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Court of Appeals  
Division III  
State of Washington

32546-6-III

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SIMEON J. JIM, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY

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APPELLANT'S BRIEF

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**STATUTES**

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A. ASSIGNMENT OF ERROR

1. The Deputy Prosecutor violated due process by misrepresenting the law as to the specific intent required to prove second degree assault.

B. ISSUE

2. There was evidence from which a jury could find that the defendant was not aware of facts that gave rise to substantial risk that the assaultive act would result in substantial bodily harm. Did the prosecutor misrepresent the law when he argued to the jury that evidence of the fact of the assault and admission that the assault resulted in substantial bodily harm was sufficient to establish the elements of second degree assault?

C. FACTS

Guadalupe and Elizabeth Capetillo have been married since June of 1980. (RP 55-56) Elizabeth is Native American and her husband is not. (RP 72-73) Although many of the facts in this case are disputed, there is evidence that because of the differences in the Capetillos' ethnic

background there was some hostility between some members of their respective families. (RP 73-74)

Although Simeon Jim is the son of Elizabeth Capetillo's cousin, he had seen almost nothing of the Capitellos since he was in high school. (RP 63-64, 456) He had returned to Yakima in the spring of 2013 after four years in the Marines, including substantial service in battle zones. (RP 454-55) He spent time with his family, including Elizabeth Capetillo's nephew Jordan Yazzie. (RP 467) Jordan's mother is Elizabeth's sister. (RP 125)

Jordan and Simeon had spent the evening of April 9 drinking an alcoholic beverage called Twisted Tea and hanging out with Jordan's ex-girlfriend. (RP 237-38, 241, 455) Eventually she kicked Jordan out and Simeon left with him. (RP 241, 456) Needing someplace to stay for the rest of the night, Jordan suggested they go to the home of his auntie Elizabeth. (RP 456)

They walked about a mile to the Capetillo residence. (RP 241) When they got there, Simeon sat on the steps while Jordan began banging on the kitchen door. (RP 245, 458-58) Guadalupe, who was about to get up and go to work, was annoyed by the visit at such an untimely hour. (RP 140-41) His annoyance was exacerbated by a history of Elizabeth's relatives, including Jordan, arriving in the middle of the night asking for

rides or money. (RP 65, 126-28, 141-43) He also believed he heard Jordan make a racial slur about him. (RP 147) He went to the door and told the young men to leave. (RP 145-46)

A fairly hostile verbal and physically threatening exchange ensued. (RP 150- 53, 199-208, 245-46) Simeon had only been to the Capetillos' home on one occasion, many years earlier, and was unaware of the nature of the relationship between Jordan, Jordan's family, and Guadalupe. (RP 142, 456-58, 469) As the exchange between Jordan and Guadalupe became heated, Simeon believed his friend was being threatened and attempted to come to his rescue. (RP 246, 463) He struck Guadalupe, who fell on the gravel driveway, had an apparent seizure, and was injured. (RP 97, 153-56, 207-08, 247, 255, 464)

While the dispute was taking place Elizabeth and her daughter had called the police. (RP 140) Simeon was charged with second degree assault. (CP 1)

Prior to this incident, Guadalupe had been diagnosed with a brain tumor. (RP 67) According to Elizabeth the diagnosis was made in October 2012, followed by surgery in 2012, and radiation therapy in February 2013. (RP 67, 70) Following surgery he returned to work, but was given light duty. (RP 132) By January 2013 he had returned to his regular work schedule but continued to suffer from weakness in his left

arm and leg. (RP 71-72, 133-34, 158) Guadalupe doesn't recall the dates of his diagnosis and surgery but remembers that following the radiation therapy he had a seizure. (RP 131-33)

Elizabeth only shared Guadalupe's medical issues with her immediate family. (RP 71) Simeon did not know about Guadalupe's disability. (RP 142, 467) Simeon stipulated that Guadalupe had sustained substantial bodily harm. (RP 11-12)

Simeon testified, and during recross examination the following exchange occurred:

Q. And when you hit or punched with your closed fist Guadalupe, you wanted to hit him isn't that correct?

A. Yes.

Q. Okay. You intended to hit him, is that correct?

A. Yes.

Q. Okay. It wasn't something by accident is that correct?

A. No.

Q. Okay. So it was an intentional -- you intentionally punched him?

A. Yes.

(RP 481-82)

The State objected to the jury instruction on the lesser offense of third degree assault because Simeon had admitted to intentionally assaulting the victim and had stipulated to the resulting substantial bodily harm. (RP 484) The court explained to the prosecutor that the mental

state as to the result of an act is not necessarily the same as the mental state as to the act itself:

Okay. So you can have an intentional assault with somebody either being reckless about what the result will be or criminally negligent with regard to what the result would be or not actually intend harm.

(RP 484-85) The deputy prosecutor told the court that he disagreed with this analysis. (RP 485)

The court instructed the jury on the elements of second degree assault:

A person commits the crime of second degree assault when he assaults another and thereby recklessly inflicts substantial bodily harm. An assault is an intentional touching or striking of another person with unlawful force that is harmful or offensive.

A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive. Substantial bodily harm means bodily harm that involves a temporary but substantial disfigurement or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ or that causes a fracture of any bodily part.

Bodily harm means physical pain or injury, illness or an impairment of physical condition.

(RP 495-96)

To convict the defendant of the crime of the crime of second degree assault, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1.) That on or about April 10, 2013, the defendant assaulted Guadalupe Capetillo;
- (2.) That the defendant thereby recklessly inflicted substantial bodily harm on Guadalupe Capetillo; and

(3.) That this act occurred in the State of Washington.

(RP 497)

The court also instructed the jury as to the mental states relating to the various degrees of assault:

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

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

When recklessness as to a particular result is required to establish an element of a crime the element is also established if a person acts intentionally *as to that result*.

(RP 496) (*emphasis added*)

During closing argument, the deputy prosecutor told the jury that since overwhelming evidence showed the defendant had admitted to intentionally striking the victim and stipulated to the resulting substantial bodily harm, the elements of second degree assault had been proven beyond reasonable doubt. (RP 529) He went on to explain the meaning of the four mental states recognized in the law:

But with regards to mens rea there are four of them in order: intent, which is the highest one which is the purpose or objective; knowing, which is knowing or should have known; reckless, knows and disregards substantial risk that some -- a wrongful act may occur; and negligent, which is -  
- I call it sometimes when somebody act -- it's an accidental thing.

(RP 530) The prosecutor then argued that the defendant could not be convicted of third degree assault because he had admitted to acting with intent which proved he acted with a more serious mental state than criminal negligence. (RP 530)

#### D. ARGUMENT

1. THE STATE’S CLOSING ARGUMENT MISSTATED THE LAW AND INTENTIONALLY MISLED THE JURY.

The two elements of second degree assault are defined by statute: A person commits assault in the second degree if he or she “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.” RCW 9A.36.021(1)(a). Evidence of intent as to the assaultive act does not prove the mental state of recklessness as to the resulting bodily injury. *State v. Keend*, 140 Wn. App. 858, 866, 166 P.3d 1268 (2007).

This crime is defined by an act (assault) and a result (substantial bodily harm). *See, e.g., State v. Tunney*, 129 Wash.2d 336, 341, 917 P.2d 95 (1996). And the mens rea of intentionally relates to the act (assault), while the mens rea of recklessly relates to the result (substantial bodily harm).

*Id.*

Despite the court’s effort to clarify the law, the prosecutor’s closing argument blurred a significant distinction between requisite mental

states as to the act and as to the result. The prosecutor assured the jury that evidence of the intentional act of assault coupled with the resulting substantial injury was sufficient to prove all the elements of second degree assault beyond a reasonable doubt. The requirement of recklessness was deliberately omitted.

This argument reflected, and conveyed to the jury, the prosecutor's disagreement with the law and his contention that proof of an intentional assault necessarily establishes the element of recklessness as to the resulting injury. The argument misled the jury as to an essential aspect of the relevant law. And in case the jury did not understand the argument, the prosecutor went on to tell the jury that, since intent to assault necessarily includes the mental state of negligence required to prove third degree negligence, it must necessarily include the recklessness required to prove second degree assault.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudiced the defendant's right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is demonstrated where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

A prosecutor's argument must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). A prosecutor's misstatement of the law can be a serious irregularity having the grave potential to mislead the jury. *See State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). The prosecutor's remarks during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

When the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wash.App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wash.2d 757, 764, 675 P.2d 1213 (1984).

*State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011), *as amended* (Nov. 18, 2011), *review granted, cause remanded*, 175 Wn.2d 1022, 295 P.3d 728 (2012).

Here, the prosecutor's argument was contrary to the law and to the court's instructions requiring proof that the defendant recklessly inflicted bodily harm and stating that recklessness as to a particular result is

established by proof of intent only when the person acts with intent “as to that result.” (RP 496)

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

(RP 496) Whether Simeon possessed the requisite mental state as to the result of substantial bodily injury was the primary issue of fact for the jury to decide. In order to prove that Simeon acted recklessly, the State had to prove that Simeon knew that there was a substantial risk that in striking Guadalupe he might inflict substantial bodily harm.

There was evidence from which a jury could find that the extent of Guadalupe’s injuries may have been caused in part by his preexisting health problems. There was evidence from which a jury could find that Simeon was unaware of Guadalupe’s disabilities. And there was evidence from which a jury could find that Simeon struck Guadalupe only once, that Guadalupe fell to the ground because of the pre-existing weakness of his leg, and that his injuries were cause by striking his head on the gravel when he fell.

By telling the jury that despite the instructions given by the court, evidence of intentional assault and resulting serious injury was sufficient to establish all the elements of the offense, the prosecutor told the jury that

resolving the factual issue of whether Simeon acted recklessly was not necessary in order to reach a guilty verdict.

E. CONCLUSION

The prosecutor's closing statements misled the jury as to the law governing an essential element of the offense, and jury may have failed to make any finding as to the essential mens rea for second degree assault. This matter should be remanded for retrial.

Dated this 1st day of December, 2014.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 32546-6-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
SIMEON J. JIM,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on December 1, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

David Trefry  
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I certify under penalty of perjury under the laws of the State of Washington that on December 1, 2014, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on December 1, 2014.

  
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