

No. 43511-0-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DOUGLAS L. BAUER

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KITSAP COUNTY

Cause No. 12-1-00290-6

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied defendant's Knapstad motion to dismiss.

2. The trial court erred when it denied defendant's motion to dismiss based on RCW 9A.36.031(1)(d) being vague as applied to the facts of this case.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the definition of “cause” as used in the third degree assault statute requires an affirmative act on the part of the defendant? (Assignments of Error #1)
2. Whether an individual can be convicted of assault when he did not act to cause bodily harm to the victim? (Assignments of Error #1)
3. Whether RCW 9A.08.020 restricts the conduct by which an individual can be held criminally liable for acts committed by a third party? (Assignments of Error #1)
4. Whether defendant’s conduct was the proximate cause of the assault? (Assignment of Error # 2)
5. Whether the defendant was given adequate notice that he could be charged with third degree assault when he never assaulted the victim? (Assignment of Error #2)
6. Whether the ex post facto clause prevents a novel interpretation of a statute from being applied retroactively? (Assignment of Error #2).

III. STATEMENT OF THE CASE

A. Procedural History

The state charged Mr. Bauer with one count of third degree assault pursuant to RCW 9A.36.031(2) and one count of unlawful possession of a firearm pursuant to RCW 9.41.040(1)(d) and RCW 9A.08.020(2)(a) for conduct that allegedly occurred on or between February 17, 2012 and February 22, 2012. CP1-7. It has given notice that it will seek an exceptional sentence based on the severity of the injuries, should Mr. Bauer be convicted of assault in the third degree.

In response to the charges, the defense filed a motion for a Bill of Particulars. CP 9-14. In its response to defendant's request for bill of particulars, the state responded that Mr. Bauer should have been aware that TGJC would cause bodily harm to another by use of a weapon. CP 35: 20-27; CP 62:6-22. However, the discovery provided by the state indicates the son of the mother, who was residing at his house, took a weapon owned by Mr. Bauer from either his vehicle or bedroom. CP 87-91; CP 123-33. Wherever it was taken from, it is undisputed that it was unbeknownst to Mr. Bauer and done in spite of earlier instructions that he was not to touch the weapons.

Subsequently, the defense filed a motion to dismiss pursuant to State v. Knapstad, as well as a motion to dismiss due to the vagueness of the assault statute as it was being applied to the facts of this case. CP 29-49.

For purposes of the Knapstad motion filed in Superior Court, it was undisputed that the evidence provided, in relevant part, as follows:

- (1) TGJC (who is responsible for bringing the firearm to school, resulting in the accidental shooting of the young girl) either broke into a locked vehicle to take the gun out of Bauer's vehicle or took it out of his bedroom;
- (2) TGJC was told never to touch any of the firearms;
- (3) Douglas Bauer is not prohibited from possessing firearms and the firearms are all properly registered;
- (4) Douglas Bauer was unaware that his firearm had been taken by TGJC;
- (5) TGJC acknowledges taking the firearm without permission and did so to protect himself;
- (6) TGJC, who was nine years old at the time of the incident, entered into a guilty plea in juvenile court for conduct arising out of this incident, with neither the prosecutor nor defense counsel, nor the court raising any issue as to his competency to proceed or understand the charges against him.

CP 48-49.

The court dismissed the unlawful possession of a firearm charge, but kept the assault charge intact. CP 139-140.

B. Facts

TGJC stayed at Douglas Bauer's residence during the weekend prior to February 22, 2012, to visit his mother, Jamie Chaffin, who lived with Mr. Bauer. He returned home on Monday, February 20, 2012. Prior to leaving the residence, unbeknownst to Mr. Bauer, TGJC entered Bauer's bedroom to retrieve his clothes and while inside "swiped" the gun into his backpack. Two days later he brought the gun to school, where it

accidentally discharged, striking a fellow student. CP 122-133. A day earlier, after TGIC returned from school there was no indication that anything was abnormal. CP 121.

IV. ARGUMENT

This case involves an issue of first impression and just how broadly a statute may be interpreted in determining whether an individual may be held responsible for conduct committed by another, without the individual's knowledge or encouragement. The trial court ruled that an individual can be held liable for an assault under these circumstances. The defense believes that this interpretation is not supported by the law and any such interpretation violates an individual's due process rights. Further, even if the statute can be interpreted to prohibit such conduct, the facts of this case do not support a prima facie case at this juncture and the court erred in not dismissing the prosecution.

A. THE COURT SHOULD REVERSE THE TRIAL COURT AND DISMISS THIS CASE BECAUSE THERE IS NO EVIDENCE THAT MR. BAUER ASSAULTED THE VICTIM.

1. RCW 9A.36.031(1)(d) requires an affirmative act by the defendant.

In deciding whether the assault statute is even applicable to the conduct here, it is important to begin with the proposition that it is the legislature that has the power to decide what acts shall be criminal or to define crimes. McInturf v. Horton, 85 Wn.2d 704, 706, 538 P.2d 499 (1975). Statutes will not be interpreted in such a way as to lead to unlikely

or strained results. State v. Ammons, 136 Wn.2d 453, 458, 963 P.2d 812 (1998). Furthermore, the interpretation of a statute is reviewed *de novo* by the appellate courts. 136 Wn.2d at 456.

The initial principle of statutory interpretation is that the courts do not construe an unambiguous statute. The court is to assume that the legislature meant exactly what it said and that plain words do not need construction. State v. McGraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995).

The charge of assault in third degree, as set forth in Count I of the Information is based on RCW 9A.36.031(1)(d), which requires that the defendant act with criminal negligence and that he “did cause bodily harm” to the victim. See WPIC 35.22. There is nothing ambiguous about the statute—to be found guilty the defendant must affirmatively cause bodily harm to the victim.

Given that Mr. Bauer never had contact with the victim, much less assaulted her, the case should never have been filed. Bauer was not present at the scene; never possessed the firearm at the time of the incident; nor was he aware that TGJC had the firearm or even brought it to school. Indeed, he was miles away from the school and every affirmative act that occurred, which resulted in the injuries to the young girl was outside of his knowledge or approval. If we are to assume that the legislature meant exactly what it said when it used the word “cause”, which is what is required, the only logical conclusion is that Mr. Bauer did not commit an assault.

This conclusion is consistent with precedence decided by the courts of this state. In addressing this issue, the court is guided by the Washington State Supreme Court’s holding that words not statutorily defined, as is the case here, should be given their ordinary or common meaning. See State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). Applying the above rule in the context of a sexual exploitation of a minor charge, the Court in Chester reversed the defendant’s conviction because the state did not prove that Chester caused the minor to engage in certain behavior. In so doing, the Court noted that “’cause’ means to be the cause of, to bring about, to induce or to compel.” 133 Wn.2d at 23 (*citing* Black’s Law Dictionary 221(6th ed. 1990); Webster’s Third New International Dictionary 356 (1986)). It requires “some affirmative act of assistance, interaction, influence or communication on the part of the defendant which initiates” the result. Id.

The same rationale should apply here. As in Chester, on its face, the statute is not ambiguous. It requires that Mr. Bauer affirmatively cause the injuries to the victim. It only becomes ambiguous, as the Supreme Court stated in Chester, when the state attempts to stretch and twist the meaning to fit the facts. 133 Wn.2d at 21.1 However, a clear reading of the statute requires that the defendant personally (or working with an accomplice) cause the injuries to the victim. Here Bauer did not. T.G.J.C.

1 To the extent that it is ambiguous, for purposes of addressing the sufficiency of the evidence, the rule of lenity requires an interpretation favorable to Mr. Bauer. State v. Evans, 164 Wn.App. 629, 635, 263 P.3d 179 (2011)

caused the injuries and he caused the injuries independently of anything Mr. Bauer did.

As a result, this court should apply Chester and hold that there was no evidence that Mr. Bauer affirmatively caused the injuries to the victim and reverse the trial court.

2. Mr. Bauer's Actions are not a Proximate Cause of the Assault.

The state argued to the trial court, with the trial court apparently concurring, that all that is required is a demonstration of "proximate cause" in order to satisfy the term "causes" as set forth in the statute. However, while the defense agrees with the position that at some point proximate cause becomes an issue, prior to even considering proximate cause (and then, intervening cause) one must first define the term "cause" as used in the statute. As set forth above, that is a word of common understanding. Conversely, "proximate cause" is a legal concept separate and apart from the definition as used in the statute. See e.g. Price v. Kitsap Transit, 70 Wn.App. 748, 756, 856 P.2d 384 (Div. II 1993)("...`proximate cause' is a legal concept based on policy considerations."); See also Herskovits v. Group Health Cooperative of Puget Sound, 99 Wn.2d 609, 637, 664 P. 2d 474 (1983)("proximate cause is a uniquely legal concept" representing judicial limitations placed upon an actor's liability for the consequences of his or her conduct.).

But even under the state's argument, the case should be dismissed. First, in the primary case relied upon by the state before the trial court,

State v. Christman, 160 Wn.App. 741, 52-54, 249 P.3d 680 (2011), the Court of Appeals distinguished between cause and proximate cause, holding that, in the context of a homicide by abuse charge, that proof requires "...that a defendant's conduct [cause] the death of a person... and likewise requires proof of proximate cause." See also, State v. Rivas, 126 Wn.2d 443, 453, 896 P.2d 57 (1995) (before criminal liability, the defendant's conduct must be both (1) the actual cause and (2) the "legal" or "proximate" cause of the result). Thus, the state must prove that Mr. Bauer affirmatively caused the harm to the victim in this case with the firearm (actual cause), before proximate cause is even an issue.

Consistent with this definition, in each and every case that the state cited to support its argument that the court focus on the meaning of proximate cause as the controlling definition, the defendant in those cases did some affirmative act to cause the injuries alleged in the particular case and then argued some other intervening act superseded the defendant's acts. See e.g. Christman, *supra*. (controlled substances homicide case where defendant affirmatively provided drugs to the victim, but argued that other drugs provided by other individuals superseded his actions); State v. Berube, 150 Wn.2d 498, 79 P.3d 1144 (2003) (defendant, in homicide by abuse charge asked another to discipline the child, was present when the child was assaulted and encouraged the assault, but then blamed the codefendant for the death); State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (second degree murder conviction based on

stabbing the victim and the defense attempting to blame the death on an intervening cause, i.e. drug use); State v. McDonald, 138 Wn.2d 680, 686 (1999) (murder conviction based on the defendant shooting the victim and the defendant arguing that the victim was deceased prior to his firing the weapon because the other defendant's shots superseded his actions); State v. Roggenkamp, 115 Wn.App. 927, 64 P.3d 92 (2003) (vehicular assault/homicide charge where defendant ran into other vehicle, but argued that the victim's driving superseded his reckless driving).

Moreover, the courts have refused to find civil liability where there is a break in the chain of events that potentially give rise to liability. For instance, in Kim v. Budget Rent A Car Systems, Inc., 143 Wn.2d 190, 15 P.3d (2001) the Washington Supreme Court found that the defendant's negligence was not the proximate cause of the injuries because:

...it is plain the accident which caused [plaintiff's] injuries was not a part of the natural and continuous sequence of events which flowed from [defendant's] act in leaving their station wagon in the parking lot. It was the result of new and independent forces. Among the new forces were the stealing of the vehicle, the pursuit by the state patrol, the attempt by the thieves to run from the officers and, finally, the accident.

143 Wn.2d at 203.

Similarly, in this instance, the state contends that Mr. Bauer's actions were the proximate cause of the injuries to the victim because in the exercise of ordinary care, he should reasonably have anticipated that his failure to secure his weapons in such a way as to prevent them from

being accessed made it foreseeable that bodily harm would occur.²

However, the stealing of the weapon, then bringing it to his guardian's residence, prior to school more than 24 hours later "is not part of the natural and continuous sequence of events which flowed from [Bauer's] act in leaving [the firearms in his residence]." As in Kim, "It was the result of new and independent forces."

To the extent that the state is alleging that the failure to secure the firearm allowed TGJC to steal it and bring it to school, unbeknownst to Mr. Bauer that alleged negligence is passive in nature and not some affirmative act required by the definition of "cause". Moreover, this "negligent entrustment" theory has been rejected by the courts in this state in the context presented here. See e.g. Schwartz v. Elerding et al., 166 Wn.App. 608, 270 P.3d 630 (Div. III 2012); Parilla et al, v. King County et al, 138 Wn.App. 427, 157 P.3d 879 (Div. I 2007).

In Elerding, Division III rejected the contention that parents are responsible for harm caused by their child when the child accesses a firearm located in the resident and then shoots another individual. Much like the state argues here, the plaintiff in that case argued that the parents were civilly liable based on the "widespread knowledge that any and all

² Pursuant to WPIC 10.04, to prove third degree assault, the state would have to demonstrate that Mr. Bauer:

... act[ed] with criminal negligence when he or she fail[ed] to be aware of a substantial risk that a wrongful act [fill in particular description of act] may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

minors have a dangerous proclivity when it comes to guns,' and on the premise that 'a minor misusing a gun is foreseeable by almost everyone.'”

166 Wn.App at 620. In rejecting this contention, the court stated:

We know of no basis for the Schwartzes' generalizations about all minors and the Schwartzes offer none, other than the restriction on minors' possession of firearms provided by the joint operation of RCW 9.41.080, .040(2)(a)(iii), and .042 and similar restrictions adopted in other jurisdictions. But... Washington statutes place no restriction on the age at which children may possess a firearm while in attendance at ... a parent's or relative's property with permission to possess the firearm. RCW 9.41.042 (1)-(4), (7).

Id. at 620-21. With the exception of requiring supervision by an adult of minors under the age of 14 in areas where discharge of a firearm is allowed, there are no restrictions to the possession of a firearm by a minor.

Id.

Moreover, in Parilla, supra, the court refused to find liability on a negligent entrustment theory where the offending individual took a bus without the defendant's permission, causing injury to the plaintiff. In so holding, the court noted that before one could be held liable under this theory there must be "some kind of agreement or consent, either express or implied, to relinquish control of the instrumentality in question." 138 Wn.App at 441 (*citing* Black's Law Dictionary 574 (8th ed. 2004)). *cf* Bernethy v. Failor's Inc, et al, 97 Wn.2d 929, 653 P.2d 280 (1982)(finding liability where the defendant intended to relinquish control of the firearm to a visibly intoxicated person).

Here, of course, the firearm was taken without Mr. Bauer's knowledge, without his consent or agreement, and without any intention to relinquish control of it. Under these facts, if there can be no civil liability, most certainly there can be no criminal liability.

3. An Individual Can Only Be Held Criminally Liable For A Crime Committed By Another Pursuant to RCW 9A.08.020.

As mentioned above the power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative." 85 Wn.2d at 706. Along with this power, it is also a legislative function to specify the ways or modes by which a given crime may be committed..." State v. Carothers, 9 Wn.App, 691, 696, 514 P.2d 170 (1973), *aff'd*, 84 Wn.2d 256, 525 P.2d 731 (1974). The Washington Supreme Court noted the limitations set forth by the legislature when it discussed when a person may be criminally liable based on another's acts in In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 842-43, 215 P.3d 166 (2009). As the court stated:

"... the legislature has established criminal liability based on someone else's acts, such as proof of aiding and abetting or accessory liability. RCW 9A.08.020. Such instances require proof of someone actually doing something to support or facilitate the commission of a crime or actually knowing and assisting in the criminal activity in order to be subject to criminal sanctions. Perhaps a person should know many things, but often the opposite could be true, like here: The parents could have just as easily presumed their son's criminal activities would stop after the first arrest just as they could have suspected their son's criminal activities would continue."

(See also Bobenhouse, supra at 889 (a person can only be charge and convicted in certain circumstances for acts committed by another pursuant to RCW 9A.08.020)).

As the state has acknowledged, RCW 9A.08.020 is inapplicable to the facts of this case because there is nothing to suggest that Mr. Bauer knew or assisted the commission of the crime. In short, the “certain circumstances” giving rise to criminal liability based on someone else’s acts do not exist. Inexplicably, however, rather than not filing the charge, the prosecutor attempts to leap frog this requirement, by creating another avenue of criminal responsibility, although it is totally at odds with the legislature’s determination that one can only be held responsible for another’s acts under very limited circumstances. This violates the separation of powers doctrine followed by the courts of this state. See State v. Wadsworth, 139 Wn.2d 724, 991, P. 2d 80 (2000).

Finally, as noted in State v. Christman, 160 Wn.App. 741, 755, 249 P.3d 680 (2011), there is a fairness component of holding a defendant responsible for a crime, which rests on policy considerations as to how far the consequences of a defendant’s acts should extend -- considerations which depend on “mixed considerations of logic, common sense, justice, policy, and precedent.” There is no precedent supporting the application of the third degree assault statute to the facts of this case, nor any logic that would make a person aware that he would be held for assaulting another person with whom he had no contact, when the assault was accomplished

without his knowledge, was deliberately hidden from him, and was done when he was unaware of the perpetrator's motivations, without any encouragement by him.

As such, the court should reverse the trial court's denial of Mr. Bauer's motion and dismiss the charges against him.

B. THIS COURT SHOULD REVERSE THE TRIAL COURT BECAUSE THE ASSAULT STATUTE IS VAGUE AS APPLIED TO THE CONDUCT AT ISSUE.

1. Mr. Bauer did not have Notice that the Third Degree Assault Status would Prohibit his Conduct in this case.

“[S]tatutes are to be construed to affect their purposes and to avoid an unlikely or strained consequence.” See State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995), *citing* Ski Acres Inc. v. Kittitas County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992). In this regard, under the Due Process clause of the 14th Amendment a statute is void for vagueness if it does not define the criminal offense with sufficient specificity so that ordinary people can understand what conduct is prescribed. See State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007). In a situation where the statute does not involve 1st Amendment rights, as is the case here, a vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case. 160 Wn.2d at 4. The test the Court is to consider is whether:

1. The statute “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed”; or

2. The statute “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.”

Id. at 5 (*quoting State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001)). As such, the Due Process clause forbids criminal statutes that permit a standardless sweep, allowing police, judges, juries, and prosecutors to pursue their own personal predilections. City of Spokane v. Douglass, 115 Wn.2d 171,181, 795 P.2d 693 (1990). The elected prosecutor acknowledged that an assault charge has never been applied in this context and a review of the cases indicates that not only has it not been applied in this context within Washington, but it does not appear to have been applied anywhere in the country in this context. As such he and the court appear to be pursuing their own predilections without adequate notice to Mr. Bauer or the citizens of this state.

The underlying principle is that an individual should not be held criminally responsible for conduct, which she could not reasonably understand to be proscribed. Watson, at 6 *citing* (United States v. Harris, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed 989 (1954)). In determining whether fair notice is given, courts and citizens may use other statutes and court rulings to clarify the meanings of particular statutes. 115 Wn.2d 171 at 180.

For instance, as mentioned above, there is no definition of “cause” set forth in the statute defining third degree assault. Therefore, the court should utilize definitions given to the term in other contexts. It appears that there is only a single relevant case that has defined the term in a

situation similar to that presented here. As the Washington State Supreme Court stated, under circumstances where the definition of “cause” is not included in the statute, the court is to give the word its common law or ordinary meaning. State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). See also State v. Marohl, 170 Wn.2d 691, 669, 246 P.3d 177 (2010) (in dismissing a third degree assault conviction for insufficient evidence, the court applies the plain and ordinary meaning as defined in the dictionary to a term left undefined in the statute). Applying the above rule in the context of a sexual exploitation of a minor charge, the court in Chester reversed the defendant’s conviction because the state did not prove that Chester caused the minor to engage in certain behavior. In so doing, the Court noted that “‘cause’ means to be the cause of, to bring about, to induce or to compel.” 133 Wn.2d at 23 (*citing* Black’s Law Dictionary 221 (6th ed. 1990); Webster’s Third New International Dictionary 356 (1986)). It requires “some affirmative act of assistance, interaction, influence or communication on the part of the defendant which initiates..” the result.

Here, there is no affirmative act alleged in the information that suggests that Mr. Bauer caused any type of bodily injury to the young girl, who is the victim in this case. Likewise, there is no accusation of any affirmative act on the part of Mr. Bauer that suggests that he caused the young boy to engage in any behavior.

Secondly, because the court is to utilize other cases and statutes to determine whether a statute is vague, the court should consider the limitations placed by the legislature in determining when a defendant may be held liable for acts committed by a third party. Under RCW 9A.08.020 an individual may only be held accountable for the conduct of another under two situations. First, he must cause another to engage in the conduct, something that is not at issue here, because he did nothing to cause another to engage in any conduct. Secondly, to hold one responsible for another's conduct one must be an accomplice, which requires knowledge and some agreement to engage in the prohibited activity. RCW 9A.08.020(3)(a). This alternative is also inapplicable.

By limiting the possible methods of making one liable for the conduct of another, the statute defining third degree assault is certainly vague as it is being applied to Mr. Bauer under the facts here. Indeed, as noted by the Washington State Supreme Court, statutes at times only become vague when the "language is stretched and twisted to fit facts not clearly within its scope." Chester, at 21. That is exactly what the state is attempting to do here—stretch and twist the words of the third degree assault statute in order to fit the facts of this case. But, by doing so, it creates a statute that is vague as applied to these facts.

While the defense is of the opinion that the state's interpretation of the third degree assault statute is not reasonable, it cannot seriously be argued that the defense's interpretation is anything other than reasonable,

given that the Washington State Supreme Court has held that “cause” requires an affirmative act and the legislature has specifically identified when an individual may be held criminally liable for acts of a third person, none of which is applicable here. Indeed, had the legislature intended to make someone in Mr. Bauer’s situation liable for an assault based on the acts of a third person outside of those instances identified in RCW 9A.08.020, it would have explicitly stated so, much like it did under RCW 69.50.401(f), when it made it unlawful to bring a minor into a drug transaction.

Moreover, given that there are no laws that make it criminal to maintain one’s firearms within their residence under lock and key, a person would be unable to be put on notice that the failure to do so would make him criminally liable for an assault he did not commit based on that theory. As such, the court should reverse the trial court and find that the third degree assault statute is vague as applied to the conduct at issue here.

2. The Ex Post Facto Clause Prevents a Novel Interpretation of The Statute to Be Applied Retroactively.

To the extent that the court is inclined to expand the breadth of the statute to the conduct at issue in this case, the United States Supreme Court has addressed similar situations where a statute has been construed to factual situations beyond its normal application. In holding such retroactive applications unconstitutional, the Court stated:

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language

but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language..
..“judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.”
Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot “be cured in a given case by construction in that very case placing valid limits on the statute.”... If this view is valid in the case of a judicial construction which adds a “clarifying gloss” to a vague statute, making it narrower or more definite than its language indicates, it must be *a fortiori* so where the construction unexpectedly broadens a statute which on its face had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an *ex post facto* law, such as Art. I § 10, of the Constitution forbids. An *ex post facto* law has been defined by this Court as one “that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action,” or “that *aggravates a crime*, or makes it *greater* than it was, when committed.” If a state legislature is barred by the *Ex Post Facto Clause* from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie v. City of Columbia, 378 U.S. 347, 352-54, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (citations omitted).

It is undisputed that the assault statute has never been applied to a factual situation similar to that presented here. It is also undisputed that the legislature has limited the modes by which an individual can be held responsible for conduct committed by another. Likewise, as mentioned above there are no laws that require firearms to be secured to prevent access to them.

Should the court allow this expansion of the assault statute it would be an unexpected judicial enlargement of its breadth. To the extent that the court enlarges the scope of the statute, it cannot be used to prosecute Mr. Bauer, as it would violate the constitutional prohibitions against ex post facto laws.

V. CONCLUSION

Based on the files and records herein, Mr. Bauer requests that the court reverse the trial court and dismiss the prosecution of this action.

RESPECTFULLY SUBMITTED this 13 day of August, 2012.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By: 
WAYNE C. FRICKE
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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Jeremy Morris
Deputy Prosecuting Attorney
614 Division Street
Port Orchard, WA 98366-4614

Doug Bauer
P.O. Box 1885
Allyn, WA 98524

Signed at Tacoma, Washington, this 13th day of August, 2012.


LEE ANN MATHEWS

RCW 9A.36.031
Assault in the third degree.

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself, herself, or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault; or

(c) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a firefighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW; or

(j) Assaults a judicial officer, court-related employee, county clerk, or county clerk's employee, while that person is performing his or her official duties at the time of the assault or as a result of that person's employment within the judicial system. For purposes of this subsection, "court-related employee" includes bailiffs, court reporters, judicial assistants, court managers, court managers' employees, and any other employee, regardless of title, who is engaged in equivalent functions.

(2) Assault in the third degree is a class C felony.

[2011 c 336 § 359; 2011 c 238 § 1; 2005 c 458 § 1; 1999 c 328 § 1; 1998 c 94 § 1; 1997 c 172 § 1; 1996 c 266 § 1; 1990 c 236 § 1; 1989 c 169 § 1; 1988 c 158 § 3; 1986 c 257 § 6.]

Notes:

Reviser's note: This section was amended by 2011 c 238 § 1 and by 2011 c 336 § 359, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 1988 c 158: See note following RCW 9A.04.110.

Severability -- 1986 c 257: See note following RCW 9A.56.010.

Effective date -- 1986 c 257 §§ 3-10: See note following RCW 9A.04.110.

RCW 9A.08.020

Liability for conduct of another — Complicity.

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct; or

(b) He or she is made accountable for the conduct of such other person by this title or by the law defining the crime; or

(c) He or she is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he or she:

(i) Solicits, commands, encourages, or requests such other person to commit it; or

(ii) Aids or agrees to aid such other person in planning or committing it; or

(b) His or her conduct is expressly declared by law to establish his or her complicity.

(4) A person who is legally incapable of committing a particular crime himself or herself may be guilty thereof if it is committed by the conduct of another person for which he or she is legally accountable, unless such liability is inconsistent with the purpose of the provision establishing his or her incapacity.

(5) Unless otherwise provided by this title or by the law defining the crime, a person is not an accomplice in a crime committed by another person if:

(a) He or she is a victim of that crime; or

(b) He or she terminates his or her complicity prior to the commission of the crime, and either gives timely warning to the law enforcement authorities or otherwise makes a good faith effort to prevent the commission of the crime.

(6) A person legally accountable for the conduct of another person may be convicted on proof of the commission of the crime and of his or her complicity therein, though the person claimed to have committed the crime has not been prosecuted or convicted or has been convicted of a different crime or degree of crime or has an immunity to prosecution or conviction or has been acquitted.

[2011 c 336 § 351; 1975-'76 2nd ex.s. c 38 § 1; 1975 1st ex.s. c 260 § 9A.08.020.]

Notes:

Effective date -- 1975-'76 2nd ex.s. c 38: "This 1976 amendatory act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1976." [1975-'76 2nd ex.s. c 38 § 21.]

Severability -- 1975-'76 2nd ex.s. c 38: "If any provision of this 1976 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1975-'76 2nd ex.s. c 38 § 20.]

HESTER LAW OFFICES

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