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Supreme Court No. (to be set)  
Court of Appeals No. 33240-0-II

**IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,  
Respondent,  
vs.  
**A.C.**  
Appellant/Petitioner

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Clallam County Superior Court  
Cause No. 04-8-00333-9  
The Honorable Judge George L. Wood  
**PETITION FOR REVIEW**

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**I. IDENTITY OF PETITIONER**

Petitioner A.C., the appellant below, asks this Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

**II. COURT OF APPEALS DECISION**

A.C. seeks review of the Court of Appeals opinion entered on August 22, 2006. A copy of the opinion is attached.

**III. ISSUES PRESENTED FOR REVIEW**

Fourteen-year-old A.C. was charged with First Degree Robbery, Assault in the Second Degree, Unlawful Possession of a Firearm in the Second Degree, Taking a Motor Vehicle Without Permission in the Second Degree, and three counts of Attempted Murder in the First Degree. Because of the seriousness of his charges, he was ineligible for all of the rehabilitative programs ordinarily available through the juvenile system. By statute, he was tried by a judge sitting without a jury.

**ISSUE 1:** Does a juvenile charged with a serious offense have the right to a jury trial under the Washington State Constitution, even if other juveniles do not?

The Washington legislature has criminalized assault, but has not defined the elements of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

**ISSUE 2:** Does the legislature's failure to define assault (and the judiciary's development of the core meaning of that crime) violate the constitutional separation of powers?

#### **IV. STATEMENT OF THE CASE**

On October 30, 2004, 14-year-old A.C. painted his face black, took a gun and van from his home, and drove around Clallam County; he was eventually chased by law enforcement and arrested after an accident in Kitsap County. RP (3-7-05) 19, 53-57, 100-104, 121-123, 137. He had previously told family members and two friends of his dislike for three coaches, and had told the friends that he planned to kill these coaches. RP (3-7-05) 10-15; RP (3-8-05) 18-25, 34.

A.C. was charged in Clallam County Juvenile Court with three counts of Attempted Murder, Taking a Motor Vehicle Without Owner's Permission in the Second Degree, Assault in the Second Degree with a Firearm Enhancement, Robbery in the First Degree with a Firearm Enhancement, and Unlawful Possession of a Firearm in the Second Degree. CP 16-18.

The juvenile court retained jurisdiction over the case, and A.C. was tried before a judge sitting without a jury. CP 7.

The court found A.C. guilty on all counts. He was found to have no criminal history, and was sentenced on June 15, 2005. CP 7-15. He

appealed, and the Court of Appeals affirmed his conviction in a part-published opinion dated August 22, 2006.

**V. THE SUPREME COURT SHOULD ACCEPT REVIEW OF THIS CASE BECAUSE IT INVOLVES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL LAW THAT ARE OF SUBSTANTIAL PUBLIC INTEREST. RAP 13.4(B)(3), RAP 13.4(B)(4).**

- A. The prohibition against jury trials for juveniles charged with serious offenses violates Article I, Section 21 and Article I, Section 22 of the Washington State Constitution.

Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right. *State v. Hobble*, 126 Wn.2d 283, 298-99, 892 P.2d 85 (1995); *City of Pasco v. Mace*, 98 Wn.2d 87, 97, 653 P.2d 618 (1982).

Washington State Constitutional provisions are analyzed with reference to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986). Absent controlling precedent, a party asserting that the state constitution provides more protection than the federal constitution must analyze the issue under *Gunwall*. *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999). Since this issue does not

fall squarely within any controlling precedent, the *Gunwall* factors must be examined. Analysis under *Gunwall* supports an independent application of Wash. Const. Article I, Sections 21 and 22 to this case and mandates reversal of the conviction.

1. The language of the state constitution requires jury trials for juveniles charged with serious offenses.

The first *Gunwall* factor requires examination of the text of the state constitutional provisions at issue. Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury *shall remain inviolate...*” *emphasis added*. “The term ‘inviolable’ connotes deserving of the highest protection... For [the right to a jury trial] to remain inviolate, it must not diminish over time.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989). Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” The direct and mandatory language (“shall have the right”) implies a high level of protection, and the provisions reference to “criminal prosecutions” does not distinguish between adult and juvenile prosecutions.

Thus juveniles who are “accused” in “criminal prosecutions...shall have the right to. . . trial by an impartial jury” (under the plain language of Article I, Section 22), and a juvenile’s right to a jury trial as it existed in

1889 “must not diminish over time,” *Sofie v. Fibreboard Corp.*, at 656.

The current statutory scheme, requiring bench trials in juvenile court, even for juveniles charged with serious offenses, directly violates both provisions of the constitution. *Gunwall* factor one favors an independent application of these provisions.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions favor an independent application of the state constitution in this case.

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21, which declares “[t]he right of trial by jury shall remain inviolate . . . .” has no federal counterpart. The Washington Supreme Court in *Pasco v. Mace, supra*, found the difference between the two constitutions significant, and determined that the state constitution provides broader protection. The court held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” This is in contrast to the more limited protections available under the federal constitution. *Pasco v. Mace*, at 99-100. This difference in language between also favors an independent application of the state constitution.

3. State constitutional history, state common law history, and pre-existing state law require jury trials for juveniles charged with serious offenses.

Under the third and fourth *Gunwall* factors this Court must look to state common law history, state constitutional history, and other pre-existing state law.

Wash. Const. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, *supra*, at 96. *See also State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987); *State v. Hobble*, *supra*; *State v. Smith*, 150 Wn.2d 135 at 151, 75 P.3d 934 (2003). In 1889, juveniles in Washington were entitled to trial by jury. Code of 1881, ch. 87, Section 1078.

A separate juvenile court developed in 1905; however, juveniles retained the right to a jury trial until 1937. Laws of 1905, Ch. 18, Section 2; Laws of 1937, Chapter 65, Section 1. Cases analyzing the constitutionality of the juvenile system have weighed the extent to which juvenile court differs from adult court. In essence, nonjury trials have been permitted because juveniles were not convicted of crimes.

In *Estes v. Hopp*, 73 Wn.2d 263, 268, 438 P.2d 205 (1968), the Washington Supreme Court described the juvenile system as rehabilitative and nonadversarial, and noted that a primary benefit was the system’s private and informal character. *Estes v. Hopp* at 268. In *State v. Lawley*, 91 Wn.2d

654, 591 P.2d 772 (1977), the Supreme Court noted a shift from rehabilitation toward punishment, and warned that jury trials would be required once “juvenile proceedings [became] akin to an adult criminal prosecution.” *Lawley* at 656. In *State v. Schaaf, supra*, the Court examined amendments to the act and concluded that “Juvenile proceedings remain rehabilitative in nature and distinguishable from adult criminal prosecutions.” *Schaaf*, 109 Wn.2d at 4. In *Monroe v. Soliz*, 132 Wn.2d 414, 939 P.2d 205 (1997), the Court again suggested that juveniles would be entitled to a jury trial once juvenile proceedings “substantively” resembled adult criminal trials or when juveniles were “encumbered with the far more onerous ramifications of... adult conviction.” *Monroe v. Soliz, supra*, at 427.

The Court of Appeals has reexamined the issue and reached the same conclusions, relying on the reasoning of *Schaaf* and *Monroe v. Soliz*. See, e.g., *State v. Tai N., supra*; *State v. J.H.*, 96 Wn.App. 167, 978 P.2d 1121 (1999); *State v. Meade*, 129 Wn. App. 918, 120 P.3d 975 (2005).

Significant changes have occurred in Washington’s system since the Supreme Court last examined the issue. Amendments to the statutes and new court decisions have eliminated many of the distinctions between the juvenile system and the adult criminal system. The emphasis has shifted from rehabilitation to punishment, and the conditions referenced in

*Lawley* and *Soliz* have come into play. The present incarnation of the juvenile system resembles the adult system, just as it did when the constitution was adopted in 1889.

First, under RCW 13.04.011(1), a juvenile “[a]djudication’ has the same meaning as ‘conviction’ in RCW 9.94A.030, and the terms must be construed identically and used interchangeably.” Because of this, a former distinguishing benefit of the juvenile system has vanished. The distinction is not merely linguistic: it is permissible to deny jury trials only if juvenile proceedings are civil rather than criminal. The *Schaaf* court believed the distinction to be vital. *Schaaf* at 7-8.

Second, amendments to the Juvenile Justice Act have lengthened the minimum period of JRA commitment, added a “clearly too lenient” aggravating factor, and eliminated flexibility in imposing restitution. *See* RCW 13.40.

Third, the goals of the juvenile system and the adult system have converged, and now both systems strike a similar balance between punishment and rehabilitation. Every rehabilitative aspect of the juvenile system has an adult counterpart. For example, juvenile sex offenders may be eligible for SSODA; adult sex offenders may be eligible for SSOSA. Both programs favor treatment over incarceration. *Compare* RCW 13.40.160(3) with RCW 9.94A.670. Similarly, juveniles with drug

problems may be eligible for treatment under the CDDA program (RCW 13.40.0357 and RCW 13.40.165) while their adult counterparts may be eligible for treatment under DOSA (RCW 9.94A.660) or, where available, under Drug Court (RCW 2.28.170). Juvenile offenders can be eligible for diversion (RCW 13.40.070) or deferred disposition (RCW 13.40.127), while adult offenders can go through local prefiling diversion programs (if charged with felonies)<sup>1</sup> or can resolve misdemeanors through “Agreed Orders of Continuance,” deferred sentences (RCW 35.50.255, RCW 3.66.068, RCW 3.50.330), and deferred prosecutions (RCW 10.05).

Fourth, juveniles adjudicated in the juvenile system are increasingly housed in adult prison. Provisions have been added to RCW 13.40.280 easing the transfer process when assaults on staff or other youth are alleged—the burden now shifts to the juvenile to show he or she should *not* be transferred to adult prison. RCW 13.40.280(4). Thus a juvenile can be incarcerated in adult prison until the age of 21, without benefit of a jury trial.

Fifth, confidentiality and privacy have disappeared from juvenile proceedings, and juvenile offenders are now stigmatized in the same

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<sup>1</sup> Although not created by statute, such programs are clearly contemplated. See RCW 9.94A.411.

manner as adults. Proceedings and records are open to the public (RCW 13.40.140(6); RCW 13.50.050(2)); furthermore, juvenile records can generally not be destroyed,<sup>2</sup> and can only be sealed under circumstances equivalent to SRA provisions allowing adult felonies to be vacated. RCW 13.50.050; RCW 9.94A.640. Juvenile conviction records can be disseminated without restriction, RCW 10.97.050, and listed on background checks under RCW 43.43.830(4). Juveniles convicted of Class A sex offenses must generally register as sex offenders for life, juveniles convicted of Class B sex offenses must generally register for at least 15 years, and juveniles convicted of Class C sex offenses must generally register for at least 10 years.<sup>3</sup> RCW 9A.44.130; RCW 9A.44.140. The current scheme also requires community and school notification whenever juveniles convicted of stalking, sex offenses, or violent offenses leave JRA custody. RCW 13.40.215.

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<sup>2</sup> The sole exception is where the entire criminal record consists of only one referral for diversion. RCW 13.50.050.

<sup>3</sup> There are three exceptions to these rules: First, adults and juveniles who stay out of trouble for ten years may petition for relief of the registration requirement. Second, juveniles who were 15 or older at the time of the offense may petition for relief, which will be granted "only if the petitioner shows, with clear and convincing evidence, that future registration of the petitioner will not serve the purposes of" the registration statute. RCW 9A.44.140. Juveniles who were under age 15 may petition and be granted relief if they haven't been adjudicated of any additional sex or kidnapping offenses within the 24 months following the conviction and can prove by a preponderance of the evidence that future registration will not serve the purposes of the registration statute. RCW 9A.44.140.

Sixth, the juvenile courts invade a juvenile offender's privacy by collecting personal data, including fingerprints, DNA, and blood for HIV testing. RCW 70.24.340 and RCW 43.43.754.

Seventh, Juvenile convictions play a significant role in adult sentencing. The SRA's definition of "criminal history" now specifically includes juvenile adjudications and no longer draws any distinction between juvenile and adult convictions. All juvenile adjudications (including misdemeanors) are to be included in an adult's criminal history, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.030(12). In 1997, the Legislature dispensed with special treatment for juvenile felony adjudications in calculation of an adult offender score.<sup>4</sup> Under the current system, all juvenile felonies count in the calculation of the adult offender score, regardless of the age of the juvenile at the time of the offense. RCW 9.94A.525. Juvenile convictions "wash out" of the offender score in the same manner as adult offenses. RCW 9.94A.525. Multiple prior juvenile convictions are now scored under the "same criminal conduct" analysis used to weigh multiple adult prior convictions, rather than the more lenient method previously in effect. RCW 9.94A.525. Furthermore,

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<sup>4</sup> The only exceptions are for nonviolent offenses and for drug convictions scored against current drug offenses. RCW 9.94A.

serious juvenile traffic convictions and felony traffic offenses enhance a sentence for vehicular homicide and vehicular assault in the same manner as adult convictions. RCW 9.94A.525. Juvenile felony convictions for violent offenses or sex offenses also count as if they were adult convictions, and score as multiple points against other violent or sex offenses. RCW 9.94A.525. Adults with juvenile records are now ineligible for some of the special programs available under the SRA. *See, e.g.*, RCW 9.94A.690(1)(a)(ii) (work ethic camp), RCW 9.94A.660 (DOSAs), RCW 9.94A.650 (First time offender waiver).

Juvenile convictions result in a broader range of collateral consequences than ever before. RCW 9.41.040 now prohibits children convicted of a juvenile felony from possessing a firearm, even under circumstances where other children are allowed to do so. RCW 9.41.042. Felony drug offenses disqualify juveniles for public assistance and food stamps. RCW 74.08.025(4). Juveniles convicted of alcohol or drug offenses lose their driver's licenses for at least one year. RCW 46.20.265.

Furthermore, *Schaaf* and the other cases addressing the issue of juvenile jury trials have all compared the two systems as a whole; they have not focused on the way the juvenile justice system treats the individual defendant in a given case. This is not the correct comparison. Instead, the focus should be on the deprivation of the appellant's

constitutional rights. The appellant's particular circumstances, including the offenses charged, should be compared with the offenses that trigger an adult defendant's constitutional right to a jury trial.<sup>5</sup> It is of little import that some theoretical juvenile charged with minor offenses might have rehabilitative options available; instead, the actual concrete facts of an individual juvenile's case must be evaluated to see if the jury right applies.

Applying this test to the facts of this case, it is clear that A.C. should have been afforded a jury trial. A.C.'s charges made him ineligible for all of the special rehabilitative programs available to other juveniles. Despite the complete absence of any criminal history, he could not participate in Diversion or Youth Court (RCW 13.40.070, RCW 13.40.580 *et seq.*), Deferred Disposition (RCW 13.40.127), the Suspended Disposition Alternative ("Option B," RCW 13.40.0357), the Chemical Dependency Disposition Alternative ("Option C," RCW 13.40.0357, RCW 13.40.160(4), and RCW 13.40.165), the Mental Health Disposition Alternative (RCW 13.40.160(5) and RCW 13.40.167), the Community Commitment Disposition Alternative Pilot Program (now expired, RCW

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<sup>5</sup> The Washington Supreme Court has decided that the right to a jury trial attaches to any offense, no matter how petty, that constitutes a crime rather than an infraction. *Pasco v. Mace*, at 99.

13.40.160(6) and former RCW 13.40.169), or the Juvenile Offender Basic Training Camp program (“boot camp,” RCW 13.40.320).

In the absence of these key rehabilitative options, the juvenile system’s treatment of A.C. did not differ from the adult system’s treatment of adults charged with petty crimes. Indeed, adults charged with misdemeanors and gross misdemeanors have a greater range of rehabilitative options available than A.C., but are still guaranteed jury trials under the state and federal constitutions.

For juveniles charged with serious offenses (such as those involved here), juvenile court is a formal, adversarial system with serious consequences. Refusal to allow juvenile cases to be tried to a jury reflects indifference to individual rights, and is antithetical to our state constitution’s strong jury protections. The framers of our state constitution would not have tolerated this result.

The context in which our state constitution was adopted and the development of the law in Washington since territorial days require jury trials for juveniles charged with serious offenses. *Gunwall* factors 3 and 4 favor an independent application of Article I, Sections 21 and 22. In order to give the proper interpretation to these constitutional provisions, juveniles charged with serious offenses must be restored the right to trial by jury.

4. Differences in structure between the federal and state constitutions favor an independent application of the state constitution.

In *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), the Supreme Court noted that “[t]he fifth *Gunwall* factor... will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State's power.” *State v. Young*, at 180. The *Schaaf* Court did not have the benefit of this decision.

5. The right to a jury trial is a matter of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The right to a jury trial for juveniles charged with serious offenses is a matter of State concern; clearly there is no need for national uniformity on the issue. *Schaaf*, 109 Wn.2d at 16. Indeed, several states provide jury trials to all juveniles on independent state constitutional grounds. See e.g. *State v. Eric M.*, 122 N.M. 436, 925 P.2d 1198, 1199-1200 (N.M. 1996); *State ex rel. Anglin v. Mitchell*, 596 S.W.2d 779, 789 (Tenn. 1980); *RLR v. State*, 487 P.2d 27, 35 (Alaska

1971).<sup>6</sup> *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

All six *Gunwall* factors favor an independent application of Article I, Section 21 and 22 of the Washington Constitution. Our state constitution provides greater protection to juveniles charged with serious offenses than does the federal constitution, and requires that the critical facts be submitted to a jury. The failure to provide a jury trial mandates reversal of A.C.'s conviction.

B. Count II must be dismissed because the absence of a legislative definition of the crime of assault violates the separation of powers.

The doctrine of separation of powers comes from the constitutional distribution of the government's authority into three branches. *State v. Moreno*, 147 Wn.2d 500 at 505, 58 P.3d 265 (2002). The state constitution divides political power into legislative authority (article II, section 1), executive power (article III, section 2), and judicial power (article IV, section 1). *Moreno*, at 505. Each branch of government wields only the power it is given. *Moreno*, at 505; *State v. DiLuzio*, 121 Wn.App. 822 at 825, 90 P.3d 1141 (2004).

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<sup>6</sup> Other states provide for jury trials by statute. *See, e.g.*, Massachusetts General Laws Chapter 119 Section 55A.

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno* at 506, *citing Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

It is the function of the Legislature to define the elements of a crime. *State v. Wadsworth*, 139 Wn.2d 724 at 734, 991 P.2d 80 (2000). This is so “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community... This policy embodies ‘the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.’” *U.S. v. Bass*, 404 U.S. 336 at 348, 92 S.Ct. 515 (1971), *citations omitted*.

The legislature has criminalized assault; however it has not defined that crime. *See, generally*, RCW 9A.36.<sup>7</sup> Instead, it has allowed the

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<sup>7</sup> There are some sections of the statute, not applicable here, which specifically define the elements of certain types of assaults. *See, e.g.*, RCW 9A.36.011(1)(b): “A person

judiciary to define the core meaning of the crime; the judiciary has done so, enlarging the definition over a period of many years. This violates the separation of powers. *Moreno, supra*.

At the turn of the last century, Washington's criminal code included a definition of assault. In 1906 the Supreme Court noted that "An assault is defined by the Code to be an attempt in a rude, insolent, and angry manner unlawfully to touch, strike, beat, or wound another person, coupled with a present ability to carry such attempt into execution." *State v. McFadden*, 42 Wash. 1 at 3, 84 P. 401 (1906). In 1909, the legislature adopted a new criminal code. The Supreme Court noted that the section defining assault (Rem. & Bal. Code SS 2746) "was repealed by the new criminal code, and so far as we are able to discover, the term assault is not defined in the latter act." *Howell v. Winters*, 58 Wash. 436 at 438, 108 Pac. 1077 (1910). In the absence of a statutory definition, the Supreme Court imported a definition from the common law, quoting from a treatise on torts:

"An assault is an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented.

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is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance."

Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is within its range; the pointing of a pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man's face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; 'A right to live in society without being put in fear of personal harm.'" Cooley, Torts (3d ed.), p. 278  
*Howell v. Winters*, at 438.

This common law definition was broader in scope than the pre-1909 code section, because it required only an apparent (as opposed to an actual) ability to inflict bodily injury.

*Howell v. Winters* was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d

138, 127 P.2d 411 (1942) was a criminal case described by the court as being “indistinguishable” from *Shaffer, supra. State v. Rush*, at 140.

Thirty years later, the core definition of “assault” expanded further, again without any input from the legislature. This expansion appeared in *dicta* in the Supreme Court’s opinion in *State v. Frazier*, 81 Wn.2d 628, 503 P.2d 1073 (1972). In that case, the Court (in *dicta*) quoted from a federal case on assault:

There can in actuality be two concepts in criminal law of assault as noted in *United States v. Rizzo*, 409 F.2d 400, 403 (7th Cir. 1969), *cert. denied*, 396 U.S. 911, 90 S.Ct. 226, 24 L.Ed.2d 187 (1969).

One concept is that an assault is an attempt to commit a battery. There may be an attempt to commit a battery, and hence an assault, under circumstances where the intended victim is unaware of danger. Apprehension on the part of the victim is not an essential element of that type of assault. . . .

The second concept is that an assault is ‘committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.’ The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one.

*State v. Frazier*, at 630-631.

Following *Frazier*, Washington’s judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3)

placing another in apprehension of harm (whether or not injury was intended). *See, e.g., State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. *See* WPIC 35.50; *see also State v. Nicholson*, 119 Wn.App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the vacuum and has undertaken to define the crime. This violates the separation of powers because it encroaches on a core legislative function.

*Moreno, supra; Wadsworth, supra.*

Division II has recently issued an opinion interpreting *Wadsworth* narrowly:

When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime... It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law.

*State v. David*, 2006 Wash. App. LEXIS 1705, pp. 15-16 (2006), citations and footnotes omitted.

In *David*, Division II addressed the legislature's failure to define proximate cause, an element of vehicular homicide. Here, by contrast, the legislature has failed to define the core meaning of the crime of assault. Although the legislature has listed factors that elevate the core crime to felony status, the hasn't designated a single element to delimit the core offense. *David* is thus distinguishable.

In this case, Division II issued a part-published opinion in which it drew an analogy to the crimes of bail jumping, protection order violations, and criminal contempt:

Although the legislature's function is to define the elements of a crime, the "legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics." *Wadsworth*, 139 Wn.2d at 743. For example, the bail-jumping statute criminalizes the failure to appear before a court, RCW 9A.76.170, but the courts determine the dates on which the defendant must appear. *Wadsworth*, 139 Wn.2d at 736-37. In protection-order legislation, the legislature specifies when the orders may be issued and the criminal intent necessary for a violation, but the courts determine the specific prohibitions. *Wadsworth*, 139 Wn.2d at 737. The legislature has broadly defined the elements of criminal contempt as intentional disobedience to a judgment, decree, order, or process of the court, but the courts declare the specific acts of disobedience. *Wadsworth*, 139 Wn.2d at 737. The legislature's history of delegating to the judiciary how statutes will be specifically applied demonstrates that the practice does not offend the separation of powers doctrine...  
Opinion, pp. 9.

But in each of these situations, the legislature has defined the general crime, and the remaining terms are case-specific. For example, a bail-jumping defendant is charged with failing to appear on a specific court-ordered date applicable to her or his case only. A protection order violation is proved with reference to a specific court order that applies only to the defendant charged. A contempt charge rests on a specific “judgment, decree, order, or process of the court,” applicable to the defendant. These statutes, cited in *Wadsworth*, are qualitatively different from the assault statute, in which the legislature has failed to define the core crime even in general terms.

Division II also found the statute constitutional because the legislature “has instructed that the common law must supplement all penal statutes.” Opinion, p. 10, *citing* RCW 9A.04.060. While this is true, it does not absolve the legislature of performing its essential function in defining the core meaning of a crime. Nor does the legislature’s acquiescence render an unconstitutional division of labor constitutional, as Division II suggests. Opinion, p. 10.

The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution. Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which A.C. was convicted is

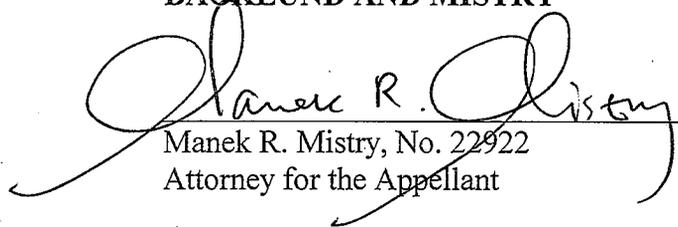
unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

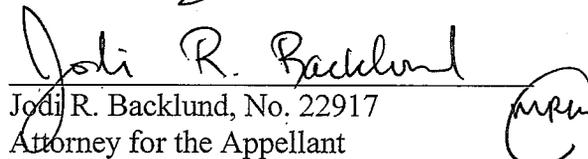
**VI. CONCLUSION**

The issues here are significant under the state constitution. Furthermore, because they could impact a large number of cases, they are of substantial public interest. This Court should accept review pursuant to RAP 13.4(b)(3) and (4)

Respectfully submitted September 14, 2006.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

A.C.  
Echo Glen  
33010 SE 99<sup>th</sup> Street  
Snoqualmie, WA 98065

and to

Clallam County Prosecuting Attorney  
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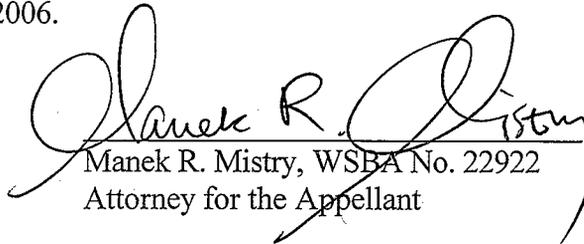
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

And that I sent the original and once copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 14, 2006.

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 September 14, 2006.

  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

**APPENDIX A:**

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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

AZEL LUKE CHAVEZ

Appellant.

No. 33240-0-II

PART PUBLISHED OPINION

ARMSTRONG, J. -- Azel Luke Chavez appeals his convictions for robbery, assault, unlawful possession of a firearm, taking a motor vehicle without permission, and attempted murder, arguing that he was constitutionally entitled to a jury trial, that his assault conviction violates separation of powers, that the court admitted his custodial confessions in violation of *Miranda*,<sup>1</sup> and that the court admitted improper hearsay evidence. We affirm, holding that Chavez had no right to a jury trial in juvenile proceedings and that the legislature did not violate the separation of powers doctrine by allowing the judiciary to define statutory terms with the common law. We also affirm the trial court's ruling that Chavez waived his *Miranda* rights; and although the trial court may have admitted hearsay evidence without a sufficient foundation, the error was harmless.

<sup>1</sup> See *Miranda v. Arizona*, 384 U.S. 436, 471, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

## FACTS

During spring training for the Sequim High School football team, three coaches disciplined Chavez on several occasions. Because of these incidents, Chavez quit the team. He remained angry with the coaches into the Fall football season. In October, he told his friend Amanda that for several months he had been planning to kill the three coaches. He explained that he would take his mother's van or his brother's truck and use his father's 12-gauge shotgun.

A few days later, Chavez told another friend, James Gambell, that he wanted to kill three people. Shortly thereafter, he donned black face paint and camouflage clothing and retrieved the shotgun, removing five shells and then reloading it with three more shells. He confronted his stepmother, Joan, pointing the gun at her and demanding the keys to the family gun safe. Joan asked, "Why are you mad at these people?" and Chavez answered, "It's the only way." Supp. Clerk's Papers (SCP) at 24. When Joan refused to give up the safe keys, and Gambell blocked his access to the safe, Chavez took the family van and drove away.

Gambell and Chavez's brother, Jason, followed in another vehicle. Chavez stopped at Amanda's house and told her, "I did it," or "I'm doing it." Clerk's Papers (CP) at 25. Chavez continued driving and when he lost Gambell and Jason, he returned to Sequim High School. The football team had already left for a game in Tacoma. Although Chavez later testified that he did not believe the team would be at the high school, he had told a police officer that he went to the high school to say goodbye to a friend who was a member of the team.

In the meantime, Joan called 911 and reported Chavez's behavior. Chavez fled Sequim and led police officers on a high speed chase from Clallam County, through Jefferson County, and into Kitsap County, where the pursuit ended when he collided head-on with a police car on the Hood Canal Bridge. Officers disarmed him and placed him under arrest. While in custody,

Chavez gave statements to three different law enforcement officers. Before each statement, the officer advised him of his *Miranda* rights.

The State charged Chavez with first degree robbery, second degree assault, second degree unlawful possession of a firearm, second degree taking a motor vehicle without permission, and three counts of attempted murder in the first degree. He was tried in juvenile proceedings without a jury. Before trial, the State moved to disqualify one of Chavez's attorneys due to a conflict of interest. During the discussions, the trial judge mentioned that Chavez, at 14, would not be able to execute a valid waiver of the conflict. The trial court also held a CrR 3.5 hearing and ruled that Chavez had voluntarily, knowingly, and intelligently waived his *Miranda* rights.

During Joan's testimony, the State sought to play the recording of her 911 call, under the recorded recollection exception to the hearsay rule. While laying the foundation for this admission, the following exchange occurred between the prosecutor and the witness:

- Q Do you remember telling the 911 operator what Azel said?  
A I remember -- I don't remember telling him what he said. . . .  
Q Is it fair to say, you just said you don't remember what you told the 911 operator in terms of what Azel said?  
A Yeah, I remember what I said.  
Q And, is it also fair to say that today you don't have a complete recollection of every word that Azel used that day?  
A No.  
Q And, is it true that when you were telling the 911 operator what had happened, you were trying to give her a full and complete picture what had happened?  
A Yeah, I was trying to let them know.

Report of Proceedings (RP) (March 7, 2005) at 64.<sup>2</sup> Over defense counsel's objection, the recording was admitted as a recorded recollection.

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<sup>2</sup> Because the various volumes of the record are not numbered consecutively, references to the record in this opinion identify the volume by date of the proceeding.

The trial judge found Chavez guilty on all seven counts. At sentencing, defense counsel argued for a reduced disposition, but the trial judge found that none of the statutory mitigating factors existed. The judge imposed the standard range disposition of 309 to 387 weeks, plus a 12-month firearm enhancement. In deciding on the standard disposition, the judge relied on the opinions of two psychological professionals as to what would be most conducive to Chavez's rehabilitation.

## ANALYSIS

### I. RIGHT TO JURY TRIAL IN JUVENILE PROCEEDINGS

Washington's Juvenile Justice Act requires cases in juvenile court to be tried without a jury. *See* RCW 13.04.021(2). Under the Washington Constitution, the right of jury trial "shall remain inviolate." WASH. CONST. art. I § 21. In criminal prosecutions, the accused has the right to "a speedy public trial by an impartial jury." WASH. CONST. art. I § 22. The U.S. Constitution guarantees a criminal defendant, "the right to a speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. The courts have held that the Juvenile Justice Act does not violate these constitutional provisions because the juvenile justice system is rehabilitative rather than retributive. *See State v. Schaaf*, 109 Wn.2d 1, 16, 743 P.2d 240 (1987); *McKeiver v. Pennsylvania*, 403 U.S. 528, 547, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971).

Nonetheless, Chavez argues that his right to a jury trial was violated. First, he asserts that two recent U.S. Supreme Court opinions support the right to a jury trial in juvenile proceedings under the U.S. Constitution. Second, he contends that the right to trial by jury enjoys greater protection under the Washington Constitution and that recent changes to the juvenile justice system change the analysis of the juvenile jury trial right in this state. Finally, he argues that the right to trial by jury should be examined in the individual case and that the lack of rehabilitative

options available under his particular conviction should trigger the right to a jury trial. These arguments are contrary to precedent.

1. The Federal Constitution

Chavez's first argument relies on the recent U.S. Supreme Court decisions of *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), to establish a broader right to a jury trial in criminal proceedings. In *Crawford*, considering whether admitting hearsay against a criminal defendant violated the Confrontation Clause, the court analyzed the clause within its historical context and concluded that it prohibits the admission of hearsay unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 53-54. In *Blakely*, considering whether the right of a jury trial extended to sentence-enhancing factors in criminal proceedings, the court again analyzed the right's history and concluded that it did apply to the aggravating factors. *Blakely*, 542 U.S. at 308. Applying this historical analysis to the juvenile jury trial right, Chavez reasons that because the law drew no distinction between the jury trial rights of juveniles and adults when the Sixth Amendment was enacted, a juvenile is entitled to a jury trial.

The argument that *Blakely* mandates a right of jury trial for juveniles has been foreclosed by our holding in *State v. Meade*, 129 Wn. App. 918, 120 P.3d 975 (2005). There, we held that the court in *Blakely* "showed no intention . . . to overrule its well-established holding that the right to a jury does not attach to the traditional juvenile justice system." *Meade*, 129 Wn. App. at 925-26 (citing *McKeiver*, 403 U.S. at 543).

To be sure, *Blakely* and *Crawford* demonstrate the U.S. Supreme Court's emphasis on historical context in interpreting the Constitution. But the historical fact that no distinction

existed between juveniles and adults regarding the right to a jury trial when the Sixth Amendment was enacted is unpersuasive. When the Bill of Rights was promulgated, no juvenile justice system existed. See MARY M. PRESCOTT, NOTE: ANOTHER OPTION FOR OLDER, NONVIOLENT JUVENILES: STATUTORY RETENTION OF JUVENILE COURT JURISDICTION PAST THE AGE OF MAJORITY, 85 Iowa L. Rev. 997, 1010 (2000) (noting that the juvenile justice system originated in 1899). Because children were subject to the same criminal justice system as adults, it was natural for them to have the same right to a jury trial. This does not alter the U.S. Supreme Court's holding that a jury trial is not constitutionally required in a separate proceeding designed to rehabilitate minors. See *McKeiver*, 403 U.S. at 547; see also *Schaaf*, 109 Wn.2d at 14 ("It does no violence to our state's common law history to give credence to a 70-year-old legal system that was nonexistent in our territorial days.").

2. The Washington Constitution

Chavez's *Gunwall*<sup>3</sup> analysis to establish that the Washington Constitution affords a broader jury trial right than the U.S. Constitution is not persuasive; the Washington Supreme Court has long held that the state constitution does not require a jury trial for juvenile offenders. See *Schaaf*, 109 Wn.2d at 16. But Chavez argues that the courts have tolerated denying jury trials for juveniles only because of the juvenile system's rehabilitative focus. He reasons that juveniles must be afforded jury trials once juvenile proceedings become "akin to an adult criminal prosecution." Br. of Appellant at 14 (quoting *State v. Lawley*, 91 Wn.2d 654, 656, 591 P.2d 772 (1979)). Chavez then lists a series of changes to the juvenile justice system "over the

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<sup>3</sup> See *State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

last decade,” which, according to Chavez, have rendered the system more penal and more akin to the adult system. *See* Br. of Appellant at 14-19.

Again, this argument is foreclosed by our holding in *Meade*. There we held that, despite numerous recent amendments to the Juvenile Justice Act, the system “remains focused on rehabilitation.” *Meade*, 129 Wn. App. at 925 (citing *State v. Watson*, 146 Wn.2d 947, 952-53, 51 P.3d 66 (2002)); *see also In re Dependency of A.K.*, 130 Wn. App. 862, 884-85, 125 P.3d 220 (2005); *State v. Tai N.*, 127 Wn. App. 733, 739-40, 113 P.3d 19 (2005), *review denied*, 156 Wn.2d 1019 (2006).

3. Juveniles Charged with Serious Offenses

Finally, Chavez claims that, even if the bench trial requirement is constitutional in its general application, as applied to him it is not. Because the serious charges against him disqualified him from “all of the special rehabilitative programs available to other juveniles,” he argues that his trial was akin to an adult criminal proceeding and therefore required a trial by jury. Br. of Appellant at 22.

The State counters that regardless of the alternative dispositions for which Chavez is not eligible, he still qualifies for rehabilitation programs during his incarceration. In particular, the State notes that Chavez is being held at a juvenile rehabilitation administration agency, which offers an array of rehabilitative services, and that the sentencing guidelines in the juvenile system are intended to respond to the needs of youthful offenders.

In imposing Chavez’s disposition, the trial judge gave great weight to two psychological evaluators’ reports that recommended the best situation for Chavez’s rehabilitation and emotional growth. And defense expert Dr. Trowbridge endorsed the psychotherapy available in juvenile institutions as being more suited to Chavez’s individual needs than the services

available in adult prisons. Because this sentencing approach shows that the State was processing Chavez in a justice system more focused on rehabilitation than the adult criminal system would have been, we find Chavez's "as applied to him" argument unpersuasive.

## II. SEPARATION OF POWERS

Chavez asks that we dismiss his assault conviction with prejudice. Count II charged Chavez with second degree assault. The relevant statute states that a defendant is guilty of assault if he "[a]ssaults another with a deadly weapon." RCW 9A.36.021(1)(c). Because the statute does not define "assault," the courts have supplied the common law definition. *See State v. Frazier*, 81 Wn.2d 628, 631, 503 P.2d 1073 (1972); *State v. Rush*, 14 Wn.2d 138, 139-40, 127 P.2d 411 (1942); *State v. Shaffer*, 120 Wash. 345, 348-50, 207 P. 229 (1922). Chavez argues that this judicial definition of an essential element of a crime violates the separation of powers.

A party challenging the constitutionality of a statute bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *State ex rel. Peninsula Neighborhood Ass'n v. Wash. State Dep't of Transp.*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000). While the Washington Constitution contains no express separation of powers clause, the doctrine has been presumed throughout the state's history by the division of government into three separate branches. *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). The principle is violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another." *State v. Moreno*, 147 Wn.2d 500, 505-06, 58 P.3d 265 (2002) (quoting *Carrick*, 125 Wn.2d at 135). But the doctrine does not require that the various branches be "hermetically sealed off from one another." *Carrick*, 125 Wn.2d at 135. They "must remain partially intertwined if for no other reason than to maintain an effective system of checks and balances, as well as an effective government." *Carrick*, 125 Wn.2d at 135 (citing *In re Juvenile*

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*Director*, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976)). Because the doctrine protects institutional rather than individual interests, a history of cooperation within the institution in a given instance militates against a finding of a separation of powers violation. *Carrick*, 125 Wn.2d at 136.

Chavez's claim raises two potential separation of powers violations. First, the courts may violate the doctrine if they encroach on legislative functions. *See State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). Second, a statute may be unconstitutional if the legislature delegates to the judiciary a function that is reserved exclusively to the legislature by the constitution. *Sackett v. Santilli*, 146 Wn.2d 498, 504, 47 P.3d 948 (2002). Chavez's arguments fail to demonstrate either violation.

Although the legislature's function is to define the elements of a crime, the "legislature has an established practice of defining prohibited acts in general terms, leaving to the judicial and executive branches the task of establishing specifics." *Wadsworth*, 139 Wn.2d at 743. For example, the bail-jumping statute criminalizes the failure to appear before a court, RCW 9A.76.170, but the courts determine the dates on which the defendant must appear. *Wadsworth*, 139 Wn.2d at 736-37. In protection-order legislation, the legislature specifies when the orders may be issued and the criminal intent necessary for a violation, but the courts determine the specific prohibitions. *Wadsworth*, 139 Wn.2d at 737. The legislature has broadly defined the elements of criminal contempt as intentional disobedience to a judgment, decree, order, or process of the court, but the courts declare the specific acts of disobedience. *Wadsworth*, 139 Wn.2d at 737. The legislature's history of delegating to the judiciary how statutes will be specifically applied demonstrates that the practice does not offend the separation of powers doctrine. *See Carrick*, 125 Wn.2d at 136.

Moreover, the legislature has instructed that the common law must supplement all penal statutes. RCW 9A.04.060. This statute performs two relevant functions. It ratifies the judicial practice of supplying common law definitions to statutes. And it affirmatively defines the elements of criminal statutes as containing common law definitions. *See State v. Smith*, 72 Wn. App. 237, 241, 864 P.2d 406 (1993). Accordingly, the legislature has not delegated to the judiciary the task of defining "assault," but rather has instructed the judiciary to define assault according to the common law.

Finally, the legislature has acquiesced to the courts' common law definition of assault, both by not changing the definition and by enacting RCW 9A.04.060. The legislature removed the statutory definition of assault from the criminal code in 1909. When the legislature enacted RCW 9A.04.060 in 1975, *Smith*, 72 Wn. App. at 241, we presume it was aware of the common assault definitions the courts had been using for the preceding half century. *See State v. Carlson*, 65 Wn. App. 153, 157-58, 828 P.2d 30 (1992).<sup>4</sup> Had the legislature believed its institutional integrity was being threatened by the courts' definition, it could have inserted its own definition into the statute. Instead, it enacted a general provision endorsing the courts' historical use of the common law to define assault.

In summary, consistent with their history, the legislative and judicial branches have cooperated in defining the offense of assault. Chavez has presented no authority to show that

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<sup>4</sup> Although Chavez claims that the courts enlarged the definition of assault in 1978, the expansion is "actual battery," added to the previously noted definitions of "attempt to commit a battery" and "placing another in apprehension of harm." Br. of Appellant at 27 (citing *State v. Strand*, 20 Wn. App. 768, 780, 582 P.2d 874 (1978); *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978)). The cited cases indicate that this was an interpretation of the common law already being applied, rather than an expansion of that law. In any event, the legislature has arguably acquiesced to this definition as well, by leaving the law unchanged for 28 years.

this established practice is unconstitutional beyond a reasonable doubt. We affirm Chavez's second degree assault conviction.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

### III. *MIRANDA* WAIVER

After his arrest, Chavez gave statements to three different police officers. Before each statement, the interrogating officer advised Chavez of his *Miranda* rights. The trial court admitted the statements, ruling that Chavez voluntarily waived his *Miranda* rights. Chavez now challenges the ruling.

A confession is admissible "if made after the defendant has been advised concerning rights and the defendant then knowingly, voluntarily and intelligently waives those rights." *State v. Aten*, 130 Wn.2d 640, 663, 927 P.2d 210 (1996) (citing *State v. Rupe*, 101 Wn.2d 664, 679, 683 P.2d 571 (1984)). In determining admissibility, the court considers "a defendant's physical condition, age, mental abilities, physical experience, and police conduct," among other factors. *Aten*, 130 Wn.2d at 663-64. We will not disturb the trial court's finding that a confession is voluntary if substantial evidence supports it. *Aten* 130 Wn.2d at 664. We give significant weight to the trial judge's finding that a confession was knowing and intelligent because the trial judge is in a better position than we are to determine the defendant's mental competency. *State v. Lanning*, 5 Wn. App. 426, 434, 487 P.2d 785 (1971).

In bench proceedings, because a trial judge is presumed to know the rules of evidence and to be capable of disregarding inadmissible evidence, we encourage the liberal admission of

evidence. *State v. Bell*, 59 Wn.2d 338, 365, 368 P.2d 177 (1962); *see also State v. Melton*, 63 Wn. App. 63, 68, 817 P.2d 413 (1991)).

Where a case is heard by a judge without a jury, a new trial should not be granted for error in the admission of evidence, if there remains substantial admissible evidence to support the findings, unless it appears that the findings are based on the evidence which should have been excluded.

*Bell*, 59 Wn.2d at 365 (quoting *State v. Ryan*, 48 Wn.2d 304, 308, 293 P.2d 399 (1956)). These principles apply to juvenile proceedings. *See In re Welfare of Noble*, 15 Wn. App. 51, 58, 547 P.2d 880 (1976).

Pursuant to CrR 3.5, the trial judge conducted a hearing before determining whether each of the statements was admissible. During these hearings, the officers testified that, at the time of interrogation, Chavez was rational and oriented, appeared to understand the situation, was able to communicate in English, and did not appear to be under the influence of drugs or alcohol. In addition, because two of the statements were recorded, the trial judge had the benefit of listening to the defendant's demeanor at the time of waiver and confession. This was substantial evidence to support the trial judge's finding that the waiver was intelligent, knowing, and voluntary.

To be sure, the trial judge stated that Chavez, at 14 years of age, would be incompetent to waive his original defense attorney's conflict of interest. This was not a formal finding, but rather a comment made by the judge during the conflict discussion. The judge offered no basis for the opinion other than the defendant's age. Age is not dispositive of capacity to waive *Miranda* rights. *See, e.g., Noble*, 15 Wn. App. at 58 (noting trial court's finding that 13-year-old had knowingly and intelligently waived his *Miranda* rights and had voluntarily given a statement). Thus, the comment about Chavez's age during the conflict discussion does not preclude the court from later finding that Chavez voluntarily waived his *Miranda* rights.

#### IV. HEARSAY

Chavez argues that the trial court erred in admitting the recording of Joan Chavez's 911 call. He claims that the State did not lay a proper foundation to admit hearsay under ER 803(a)(5) because it failed to establish either that Joan lacked sufficient recollection about the matter or that the recording correctly reflected her knowledge.

A recorded recollection is not excluded by the hearsay rule if 1) it concerns "a matter about which a witness once had knowledge," 2) the witness "now has insufficient recollection to enable the witness to testify fully and accurately," 3) it is "shown to have been made or adopted by the witness when the matter was fresh in the witness' memory," and 4) it is shown to reflect the witness's prior knowledge correctly. ER 803(a)(5). Here, the first and third elements are not in dispute.

The fourth element may be met without a direct averment by the witness if the circumstances provide sufficient indicia of reliability. *State v. Alvarado*, 89 Wn. App. 543, 551-52, 949 P.2d 831 (1998). Relevant circumstances include:

- (1) whether the witness disavows accuracy;
- (2) whether the witness averred accuracy at the time of making the statement;
- (3) whether the recording process is reliable; and
- (4) whether other indicia of reliability establish the trustworthiness of the statement.

*Alvarado*, 89 Wn. App. at 552. The circumstances here sufficiently indicate reliability so that the witness's direct statement of accuracy was unnecessary. Joan never disavowed the accuracy of the statements she made to the 911 operator. She testified that she was trying to give the operator a full and complete description of what had occurred and that the events were fresh in her mind when she made the call. Whether this was enough to correctly reflect Joan's prior knowledge was within the trial judge's discretion.

The second element is met when the witness can testify generally about the matter, but cannot remember details about critical issues. *See United States v. Williams*, 571 F.2d 344, 349 (6th Cir. 1978). Here, in attempting to establish this foundation, the prosecutor asked the following questions:

Do you remember what you told the 911 operator?

...

Do you remember telling the 911 operator what Azel said?

...

Is it fair to say, you just said you don't remember what you told the 911 operator in terms of what Azel said?

RP (March 7, 2005) at 64. Notably, the prosecutor did not ask Joan if she remembered what Chavez actually said or did. Joan was asked only about her own statements to the 911 operator. From the context of this case, it is clear that the matter in question, the purpose for which the 911 call was admitted, was Chavez's behavior. Joan testified extensively about that. And the prosecutor's questions about Joan's memory of her own statements to the 911 operator failed to lay a foundation for an insufficient recollection of the facts in question. Admission of the tape as a recorded recollection exception to the hearsay rule therefore was error.

Nonetheless, this error does not entitle Chavez to a new trial. As explained above, an error in admitting evidence in a bench proceeding mandates a new trial only where there is insufficient additional evidence to support the findings or the findings appear to be based on the inadmissible evidence. *Bell*, 59 Wn.2d at 365. The only finding of fact that appears to have relied on the content of the 911 call for support was finding 9, which states in pertinent part:

The respondent also said, "I'm going to start with you if you don't get out of my way." This latter finding is supported by that portion of Joan's 911 call which was played into the record, which, given the totality of the circumstances, accurately states what the respondent said.

SCP at 24. Eliminating this quote from the findings of fact and conclusions of law, there remains ample evidence of a hostile, armed confrontation between Chavez and his mother. The exact language was not necessary. Thus, sufficient evidence supports the findings of guilt on all counts without the 911 call.

#### V. STATEMENT OF ADDITIONAL GROUNDS

In a statement of additional grounds (SAG), Chavez raises two challenges to his conviction. In the first challenge, he claims that the charges of attempted murder should have been dropped because the Model Penal Code defines a substantial step as "lying in wait or following." SAG 1. He argues that he was neither lying in wait nor following and that he was on his way to a friend's house when he left Sequim in his mother's van.

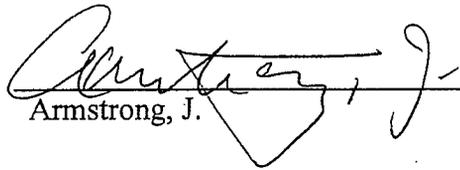
Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The trial court considered Chavez's explanations for his actions and found them to be not credible. The trial court found a substantial step where Chavez, in conformity with his stated plan for murdering the three coaches, drove with a loaded shotgun to the high school where he expected to find the coaches. The fact that the coaches were not there, making the murder impossible to complete, is not a defense to the crime of attempt. *See* RCW 9A.28.020(2). The evidence is sufficient to support the conviction.

In the second additional ground, Chavez requests a reduced sentence on the grounds that his sentence is unfair because he is a first time offender and has become rehabilitated during his time of incarceration. A standard range disposition is not appealable on the ground of being clearly excessive or too lenient. RCW 13.40.160(2), .230(2). The trial court imposed the

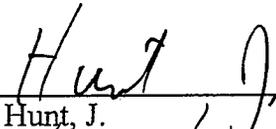
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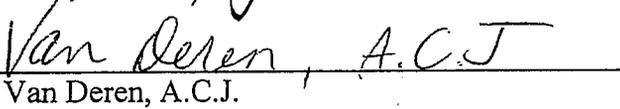
standard range disposition for Chavez's convictions. RCW 13.40.0357, .193(2). Calculation of the standard range took into account the fact that this was Chavez's first offense. Defense counsel argued for a lighter disposition based on mitigating factors. The trial court considered these arguments but found they did not entitle Chavez to a reduction. There is no basis for adjusting the disposition on appeal.

Affirmed.

  
Armstrong, J.

We concur:

  
Hunt, J.

  
Van Deren, A.C.J.