No. 93385-5

No. 46605-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Zaida Cardenas-Flores,

Appellant.

Clark County Superior Court Cause No. 14-1-00298-0

The Honorable Judge David Gregerson

Appellant's Reply Brief

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ARGUMENT

I. RESPONDENT'S ARGUMENT CONFIRMS THAT THE STATE FAILED TO PROVE AN INTENTIONAL ASSAULT.

A. The state proved no more than reckless conduct.

Zaida Cardenas-Flores did not commit second-degree assault.

She admitted to police that she accidentally injured her infant son while putting him in or taking him out of his car seat. RP 186, 188, 201-202, 235, 246, 247, 258. Dr. Lang confirmed that this account made sense, if the child's leg twisted hard enough during the maneuver. RP 79-80, 245. Using words that were "a bit more robust,"[1] the prosecutor relied on Ms. Cardenas-Flores's account in closing, contending that she injured her child while putting him in or taking him out of his car seat. RP 398, 423.

This evidence of accidental trauma was insufficient to show that Ms. Cardenas-Flores "intentionally assault[ed] another and thereby recklessly inflict[ed] substantial bodily harm." CP 19. Regardless of any injury caused, straightening a baby's leg while placing him in a child seat is not an intentional assault. Nor is lifting a baby from a child seat an assault, even when injury results because his leg is still caught in a strap.

[1] Brief of Respondent, p. 13, n. 1.

Because the evidence was insufficient, the conviction must be reversed and the case dismissed. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

The *Pennewell* case, upon which Respondent relies, actually supports Ms. Cardenas-Flores's position. Brief of Respondent, pp. 12-13 (citing *State v. Pennewell*, 23 Wn. App. 777, 782, 598 P.2d 748 (1979)).

The *Pennewell* court upheld a conviction where the defendant gave explanations inconsistent with the medical findings. *Id.,* at 782-783.[2] Here, Ms. Cardenas-Flores gave explanations that were *consistent* with the medical findings. RP 79-80, 245.

Although she later repudiated her "confessions," this repudiation does not somehow make the evidence sufficient. RP 182-259, 266-345; Brief of Respondent, p. 14. Disavowing reckless or negligent conduct does not transform that conduct into an intentional assault.

Nor does her belief in another possible cause of injury undermine her claim of accident. First, there is no suggestion that the couple fabricated the co-sleeping incident. Second, the mother is not herself a medical expert, and thus cannot be expected to rule out the accident—which she did not witness—as a cause of the child's injury. RP 268-270.

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[2] The defendant in *Pennewell* also had "total control" over the victim at the time of injury. *Id.*

Although Dr. Lang ruled out the co-sleeping incident, this does not mean Ms. Cardenas-Flores's belief was insincere, and it certainly does not prove an intentional assault. RP 75.

Similarly her "'special insight into [C.A.'s] young age and vulnerability'" relates only to the issue of recklessness. Brief of Respondent, pp. 14 (quoting *State v. Hovig*, 149 Wn. App. 1, 9-10, 202 P.3d 318 (2009)). The same is true regarding her knowledge that C.A. already had "to some degree an injured leg." Brief of Respondent, p. 15 (citing *Hovig*.) Her apparent failure to exercise adequate care did not by itself amount to an intentional assault.

Conviction required proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. CP 19; RCW 9A.36.021(1)(2). Respondent asks this court to dispense with the requirement of an assault, arguing the sufficiency of *any* intentional touching accompanied by the reckless infliction of substantial harm. Brief of Respondent, p. 13.

An intentional act resulting in harm is not second-degree assault, unless the intentional act is itself an intentional assault. RCW 9A.36.021. Even if done recklessly, straightening a baby's leg in order to place him in a car seat is not a "'physical act constituting assault.'" Brief of Respondent, quoting *State v. Keend,* 140 Wn. App. 858, 867, 166 P.3d

1268 (2007), *rev. denied,* 163 Wn.2d 1041, 187 P.3d 270 (2008). The same is true of lifting a baby from his car seat.

At most, Ms. Cardenas-Flores recklessly or negligently caused bodily harm, an element of third-degree assault. RCW 9A.36.031(1)(f).[3] Ms. Cardenas-Flores may be convicted of that offense on remand if she acted recklessly or negligently and "caused bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031(1)(f).

However, because the judge did not instruct jurors on third-degree assault, this court does not have the option of entering a conviction for that offense. *See In re Heidari*, 174 Wn.2d 288, 292-296, 274 P.3d 366 (2012).

Nothing in the record suggested that the child's injuries could only be caused by an intentional assault. Dr. Lang testified only that the injury involved "more force than what's going to be going on in normal everyday life." RP 80. This is entirely consistent with recklessness or negligence.

The evidence was insufficient for conviction of second-degree assault of a child. The charge must be dismissed with prejudice. *Smalis,* 476 U.S. at 144.

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[3] "A person is guilty of assault in the third degree if he or she… [acting with] criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering." RCW 9A.36.031.

B. The independent evidence does not establish the *corpus delicti* of second-degree assault of a child.

1. A non-constitutional sufficiency claim (such as a *corpus delicti* argument) may be raised for the first time on appeal under RAP 2.5(a)(2).

A party may raise "for the first time in the appellate court… failure to establish facts upon which relief can be granted." RAP 2.5(a)(2). This allows a party to raise sufficiency errors that do not fit within RAP 2.5(a)(3), including non-constitutional errors and errors that are not manifest. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) *aff'd,* 174 Wn.2d 909, 281 P.3d 305 (2012). A defendant "may always challenge the sufficiency of the evidence supporting a conviction for the first time on review."[4] *Id.*

The *corpus delicti* rule is first and foremost a rule of evidentiary sufficiency: "A confession not corroborated by independent evidence of the *corpus delicti* is not sufficient to support a conviction of crime." *State v. Marselle*, 43 Wash. 273, 276, 86 P. 586 (1906). The modern rule is also a rule governing the admissibility of evidence. *State v. Dow*, 168 Wn.2d 243, 249-254, 227 P.3d 1278 (2010) (citing RCW 10.58.035).[5]

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[4] In the alternative, failure to raise a proper objection under the *corpus delicti* rule will inevitably constitute ineffective assistance of counsel, as argued in the Opening Brief.

[5] The *Dow* court noted that RCW 10.58.035 governs issues of admissibility, and preserves intact the rule's requirements regarding sufficiency. *Id.* Respondent's argument that "the state could have availed itself of RCW 10.58.035(1)" if defense counsel had objected misses this point. Brief of Respondent, p. 19. The prosecution might have used the statute to

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Ms. Cardenas-Flores can raise the sufficiency of the evidence under the *corpus delicti* rule for the first time on appeal. RAP 2.5(a)(2); *Sweany*, 162 Wn. App. at 228. Respondent's contrary argument is based on a case that is no longer good law. Brief of Respondent, pp. 17-19 (citing *State v. Grogan*, 147 Wn. App. 511, 519, 195 P.3d 1017 (2008) (Grogan I)).[6]

The *Grogan* decision upon which Respondent relies predated *Dow.* Following *Dow,* the Supreme Court granted review of *Grogan* and remanded for reconsideration in light of *Dow.* 168 Wn.2d 1039, 234 P.3d 169 (2010). On remand, the Court of Appeals reached the merits of the appellant's *corpus delicti* claim, despite the lack of objection in the trial court.[7] *State v. Grogan*, 158 Wn. App. 272, 273-274, 246 P.3d 196 (2010) (Grogan II). No subsequent published opinion supports Respondents'

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overcome a *corpus delicti* objection as to admissibility; however, it would still have had the challenge of proving the *corpus delicti* by evidence independent of Ms. Cardenas-Flores's extrajudicial statements. *Id.*

[6] The full citation is *State v. Grogan*, 147 Wn. App. 511, 519, 195 P.3d 1017 (2008) *review granted, cause remanded,* 168 Wn.2d 1039, 234 P.3d 169 (2010) (*Grogan* I); *on remand State v. Grogan*, 158 Wn. App. 272, 273, 246 P.3d 196, 197 (2010) (*Grogan* II).

[7] It is likely that *corpus delicti* issues involving admissibility are waived absent objection, since they do not fit within RAP 2.5(a)(2).

argument, and the Court of Appeals has since addressed *corpus delicti* issues for the first time on appeal.[8]

The *corpus delicti* issue is properly before the court. Furthermore, the court may accept review of any issue argued for the first time on appeal. RAP 2.5(a); s*ee State v. Russell,* 171 Wn.2d 118, 122, 249 P.3d 604 (2011). If the *corpus delicti* argument is not reviewable under RAP 2.5(a)(2), the court should nonetheless exercise its discretion and review the issue on its merits. *Id.*

2. The independent evidence does not prove an assault.

Dr. Lang agreed that C.A.'s injuries could have resulted from excessive force applied when putting him in or taking him from his car seat. RP 79-80. She could not diagnose non-accidental trauma. RP 81, 136, 138. The state produced no independent explanation of how the injury occurred, and nothing in the defense case[9] established that an assault occurred.

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[8] *See, e.g., State v. Witherspoon*, 171 Wn. App. 271, 296 n. 7, 286 P.3d 996 (2012) *aff'd,* 180 Wn.2d 875, 329 P.3d 888 (2014), *as corrected* (Aug. 11, 2014) ("Notably, the Washington Supreme Court has addressed corpus delicti arguments raised for the first time on appeal") (citing *State v. Riley,* 121 Wn.2d 22, 31–32, 846 P.2d 1365 (1993)).

[9] As Respondent notes, the court may consider all of the evidence introduced by either party, including the defendant's own testimony. Brief of Respondent, pp. 23-24. Ms. Cardenas-Flores did not admit to assaulting her son during her testimony. No one suggested that she fabricated the co-sleeping incident, and her belief that the injury occurred then does not prove that she assaulted her child. This is especially true in light Dr. Lang's inability to rule

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Thus no independent evidence corroborates "*the specific crime* with which the defendant has been charged." *State v. Brockob*, 159 Wn.2d 311, 329, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007) (emphasis in original). Nor can it be said that the independent evidence is consistent with guilt and inconsistent with a hypothesis of innocence.[10] *Id.*

The state failed to present independent evidence proving second-degree assault of a child. The conviction must be reversed and the case dismissed with prejudice. *Dow,* 168 Wn.2d at 255.

3. The independent evidence does not prove intent; Division II should not follow the interpretation of *Brockob* espoused by Divisions I and III.

Following *Brockob,* the state must independently establish the defendant's *mens rea.*[11] In *Brockob,* for example, the state failed to produce independent evidence corroborating one defendant's intent to manufacture methamphetamine. *Id.,* at 331-333.[12] Absent independent

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out accidental trauma and the defendant's plausible descriptions of accidental injury, even though she subsequently disavowed those accounts.

[10] In this context, "innocent" means innocent of the charged crime. *Id.,* at 332 ("Contrary to the dissent's claim, our conclusion is not based on whether the State's evidence supported an inference that Brockob was *innocent* of committing a crime.")

[11] Indeed, even before *Brockob,* the Supreme Court made clear that the state was required to produce independent evidence of the perpetrator's mental state. *See, e.g., State v. Aten*, 130 Wn.2d 640, 658, 927 P.2d 210 (1996) (reversing for absence of independent proof of criminal negligence).

[12] The Supreme Court also addressed two companion cases, finding independent evidence sufficient in one, and concluding that sufficient evidence supported both convictions.

evidence of intent, the defendant's statement could not be considered. The *Brockob* court found the remaining evidence insufficient to prove possession of pseudoephedrine with intent to manufacture. *Id.*

The outcome in *Brockob* hinged on the state's failure to provide independent evidence of the defendant's intent. *Id.* Divisions I and III have ignored this aspect of *Brockob.*[13] *State v. Angulo*, 148 Wn. App. 642, 200 P.3d 752 (2009); *State v. Hummel*, 165 Wn. App. 749, 768, 266 P.3d 269 (2012). *Angulo* and *Hummel* are directly contrary to *Brockob.* They were wrongly decided. Division II should not apply their reasoning to this case.

In *Brockob,* the court made clear that independent evidence must corroborate "not just *a crime* but *the specific crime* with which the defendant has been charged." *Brockob,* 159 Wn.2d at 329. The *Brockob* majority criticized the dissent for claiming that the rule only requires "'an inference that *a crime was committed.*'" *Id.* (quoting dissent). According to the majority,

> [T]he rule is not so forgiving. The State's evidence must support an inference that *the crime with which the defendant was charged* was committed. This is a much higher standard than the dissent implies. It requires that the evidence support not only the inference that *a crime* was committed but also the inference that *a particular crime* was committed.

[13] In its subsequent cases addressing *corpus delicti,* the Supreme Court has not addressed the issue.

Id. Despite the Supreme Court's clear language and its application of that language to the facts in *Brockob,* the *Angulo* court relied on prior cases and asserted that "[t]he corroboration does not require proof of all elements of the charged offense." *Angulo*, 148 Wn. App. at 653.

This is simply wrong under *Brockob.* Where independent evidence fails to *prima facie* establish each element of the charged crime, it is necessarily consistent with a hypothesis of innocence as to that crime. Thus, under the independent evidence, Mr. Brockob was "innocent" of possession of pseudoephedrine with intent to manufacture: no independent evidence supported an inference that he intended to manufacture methamphetamine. *Brockob,* 159 Wn.2d at 330-331.

Having ignored the holding of *Brockob,* the *Angulo* court went on to depart from other precedent and upheld a rape prosecution despite a lack of independent evidence of penetration. *Angulo*, 148 Wn. App. at 656. Indeed, the *Angulo* court explicitly acknowledged its reliance on a prior standard—"the traditional requirement of a 'criminal act'"—instead of *Brockob's* insistence that the independent evidence corroborate the crime with which the defendant was charged. *Brockob,* 159 Wn.2d at 329.

This court should not follow Division III in ignoring Supreme Court precedent. The Court of Appeals is "bound to follow [the] Supreme

Court's precedents and [has] no authority to abolish them." *Gorman v. Pierce Cnty.*, 176 Wn. App. 63, 76, 307 P.3d 795 (2013) *review denied,* 179 Wn.2d 1010, 316 P.3d 495 (2014).

In *Hummel,* Division I resisted *Brockob's* clear language and the Supreme Court's application of that language in Mr. Brockob's case. The challenge facing the *Hummel* court was to apply *Brockob* in light of "decades of case law explaining the application of the *corpus delicti* rule in homicide cases." *Hummel*, 165 Wn. App. at 762. As in *Angulo,* the *Hummel* court relied on cases predating *Brockob. Id.,* at 766-768.

Instead of reaching back to earlier cases, Division I should have focused on the interplay between the majority and the dissent. The majority's responses to the dissent clarify the holding of *Brockob,* as outlined above. Still, had the *Hummel* court properly applied *Brockob,* it would likely have reached the same result. Independent evidence in that case *prima facie* established that Mr. Hummel killed his wife, acting with premeditated intent. *Hummel*, 165 Wn. App. at 770.

Division II should not follow *Hummel,* to the extent that it departs from the rule set forth in *Brockob. Gorman,* 176 Wn. App. at 76. When applied to the facts of this case, *Brockob* requires reversal because the state failed to provide independent evidence proving that Ms. Cardenas-Flores intended to assault her child.

The conviction must be reversed and the case dismissed with prejudice. *Brockob,* 159 Wn.2d at 329-331.

4. If the state's failure to prove the *corpus delicti* by independent evidence is not preserved for review, Ms. Cardenas-Flores received ineffective assistance of counsel.

Respondent's argument on this issue relies on the merits of the *corpus delicti* claim. Accordingly, Ms. Cardenas-Flores rests on the argument set forth in her Opening Brief.

C. The state did not prove that the offense occurred in Washington State.

Ms. Cardenas-Flores relies on the argument set forth in her Opening Brief.

II. THE COURT'S INSTRUCTIONS ALLOWED CONVICTION FOR ANY INTENTIONAL TOUCHING, EVEN ABSENT PROOF OF AN ASSAULT.

A. The court's instructions did not make manifestly clear the state's obligation to prove that the mother acted with "criminal intent" and used "unlawful force," as required for assault by means of battery.

The court's instructions obligated jurors to convict if Ms. Cardenas-Flores recklessly caused substantial bodily harm through any intentional touch. CP 20; *see* Appellant's Opening Brief, pp. 29-34. This is true even if she used lawful force and lacked criminal intent.

But assault by means of battery requires proof of both unlawful force and criminal intent. *State v. Hahn*, 174 Wn.2d 126, 129, 271 P.3d

892 (2012); *State v. Jarvis*, 160 Wn. App. 111, 117, 246 P.3d 1280 (2011). Respondent does not address this argument.[14] Brief of Respondent, pp. 25-31. Respondent's failure to argue this point may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The phrase "with unlawful force" is bracketed in the pattern instruction defining assault, and was omitted from the court's instructions in this case. CP 20; *see* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed).[15] In most cases, the language is optional, because an intentional touching that causes harm will generally qualify as an assault.

However, in cases involving caretakers and infants, the standard instructions are inadequate because they do not accurately convey the "unlawful force" requirement. *See* Appellant's Opening Brief, pp. 29-34. In cases such as this one, where a caretaker is accused of committing battery upon an infant, omitting the phase "with unlawful force" relieves

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[14] Instead of focusing on the court's failure to instruct jurors on the elements of unlawful force and criminal intent, Respondent points out that specific intent to cause harm is not an essential element of assault by means of battery. Brief of Respondent, pp. 29-31. As Respondent notes, this is well-settled. Brief of Respondent, p. 29. It is not the argument raised by appellant.

[15] The pattern instruction's first paragraph, including all bracketed material, reads as follows:

> [An assault is an intentional [touching] [or] [striking] [or] [cutting] [or] [shooting] of another person[, with unlawful force,] that is harmful or offensive [regardless of whether any physical injury is done to the person]. [A [touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 35.50 (3d Ed).

the state of its burden to prove the elements of an assault by means of battery.[16]

Similarly, in most cases, the requirement of "criminal intent" is adequately captured by the inclusion of the phrase "an intentional touching… that is harmful or offensive." CP 20; WPIC 35.50. However, this is not the case where a parent is accused of assaulting her own infant. An infant cannot be "offended" by a parent's touch.[17] Furthermore, a parent's intentional touch can cause accidental harm to an infant; thus, the phrase "an intentional touching… that is harmful" necessarily includes intentional acts that do not qualify as assault. *See* Appellant's Opening Brief, pp. 31-32 (describing examples).

Nor is the problem solved by Instruction 8 ("A person commits the crime of assault in the second degree when he *intentionally assaults* another."). CP 19 (emphasis added). Considering the two instructions in conjunction does nothing to clarify the "criminal intent" requirement: "A person commits the crime of assault in the second degree when he intentionally [commits] an intentional touching…that is harmful." CP 19-20 (combined). When read as a whole, the instructions do not make the

[16] By contrast, the standard instructions would be sufficient for a third-degree assault charge, which requires only proof of criminal negligence. *See* RCW 9A.36.031(1)(f).

[17] The only possible exception arises when a parent sexually touches a child. That situation is not applicable to this case.

relevant standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).

The court's instructions relieved the state of proving that the mother acted with "criminal intent" and used "unlawful force." *See* CP 19-20. Both "criminal intent" and "unlawful force" are elements of assault by means of a battery. *Hahn*, 174 Wn.2d at 129; *Jarvis*, 160 Wn. App. at 117.

The conviction must be reversed and the case remanded for a new trial with proper instructions. *Kyllo*, 166 Wn.2d at 864.

B. An instructional error relieving the state of its burden to prove an element of a criminal offense qualifies for review under RAP 2.5(a)(3).[18]

A manifest error affecting a constitutional right may be raised for the first time on review.[19] RAP 2.5(a)(3). An appellant need only make "a plausible showing that the error… had practical and identifiable consequences in the trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d

[18] Respondent faults appellant for making this point in a footnote, and for failing to fully argue RAP 2.5(a)(3). Brief of Respondent, p. 27-28. The Supreme Court has made clear that established principles of law need not be relitigated in every appeal. *See, e.g., Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 787, 317 P.3d 1009 (2014) (noting that a *Gunwall* analysis is "unnecessary and unhelpful" where state constitutional principles are well-established). Furthermore, Appellant did not "attempt[ ] to circumvent the page limits" through "excessive use of footnotes." *Tamosaitis v. Bechtel Nat., Inc.*, 182 Wn. App. 241, 248, 327 P.3d 1309 *review denied,* 181 Wn.2d 1029, 340 P.3d 229 (2014).

[19] In addition, the court may accept review of any issue argued for the first time on appeal. RAP 2.5(a); s*ee Russell,* 171 Wn.2d at 122.

46 (2014). The showing required under RAP 2.5(a)(3) "should not be confused with the requirements for establishing an actual violation of a constitutional right." *Id.*

An error has practical and identifiable consequences if "given what the trial court knew at that time, the court could have corrected the error." *State v. O'Hara*, 167 Wn.2d 91, 100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). In this case, the trial judge had heard all of the evidence at the time he instructed the jury. Given what he knew at the time, he could have corrected the error.

Instructions that relieve the state of its burden to prove every element create manifest error affecting a constitutional right under RAP 2.5(a)(3). *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996). A misstatement in an instruction defining assault qualifies as manifest error affecting a constitutional right, and thus may be reviewed for the first time on appeal. *Id.*

The Supreme Court has rejected any characterization of such errors as "located in the definition of assault and thereby falling short of the manifest error standard." *Id.* The *Eastmond* court faced a challenge similar to that raised here: the instruction defining assault in that case misstated the *mens rea* required for conviction. *Id.* The court found that the instruction defining assault relieved the state of its burden to prove the

requisite mental state. It reviewed the issue as manifest constitutional error, and reversed the defendant's conviction. *Id.*

Subsequent cases have affirmed that a proper instruction defining assault is necessary to convey the essential elements of that offense. *See, e.g., State v. Sanchez*, 122 Wn. App. 579, 591, 94 P.3d 389 (2004). Despite this, Respondent contends the error here does not qualify for review under RAP 2.5(a)(3).

Respondent does not address *Eastmond* or *Sanchez.* Instead, Respondent relies on two easily distinguished cases in support of its waiver argument. Respondent, p. 28 (citing *State v. Daniels*, 87 Wn. App. 149, 154, 940 P.2d 690 (1997) and *State v. Pawling,* 23 Wn. App. 226, 597 P.2d 1367 (1979).

The *Daniels* case did not involve the flawed combination of instructions given here. Instead, the court properly instructed jurors that conviction of second-degree assault required proof of an intentional assault accompanied by the reckless infliction of substantial bodily harm. The court did not give any further elaboration on the meaning of assault. *Daniels,* 87 Wn. App. at 153. The instructions given in *Daniels* adequately conveyed the requirements of criminal intent and unlawful force and made the relevant standard manifestly clear.

The problem in this case arose because the court *did* given an instruction elaborating on the meaning of assault. Had the trial court simply focused the jury on the "intentionally assaults" language of Instruction No. 8, jurors would likely have understood the requirement that the state prove both "criminal intent" and "unlawful force." The average juror would understand that the phrase "intentionally assaults" implies criminal intent and an act involving unlawful force. CP 19. However, the court muddied the water by telling jurors to look for any "intentional touching… that is harmful," without clarifying the state's obligation to prove unlawful force and criminal intent. CP 20.

Furthermore, the *Daniels* court reached the merits of the appellant's argument. The court recognized that if the appellant was correct, then he "was denied a jury verdict on [an] element and this court can review the alleged error under RAP 2.5(a)(3). *Id.,* at 155. Here, as in *Daniels,* the Court of Appeals should reach the merits of the argument. *Id.*

Nor does *Pawling* help Respondent's argument. Although definitional instructions seldom raise constitutional issues, the argument here involves both the *mens rea* ("criminal intent") and the *actus reus* ("unlawful force") of the crime as charged. In other words, the erroneous combination of instructions relieved the state of its burden to prove the core elements of the offense, not merely some peripheral definition.

The court's instructions failed to make the relevant standard manifestly apparent to the average juror. *Kyllo*, 166 Wn.2d at 864. This relieved the state of its burden to prove the essential elements of the offense. The conviction must be reversed and the case remanded for a new trial with proper instructions. *Id.*

III. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY IMPROPERLY SHIFTING THE BURDEN OF PROOF.

Ms. Cardenas-Flores relies on the argument set forth in her Opening Brief.

IV. MS. CARDENAS-FLORES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Ms. Cardenas-Flores withdraws her arguments regarding defense counsel's failure to consult with a medical expert.

Respondent points out that defense counsel refers to an expert at least once in the transcript. Brief of Respondent, p. 39. In light of this, Ms. Cardenas-Flores withdraws Assignments of Error Nos. 18, 19, and 20, Issues Nos. 9 and 10, and her argument set forth on pages 36-41 of the Opening Brief. She reserves those errors, issues, and arguments for a Personal Restraint Petition, should one become necessary.

B. Defense counsel unreasonably failed to request a limiting instruction and did not object to prosecutorial misconduct; his deficient performance prejudiced Ms. Cardenas-Flores.

Ms. Cardenas-Flores rests on the argument set forth in her Opening Brief.

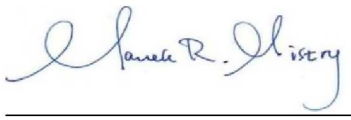
CONCLUSION

For the foregoing reasons, the conviction must be reversed and the case dismissed. In the alternative, the charge must be remanded for a new trial.

Respectfully submitted on July 8, 2015,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



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

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Zaida Cardenas-Flores, DOC #376856
Washington Corrections Center For Women
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Gig Harbor, WA 98332

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 July 8, 2015.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 08, 2015 - 11:32 AM

Transmittal Letter

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