

FILED  
January 14, 2013  
Court of Appeals  
Division III  
State of Washington

No. 30886-3

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER L. JONES, Appellant

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APPEAL FROM THE SUPERIOR COURT  
OF BENTON COUNTY

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BRIEF OF APPELLANT

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Marie J. Trombley, WSBA 41410  
PO Box 829  
Graham WA 98338  
509.939.3038  
marietrombley@comcast.net

## TABLE OF CONTENTS

I.	Assignments of Error .....	1
II.	Statement of Facts.....	2
III.	Argument .....	5
	A. The Evidence Was Insufficient To Sustain A Conviction For Assault-Second Degree. ....	5
	1. Finding Of Fact 25 Is Not Supported By Substantial Evidence. ....	6
	2. Finding Of Fact 26 Is Not Supported By Substantial Evidence. ....	7
	3. Finding Of Fact 27 Is Mislabeled As A Finding Rather Than A Conclusion Of Law .....	8
	4. The Court Erred When It Entered Conclusion Of Law 1: “The defendant intentionally assaulted Tonya Ponce and thereby recklessly caused her substantial bodily harm.” .....	9
	5. This Court Has The Authority To Remand For Entry Of Judgment And Sentence On A Lesser Degree Offense. ....	11
	B. The Trial Court Must Correct The Judgment And Sentence. ....	12
	C. The Imposed Jury Demand Fee Should Be Reversed And The Fee Assigned To Defense Counsel. ....	13
IV.	Conclusion .....	14

## TABLE OF AUTHORITIES

### *Washington Cases*

<i>Casterline v. Roberts</i> , 168 Wn.App. 376, 284 P.3d 743 (2012) .....	8
<i>Hegwine v. Longview Fibre Co., Inc.</i> , 132 Wn.App. 546, 132 P.3d 789 (2006).....	8
<i>Moulden&amp;Sons,Inc. v. Osaka Lanscaping &amp; Nursery, Inc.</i> , 21 Wn. App. 194, 584 P.2d 968 (1978).....	8
<i>Spokane County v. City of Spokane</i> , 148 Wn.App. 120, 197 P.3d 1228 (2009) .....	6
<i>State v. Atterton</i> , 81 Wn.App. 470, 915 P.2d 535 (1996) .....	11
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983) .....	5
<i>State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997) .....	12
<i>State v. Cross</i> , 156 Wn.App. 568, 234 P.3d 288 (2010) .....	13
<i>State v. Esters</i> , 84 Wn.App. 180, 927 P.2d 1140 (1996), (rev. denied, 131 Wn.2d 1024 (1997)) .....	10
<i>State v. Garcia</i> , 146 Wn.App. 821, 193 P.3d 181 (2008) .....	12
<i>State v. Graham</i> , 153 Wn.2d 400, 103 P.3d 1238 (2005). .....	9
<i>State v. Green</i> , 94 Wn.2d 216, , 616 P.2d 628 (1980) .....	6,9
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991).....	7
<i>State v. Hathway</i> , 161 Wn. App. 634, 251 P.3d 253 (2011).....	13
<i>State v. Jones</i> , 34 Wn.App. 848, 851, 664 P.2d 12 (1983).....	9
<i>State v. Keend</i> , 140 Wn.App. 858, 166 P.3d 1268 (2007) .....	10
<i>State v. Little</i> , 116 Wn.2d 488, 806 P.2d 749 (1991) .....	6

<i>State v. McKague</i> , 159 Wn.App. 489, 146 P.3d 558 (2011) <i>aff'd</i> . 172 Wn.2d 802, 262 P.3d 1255 (2011) .....	10
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999).....	6
<i>State v. Miles</i> , 77 Wn.2d 593, 464 P.2d 723 (1970).....	12
<i>State v. Moten</i> , 95 Wn.App. 927, 976 P.2d 1286 (1999) .....	13
<i>State v. Niedergang</i> , 43 Wn.App. 656, 719 P.2d 576 (1968) .....	8
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	6
<i>State v. Souza</i> , 60 Wn.App. 534, 805 P.2d 237 (1991).....	9
<i>State v. Teal</i> , 152 Wn.2d 333, 96 P.3d 974 (2004) .....	5
<i>State v. Tunney</i> , 129 Wn.2d 336, 917 P.2d 95 (1996) .....	10
<i>State v. Tyler</i> , 138 Wn.App. 120, 155 P.3d 1002 (2007) .....	11
<i>State v. Vickers</i> , 148 Wn.2d 91, 116, 59 P.3d 58 (2002) .....	6

***U.S. Supreme Court Cases***

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

RCW 10.01.160(1) .....	13
RCW 10.46.190 .....	13
RCW 10.61.006, .010 .....	11
RCW 36.18.016(3)(b).....	13
RCW 9.94B.040.....	14
RCW 9A.08.010(d) .....	11

RCW 9A.36.021(1)(a) ..... 10

RCW 9A.36.031(1)(f)..... 11

*Rules*

CrR 7.8(a)..... 13

RAP 12.2..... 11

I. Assignments of Error

- A. The court erred when it entered Finding of Fact 25: “The photos of the scene show that the cup of lemonade referred to by Ms. Ponce was not empty.” (CP 51).
- B. The court erred when it entered Finding of Fact 26: “The defendant would have shoved Ms. Ponce with sufficient force to cause her to have a significant laceration on her head.” (CP 51).
- C. The court erred when it entered Finding of Fact 27: “The defendant shoved Ms. Ponce intentionally. The intentional act recklessly inflicted substantial bodily harm.” (CP 51).
- D. The court erred when it entered Conclusion of Law 1: “The defendant intentionally assaulted Tonya Ponce and thereby recklessly caused her substantial bodily harm.” (CP 52).
- E. The court must correct an error on the judgment and sentence form that indicates an exceptional sentence was imposed, when the court did not impose one. (CP 27-28).
- F. The trial court should reverse the imposed jury demand fee of \$250 as defense counsel acknowledged on the record that it was his error and he would pay the fee. (CP 37).

## Issues Related To Assignments Of Error

1. Was the evidence sufficient to sustain a conviction for second-degree assault where the facts did not support the element of recklessness? (Assignment of Error A,B,C).
2. Must the trial court correct the judgment and sentence, which indicates that the court was imposing an exceptional sentence, when the court did not impose an exceptional sentence?
3. Must the trial court reverse the imposed jury demand fee when defense counsel and the court agreed that counsel would pay the fee?

## II. Statement of Facts

Christopher Jones was charged by information with one count of assault second degree - domestic violence, one count of failure to register, and one count of bail jumping on March 12, 2012. CP1-2.

Although the State completed a Subpoena for Jury Trial on April 27, on the day of trial, May 7, 2012, Mr. Jones waived his right to a jury. Defense counsel told the court that because he had neglected to discuss the issue of a jury trial with Mr. Jones at an earlier date, counsel would pay any future imposed cost of a jury trial fee. CP 16;20-21; Vol. 2RP 22.<sup>1</sup>

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<sup>1</sup> For purposes of this brief, the hearing dates of March 14, 2012 and April 26, 2012, will be referenced as Vol. 1 RP page no.; the hearing dates of May 7 and 9,

On March 7, 2012, Christopher Jones spent the day with his fiancée, Tonya Ponce. Vol. 2RP 172. That evening they attended a party and drank alcohol. Exh. 31. They left around 11 p.m. Vol. 3RP 199. When they arrived back at Ms. Ponce's apartment, she took her prescription medications: amitriptyline, oxycodone, soma, xanax, cymbalta and ambient, and retired for the night. Mr. Jones returned to the party alone. Vol. 3RP 172;201.

Early the next morning, Mr. Jones went back to Ms. Ponce's apartment. She was lying in the bed. Vol. 3RP 202. Ms. Ponce questioned him about his return to the party and his behavior. Vol. 3RP 204,205. She got up out of the bed and went into the kitchen. When she walked back into the bedroom, she carried a cup of liquid. Vol. 3RP 204-05. Ms. Ponce did not remember how it happened, but she fell. She hit her head, resulting in a 4cm laceration to her scalp, and a fractured left ulna. Vol. 2RP 44; Vol. 3RP 174. Ms. Ponce testified that she was "out of it". She vaguely remembered Mr. Jones tried to help her up and wanted to take her to the hospital. She resisted his assistance. Vol. 3RP 176-77.

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and the afternoon of May 8, will be referenced as Vol. 2 RP page no; the hearing date of the morning of May 8 will be referenced as Vol. 3 RP page no.

George Canada, a neighbor, heard Ms. Ponce “crying and asking for help, I’m bleeding. Someone help me.” Vol. 3RP 133. Mr. Canada called 911. (Exh. 41).

Officers were dispatched to the apartment complex around 6 a.m. Vol. 3RP 93. They later described Ms. Ponce as “crying, dazed, confused” and “unsteady”. She told officers that she did not know what happened to her. Vol 3RP 97, 100, 114. As Mr. Jones walked away from the apartment an officer stopped him, and later reported that he said, “Yeah, I did it” and to “take him to jail.” Vol. 2RP 117. In a recorded interview, Mr. Jones explained that he never intended to hurt Ms. Ponce, but rather, she threw lemonade at him, and believing that she was going to come at him, he shoved her with his foot. (Exh. 31). Mr. Jones testified officers told him they saw where the lemonade had run down the bedroom wall. Vol. 3RP 213.

Ms. Ponce arrived at the emergency room shortly before 7 a.m. that morning. Vol. 2RP 43. The ER doctor testified that the side effects of the drugs Ms. Ponce had ingested could cause balance issues. He further testified that she did not tell him how her injuries occurred. Vol. 2RP 59, 61. He agreed the fracture could have resulted from a fall onto an object rather than some type of defensive wound. Vol. 2RP 60.

Defense counsel requested the court to consider the lesser-included offense of assault third-degree; however, after a bench trial, Mr. Jones was convicted of assault second-degree domestic violence, and bail jumping. CP 26. The Felony Judgment and Sentence indicates that an exceptional sentence was imposed: however, the court imposed concurrent sentences within the standard range. CP 27,30. The court also imposed a jury demand fee of \$250. This appeal followed. CP 39.

### III. Argument

#### A. The Evidence Was Insufficient To Sustain A Conviction For Assault-Second Degree.

Mr. Jones' right to due process under Washington Constitution, Article 1, §3 and United States Constitution, Fourteenth Amendment, was violated where the State failed to prove beyond a reasonable doubt that Mr. Jones recklessly inflicted substantial bodily harm on another. *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, 25 L.Ed.2d 368 (1970). The State bears the burden of proving all elements of a crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004).

In a challenge the sufficiency of the evidence, the reviewing court views the evidence in a light most favorable to the prosecution and determines whether any rational trier of fact could have found the

elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences are drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The same standard applies regardless of whether the case is tried to a jury or to the court. *See State v. Little*, 116 Wn.2d 488, 491, 806 P.2d 749 (1991).

On appeal, the Court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Conclusions of law are reviewed *de novo*. *Spokane County v. City of Spokane*, 148 Wn.App. 120, 124, 197 P.3d 1228 (2009).

Here, the court's findings are not based on substantial evidence as to the element of recklessness. Nor do the findings support the legal conclusion that Mr. Jones recklessly inflicted substantial bodily harm on Ms. Ponce.

1. Finding Of Fact 25 Is Not Supported By Substantial Evidence.

The court found that “photos of the scene show that the cup of lemonade referred to by Ms. Ponce was not empty.” Although Ms. Ponce had no recollection of preparing or throwing the lemonade, there was a cup of lemonade on the bed table. At trial, the State pointed out that the cup was full, and therefore, she must not have thrown it at Mr. Jones. However, Mr. Jones reported to officers *immediately* after the incident that she had thrown lemonade on him as he lay on the bed and later testified that officers saw where the liquid landed and ran down the wall.

Substantial evidence does not support the court’s finding on this issue. Factual findings are erroneous if not supported by substantial evidence. An appellate court will reverse such findings under the clearly erroneous standard. *State v. Grewe*, 117 Wn.2d 211, 218, 813 P.2d 1238 (1991).

2. Finding Of Fact 26 Is Not Supported By Substantial Evidence.

In making finding of fact 26, the court found: “The defendant would have shoved Ms. Ponce with sufficient force to cause her to have a significant laceration on her head.” The State presented no evidence where or even if Mr. Jones’ foot struck Ms. Ponce. More specifically, it did not present evidence as to the degree of force, if any, that was used. In fact, the evidence was that Ms. Ponce had been drinking vodka the evening before, taken numerous prescription medications before going to

bed, and was unsteady on her feet the next morning. She was later described as dazed, confused, and unable to recall what caused her injuries. Substantial evidence does not support a finding that Mr. Jones shoved her with “sufficient force” to cause a cut to her scalp.

3. Finding Of Fact 27 Is Mislabeled As A Finding Rather Than A Conclusion Of Law.

The court entered finding of fact 27: “The defendant shoved Ms. Ponce intentionally. The intentional act recklessly inflicted substantial bodily harm.” Findings of fact are determinations of whether the evidence shows that something occurred or existed. *Moulden&Sons,Inc. v. Osaka Lanscaping & Nursery, Inc.*, 21 Wn. App. 194, 197, 584 P.2d 968 (1978). Conclusions of law are determinations made by a process of legal reasoning from facts in evidence. *State v. Niedergang*, 43 Wn.App. 656, 658-59, 719 P.2d 576 (1968). Where a conclusion of law is mislabeled as a finding of fact, the appellate court treats it as a conclusion of law, and the review is *de novo*. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006); *Casterline v. Roberts*, 168 Wn.App. 376, 382, 284 P.3d 743 (2012).

Here, the only finding of fact was that Mr. Jones “shoved” Ms. Ponce. The court made no findings of fact for recklessness, but rather, entered a conclusion of law. Generally, where the trial court fails to enter

a finding as to an element of the crime charged, vacation and remand is the appropriate remedy. *State v. Jones*, 34 Wn.App. 848, 851, 664 P.2d 12 (1983). However, if the record is devoid of any evidence to support the omitted finding, then reversal is appropriate, because to allow either party the opportunity to present additional evidence would violate the double jeopardy clause. *State v. Souza*, 60 Wn.App. 534, 541, 805 P.2d 237 (1991). The record here does not contain a proper finding of fact and furthermore, is devoid of any evidence to support a finding on which to base a conclusion of recklessness; which requires both an objective and subjective component of knowledge of a substantial risk and disregard of it. *State v. Graham*, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005). The appropriate remedy in this case is reversal.

4. The Court Erred When It Entered Conclusion Of Law 1: “The defendant intentionally assaulted Tonya Ponce and thereby recklessly caused her substantial bodily harm.”

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 220-21. Even viewed in this manner, the State’s evidence here fell short and the court made no relevant findings of fact for the legal conclusion of recklessness.

RCW 9A.36.021(1)(a) provides: “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: ... Intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” Under Washington law, intentionality and recklessness are two discrete mental elements. *State v. McKague*, 159 Wn.App. 489, 501, 146 P.3d 558 (2011) *aff’d*. 172 Wn.2d 802, 262 P.3d 1255 (2011). The mens rea of intentionality relates to the act of assault, and the mens rea of recklessness relates to the result, that is, substantial bodily harm. *State v. Esters*, 84 Wn.App. 180, 185, 927 P.2d 1140 (1996), (rev. denied, 131 Wn.2d 1024 (1997)); see also *State v. Keend*, 140 Wn.App. 858, 866-67, 166 P.3d 1268 (2007); *State v. Tunney*, 129 Wn.2d 336, 341, 917 P.2d 95 (1996).

As stated above, there was no evidence presented that Mr. Jones knew there was a substantial risk that Ms. Ponce would suffer substantial bodily harm, or that he disregarded such a risk. In fact, in an interview with officers, Mr. Jones stated that he never even intended to hurt her, much less know there was a substantial risk of substantial harm. (Exh. 31). The evidence is insufficient to show that Mr. Jones was reckless, and the trial court’s findings of fact do not support its conclusion of law, that Mr. Jones committed second-degree assault.

5. This Court Has The Authority To Remand For Entry Of Judgment And Sentence On A Lesser Degree Offense.

A reviewing court may reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and the interest of justice may require. RAP 12.2. Where the evidence is insufficient to convict of the charged crime, but sufficient to support conviction of a lesser degree crime, an appellate court may remand for entry of judgment and sentence on the lesser degree. *State v. Atterton*, 81 Wn.App. 470, 473, 915 P.2d 535 (1996); See also RCW 10.61.006, .010.

A person commits third degree assault if he, under circumstances not amounting to assault in the first or second degree, with criminal *negligence*, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031(1)(f). Negligence in this context means fails to be aware of a substantial risk that substantial bodily harm may occur and that failure of awareness constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation. RCW 9A.08.010(d). Assault in the fourth degree is committed when a person intentionally touches or strikes another person in a way “that is harmful or offensive, regardless of whether it results in physical injury.” *State v. Tyler*, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007). Here, the trial court

was also the trier of fact, and necessarily found that Mr. Jones committed either third or fourth degree assault. Each of the elements for third degree and fourth degree assault are necessary elements of the second-degree assault.

It was undisputed that Mr. Jones assaulted Ms. Ponce when he intentionally shoved or kicked her with his foot. However, no evidence as to the element of recklessness was offered, nor proven beyond a reasonable doubt. The evidence in this case supports the inference that Mr. Jones committed a lesser crime. *See State v. Berlin*, 133 Wn.2d 541, 545-46, 947 P.2d 700 (1997). Ms. Ponce's physical unsteadiness on that morning may raise the offense to the mental state of negligence, failure to be aware of the substantial risk of substantial injury. Or, alternatively, this Court may find that while the touching was intentional, the *mens rea* did not even amount to the mental state of negligence. This Court may remand for entry of a lesser-included offense of third or fourth degree assault. *See State v. Miles*, 77 Wn.2d 593, 604, 464 P.2d 723 (1970) (On review of bench trial, assault in the second degree was reduced to assault in the third degree); *State v. Garcia*, 146 Wn.App. 821, 829-30, 193 P.3d 181 (2008) (On review of bench trial, one count of third degree assault reduced to one count of fourth degree assault).

B. The Trial Court Must Correct The Judgment And Sentence.

The judgment and sentence prepared by the State and entered by the court contained an error. At the sentencing hearing, despite no prior notice, the state proposed the court impose an exceptional sentence of consecutive sentences for the assault and the bail jumping convictions. The court instead, imposed a standard range sentence, to run concurrently. Vol. 3RP 252. However, the judgment and sentence that was entered retains the checked “exceptional sentence” box.

Under CrR 7.8(a), clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time. The remedy is to remand to the trial court for correction of the error. *State v. Cross*, 156 Wn.App. 568, 589 n. 13, 234 P.3d 288 (2010); *State v. Moten*, 95 Wn.App. 927, 929, 976 P.2d 1286 (1999). Mr. Jones respectfully asks this Court to remand for correction of the error.

C. The Imposed Jury Demand Fee Should Be Reversed And The Fee Assigned To Defense Counsel.

RCW 10.01.160(1) permits a trial court to impose costs following a defendant’s conviction. While such costs cannot include expenses inherent in providing a constitutionally guaranteed jury trial...” the court is authorized to impose a jury demand fee of up to \$250 for a 12-person jury. *State v. Hathway*, 161 Wn. App. 634, 651-52, 251 P.3d 253 (2011); RCW 10.46.190; RCW 36.18.016(3)(b).

After finding Mr. Jones guilty, the court imposed court costs, including a \$250 jury demand fee. (CP 37). The obligation to pay legal financial obligations is a sentencing condition, and failure to comply without showing good cause may subject Mr. Jones to punishment in the future. RCW 9.94B.040. Here, at the outset of the trial, defense counsel took responsibility for the jury demand fee on the record. At that time, the court agreed that defense counsel could pay the fee out of his own pocket. Mr. Jones respectfully asks this Court to remand to the trial court and have the jury demand fee stricken from the judgment and sentence.

#### IV. Conclusion

Based on the foregoing facts and authorities, Mr. Jones respectfully requests that his conviction for assault second-degree be dismissed with prejudice; or in the alternative, that this Court remand for entry of judgment on a lesser included offense of assault.

Dated this 14<sup>th</sup> day of January 2013.

Respectfully submitted,

s/ Marie J. Trombley  
WSBA 41410  
PO Box 829  
Graham, WA 98338  
509-939-3038  
Fax: 253-268-0477  
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Christopher L. Jones, do hereby certify under penalty of perjury of the laws of the United States and the State of Washington, that on January 14, 2013, I sent a true and correct copy of appellant's brief by first-class mail, postage prepaid, to Christopher L. Jones, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326; and by email per agreement between the parties to: Andrew K. Miller, Benton County Prosecutor, at [prosecuting@co.benton.wa.us](mailto:prosecuting@co.benton.wa.us).

s/Marie Trombley

WSBA 41410  
Attorney for Appellant  
PO Box 829  
Graham, WA 98338  
509-939-3038  
Fax: 253-268-0477  
[marietrombley@comcast.net](mailto:marietrombley@comcast.net)