(3). *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604

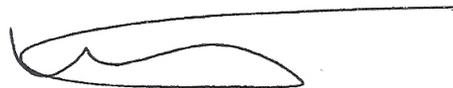
(2011). The Rules of Appellate Procedure require courts to decide cases on their merits “except in compelling circumstances where justice demands...” RAP 1.2(a). A decision on the merits here would promote justice; there is no compelling basis to refuse review on the merits. RAP 1.2(a).

The court’s instruction failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864.<sup>1</sup> This relieved the state of its burden to prove intentional assault. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

**E. CONCLUSION**

Mr. Hansen’s conviction must be reversed and the case remanded for a new trial. The trial court commented on the evidence and relieved the State of its burden to prove the elements of third-degree assault.

Respectfully submitted May 7, 2019.



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<sup>1</sup> U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22.

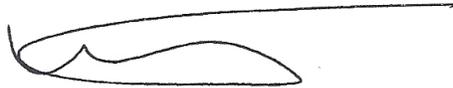
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Clark County Prosecutor's Office, at [cntypa.generaldelivery@clark.wa.gov](mailto:cntypa.generaldelivery@clark.wa.gov); (2) the Court of Appeals, Division II; and (3) I mailed it to Kenneth Hansen, DOC#924603, Stafford Creek Corrections Center, 191 Constantine Way Aberdeen, WA 98520.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 7, 2019, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Kenneth Hansen, Appellant

**LAW OFFICE OF LISA E TABBUT**

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**Transmittal Information**

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