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COURT OF APPEALS  
DIVISION TWO

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**Court of Appeals No. 34476-9-II**

STATE OF WASHINGTON

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

**DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**TOR KILDAL KNIGHT,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Superior Court of Pierce County,**

**Cause No.03-1-03695-3**

**The Honorable Stephanie Arend, Presiding Judge**

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**I. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying Mr. Knight's motion for a directed verdict at the close of testimony.
2. The trial court abused its discretion in failing to instruct the jury that resisting arrest is a lesser included crime of third degree assault.
3. The trial court abused its discretion in failing to instruct the jury that evidence of arrest is not evidence of guilt.

**II. ISSUES PRESENTED**

1. Was there sufficient evidence to convict Mr. Knight of assaulting the deputies with the truck where there was insufficient evidence to establish that Mr. Knight intended to harm the Deputies? (Assignment of Error No. 1)
2. Did the trial court abuse its discretion in denying Mr. Knight's request to instruct the jury regarding resisting arrest? (Assignment of Error No. 2)
3. Did the trial court abuse its discretion in denying Mr. Knight's request to instruct the jury that evidence of arrest is not evidence of guilt? (Assignment of Error No. 4)

**III. STATEMENT OF THE CASE**

***Factual and Procedural Background***

Due to conflicts between testimony given by the witnesses and the forensic evidence, it is impossible to provide a settled version of events.

Instead, a summary of the testimony of each witness will be given.

***Deputy Mark Tompkins***

On August 2, 2003, Deputy Mark Tompkins was on patrol. RP 98. Around midnight, Deputy Tompkins observed a blue Chevy Cavalier he did not recognize. RP 99. He ran the license plate and the vehicle came back registered to Lisa Caskin. RP 99. After the vehicle passed Mr. Tompkins, it turned onto 38<sup>th</sup> Street. RP 99. One of the houses on 38<sup>th</sup> Street is Mr. Tor Knight's house. RP 99. Deputy Tompkins called Deputy Darby to ask him if he recognized the vehicle. RP 100. As a result of their conversation, Deputies Tompkins and Darby determined that the Chevy Cavalier must be going down 38<sup>th</sup> to visit Mr. Knight. RP 100. Deputies Tompkins and Darby called LESA and learned that there was a warrant in the system for Mr. Knight for failing to follow the directives of the community custody officer. RP 100-101. Deputy Tompkins waited for Deputy Darby to arrive and then Deputies Tompkins and Darby drove down 38<sup>th</sup> Street to serve the warrant. RP 101.

Deputy Darby spoke with a female inside a house, after which Deputy Darby indicated to Deputy Tompkins that he had an idea of where Mr. Knight might be. RP 133. Deputy Tompkins went to the side of the house to watch for threats or somebody escaping while Deputy Darby spoke with the woman. RP 102-103. Deputy Tompkins was not directly involved with the

conversation between Deputy Darby and the woman. RP 133.

The deputies proceeded to an area in the woods where there was a series of wooded trails. RP 133-134. Deputy Tompkins got into Deputy Darby's four wheel drive Chevy Tahoe because the trails were not suitable for Deputy Tompkins' vehicle. RP 134. The deputies drove a series of trails for roughly half a mile and eventually came to a cleared area where there were vehicles parked. RP 134-135. The area had very tall trees, no lights, and was very dark. RP 135. The only source of lighting was from the Deputies' vehicle. RP 135. Deputy Tompkins saw the Chevy Cavalier he had observed earlier and saw a female standing next to it. RP 136.

Deputy Darby parked the Tahoe and Deputy Tompkins got out and approached the female to talk to her. RP 136. Deputy Tompkins spoke with the female briefly (RP 137) and then began to search the vehicles in the area for Mr. Knight. RP 140. Deputy Tompkins heard Deputy Darby begin yelling near a vehicle to his left. RP 141. Deputy Darby was yelling, "Tor, show me your hands." RP 141. Deputy Tompkins ran to Deputy Darby. RP 141.

Deputy Darby was positioned near a Ford truck that had four doors, two on each side. RP 141. Deputy Darby was standing on the driver's side near the rear door. 141-142. As Deputy Tompkins approached the truck, he

saw Mr. Knight come up from the floorboard area, look out the windows, and say "Fuck you guys." RP 142-143. Mr. Knight then climbed into the front seat of the truck. RP 144. Deputy Darby tried to open the rear driver's side door of the vehicle but it was locked. RP 144-145. Deputy Tompkins went to the front of the vehicle. RP 146. Mr. Knight sat up in the driver's seat and started the vehicle, so Deputy Tompkins retreated back to the driver's side of the vehicle. RP 148. Deputy Tompkins did not know exactly where Deputy Darby was, but he knew that Deputy Darby was to his right. RP 218. Deputy Tompkins had his flashlight shining at Mr. Knight with his firearm drawn and pointed over the top of the flashlight, and Mr. Knight looked directly at Deputy Tompkins. RP 149-152. As Mr. Knight accelerated, he ducked below the dashboard and swerved the truck toward Deputy Tompkins. RP 153. Deputy Tompkins fired four shots at the truck. RP 154-155. Deputy Darby was also firing at the truck. RP 155.

The truck turned away from Deputy Tompkins and collided with a group of trees. RP 155-156. Deputy Tompkins ran to the driver's side of the vehicle and saw Mr. Knight exiting from the passenger side of the vehicle. RP 157. Deputy Tompkins chased Mr. Knight through the woods until Mr. Knight fell down. RP 159-160. Deputy Tompkins shone his light on Mr. Knight and observed that Mr. Knight was not armed. RP 160-161. Mr.

Knight began flailing at Deputy Tompkins, so Deputy Tompkins holstered his firearm and began hitting Mr. Knight with his flashlight. RP 161-164.

Mr. Knight managed to knock Deputy Tompkins' glasses off and then ran away and jumped over a fence. RP 163-164. As Mr. Knight jumped over the fence, Deputy Tompkins pushed him to the ground took him into custody. RP 165. Shortly thereafter, Deputy Darby arrived and assisted in taking Mr. Knight into custody. RP 165.

After Mr. Knight was handcuffed, another deputy arrived. RP 166-167. As the deputies put Mr. Knight into a vehicle, Deputy Tompkins noticed blood on Mr. Knight's thigh and told the deputy transporting Mr. Knight to get him medical attention. RP 167.

***Deputy Shaun Darby***

On August 3, 2003, Deputy Shaun Darby was on Patrol in his 1999 Chevy Tahoe. RP 245. Deputy Darby was working with Deputy Tompkins and they were going to arrest Mr. Knight because Mr. Knight had an arrest warrant issued for his failure to comply with the directives set forth by his community custody officers. RP 250.

When the deputies arrived at the house on 38<sup>th</sup> street, both Deputy Tompkins and Deputy Darby spoke with the lady who answered the door. RP 251. The deputies entered the home to determine that Mr. Knight was not

there, then “gained some information as to where [Mr. Knight] may be.” RP 252. The Deputies then left the residence to look for Mr. Knight. RP 252.

The officers proceeded to the series of trails, but because the trails were on the property of Mr. Knight’s parents, in order to get to the trails the officers had to drive 50 feet down the driveway of Mr. Knight’s parents’ house. RP 253. The deputies drove down the trails until they emerged onto another street, then circled back around to Mr. Knight’s parents’ driveway, drove past where Deputy Tompkins had parked his car, and entered another set of trails. RP 255. The Deputies pulled into an area used by the Knights to store some property and saw a female standing next to the Chevy Deputy Tompkins had seen earlier. RP 255-256.

Deputy Tompkins went to speak with the female and Deputy Darby began search the other vehicles for Mr. Knight. RP 256-257. Deputy Darby located Mr. Knight in the back seat of a four door pickup and ordered him to get up and show Deputy Darby his hands. RP 258-260. Mr. Knight got up, said, “Fuck you guys,” and climbed into the driver’s seat of the truck. RP 260.

Deputy Darby began to distance himself from Mr. Knight while ordering him to get out of the truck. RP 260-261. As Deputy Darby backed up he drew his firearm and pointed it at Mr. Knight. RP 263. Deputy Darby

backed up until he was directly in front of the driver's side headlight. RP 262. Mr. Knight started the truck and drove at Deputy Tompkins. RP 262-263. Deputy Darby commanded Mr. Knight to stop and fired his gun at Mr. Knight three times. RP 264-265. The truck veered away from the deputies and crashed into a dirt embankment. RP 266.

When the truck stopped, Deputy Darby ran up to the truck and saw Mr. Knight crawling out the passenger side door. RP 267. Deputy Darby could not see Deputy Tompkins and thought he was under the truck. RP 267. Deputy Darby then heard Deputy Tompkins yelling down the road, so Deputy Darby ran towards Deputy Tompkins. RP 268.

When Deputy Darby caught up with Deputy Tompkins, Mr. Knight was on his hands and knees on the ground and Deputy Tompkins was struggling to get control of Mr. Knight's left arm. RP 269. Deputy Tompkins grabbed Mr. Knight's right arm and began hitting Mr. Knight with his flashlight. RP 269-270. Eventually the deputies handcuffed Mr. Knight and radioed for medical aid. RP 270. Mr. Knight continued to yell for help and was yelling for his parents. RP 270.

### ***Gordon Kip Hocking***

Mr. Hocking is an accident reconstructionist for the Pierce County Sheriff's Department. RP 296. On August 3, 2003, Mr. Hocking was called

to the scene of the shooting. RP 299. Mr. Hocking took measurements and created a scale diagram of the scene. RP 300-301. Plaintiff's exhibit 16 is the diagram Mr. Hocking created. RP 302.

*Steven Wilkins*

Mr. Wilkins is the lead forensic investigator for the Pierce County Sheriff's Department. RP 311. On August 3, 2003, Mr. Wilkins was called to investigate the case involving Mr. Knight. RP 312. Upon arriving at the scene, Mr. Wilkins spoke with the officers on scene, took a video of the scene, then left the scene because he was informed the police wanted to get a warrant. RP 313. The police got a warrant and a few hours later Mr. Wilkins resumed his investigation. RP 313-314. Plaintiff's exhibit 15 is the video taken by Mr. Wilkins. RP 314. Mr. Wilkins also took photographs of the scene and met with Mr. Hocking. RP 315.

Mr. Wilkins' analysis of the scene, location of spent shell casings, and trajectory of the bullets fired at the truck can tell him nothing about the location of the deputies when they fired at Mr. Knight's truck other than that the deputies were on the driver's side of the truck and fired at it as it passed them. RP 315-357.

None of the rounds that hit the truck were fired by somebody standing in front of it. RP 372.

Mr. Wilkins did not see any signs the truck made any sudden turns.

RP 371.

***Wayne Knight***

Wayne Knight is Mr. Knight's father. RP 383. Wayne Knight owns the truck which was shot at by the deputies. RP 383-385. The truck was a diesel and was difficult to start unless the person starting the truck waits seven seconds for the glow plugs to warm up the engine. RP 386-388. When the truck first starts, it is extremely loud, especially when it is cold. RP 388-389. The truck is very sluggish and accelerates extremely slowly. RP 389.

***Tor Knight***

On August 3, 2003, Mr. Knight was asleep on the floor of his father's truck and was awakened by yelling and lights in his eyes. RP 395-396. Mr. Knight initially tried to get out of the truck through the back doors but the doors wouldn't open. RP 397. Mr. Knight had pressed the wrong button and activated the child safety feature on the back doors. RP 397.

Mr. Knight panicked, climbed into the front of the truck and started it. RP 398. When Mr. Knight started the truck the headlights came on automatically. RP 399. Mr. Knight did not see anybody standing in front of the truck. RP 400. When Mr. Knight was in the front seat there were lights being shined in his eyes from the outside. RP 399-400. As soon as Mr.

Knight started the truck, "the world exploded" and Mr. Knight fell to the right grabbing the gear shift and putting the truck into gear. RP 400-401. The truck then stopped in a pile of dirt. RP 401.

When the truck stopped, Mr. Knight got out of the truck and tried to run. RP 401. Mr. Knight ran towards his parent's home. RP 402.

Between being shot and being pinned by the deputies, Mr. Knight did not remember any encounters with the police. RP 424-425. Mr. Knight did not try to hit anybody. RP 425.

The truck did not move a long distance and did not move very fast. RP 404.

When the police first contacted Mr. Knight, he was hiding from the police and waiting for Ms. Lisa Caskin, the owner of the blue Chevy, to arrive and give Mr. Knight a ride to Tacoma so he could turn himself in to the jail. RP 408-409. Mr. Knight did not hear the police arrive or see the lights. RP 411.

***Kay Sweeney***

Ms. Sweeney is a forensic scientist. RP 434. Ms. Sweeney was retained by Mr. Knight's trial counsel to investigate the circumstances of Mr. Knight's case. RP 438. Ms. Sweeney reviewed the statements of the deputies, x-rays of the bullet remaining in Mr. Knight's body, poor-quality

black and white photographs of the scene and the truck, the door of the truck, a crime lab report about spent shell casings found at the scene, a diagram of the scene, and information from Mr. Wilkins regarding firing the firearms and diagramming the trajectories of bullet entry into the truck. RP 438-439. Using this information, Ms. Sweeney determined what bullets caused what damage and where each officer was when he fired each shot. RP 440. Ms. Sweeney determined that Deputy Darby fired a .45 automatic round through the windshield and into the passenger seat and another round through the door and into Mr. Knight's leg. RP 440-441.

Ms. Sweeney determined that Deputy Tompkins was about 25 feet away from the truck when he fired at least two bullets. RP 450-452. The first bullet hit the truck either before it began to move or shortly thereafter. RP 453.

On September 14, 2004, the parties made a number of stipulations: (1) the State's witnesses would be prohibited from discussing any prior contacts with Mr. Knight before the date of August 3, 2003; (2) the State would not inquire about or put into evidence any of Mr. Knight's felony convictions; (3) there would be no reference at trial to the fact that Mr. Knight has occasionally used drugs; (4) there would be no reference to any police shooting review board hearings by the defense witnesses; (5) if Mr. Knight's

father, Wayne Knight, testifies, his testimony would be limited to the position of the truck before and after the shooting, the condition of the truck, and his conversation with the police before the shooting but would not be allowed to describe his personal restraint and arrest by the police; and (6) that the State would not refer to the nature and quality of any felony conviction of Mr. Knight, but the State could show that Mr. Knight was on community supervision. RP 8-9, 9-14-04.<sup>1</sup>

Mr. Knight moved for a mistrial based on Deputy Tompkins' testimony that he and Deputy Darby were aware of a "felony warrant in the system for Tor Knight's arrest." RP 100-101, 103-109. The trial court denied the motion. RP 108.

At the close of the State's case Mr. Knight moved for dismissal of the counts of first degree assault on grounds that Mr. Knight acted without the intent to inflict bodily harm. RP 374-375. Mr. Knight also moved for dismissal of the third degree assault charge on grounds that Deputy Darby did not see Mr. Knight strike Mr. Tompkins and Mr. Tompkins suffered no injury. RP 375-376. The court denied the motion. RP 378-380.

After resting, Mr. Knight moved for a directed verdict with regards

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<sup>1</sup> The pagination of the pretrial hearings is not consecutive to the pagination of the trial transcripts. Reference to these hearings will be made by giving the page number followed by the date of the proceeding.

to the first degree assault charges. RP 463. The motion was denied. RP 469-470.

The jury found Mr. Knight guilty of two counts of second degree assault and one count of third degree assault. RP 579-580.

At sentencing, Mr. Knight moved for a new trial on grounds that Deputy Tompkins violated a pretrial order that the State was barred from referencing or putting into evidence any of Mr. Knight's previous felony convictions, the trial court failed to instruct the jury on lesser included offenses to the crimes charged, and that the State presented inadmissible hearsay evidence in the form of a tape recorded Statement made by Deputy Tompkins. CP 161-180, RP 5-15, 1-27-06. The trial court denied the motion. RP 14-15, 1-27-06.

Mr. Knight was sentenced to the low end of the standard range with the sentences to run concurrently for a total of 43 months confinement. CP 290-302, RP 38, 1-27-06.

Notice of appeal was timely filed on February 24, 2006. CP 303.

#### **IV. ARGUMENT**

##### **1. There was insufficient evidence to convict Mr. Knight of assaulting the deputies with the truck.**

When the sufficiency of the evidence to convict the defendant of a

crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), citing *State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Knight was charged with two counts of assault in the first degree and was convicted of two counts of assault in the second degree.

It is well established that the term “assault” conveys the notion of an intentional, willful act and “knowing, purposeful conduct.” *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039 (1992). An assault “includes the element of *intent*.” *Davis*, 119 Wn.2d at 663 (emphasis in original) (quoting *State v. Hopper*, 118 Wn.2d 151, 159, 822 P.2d 775 (1992); see also *State v. Taylor*, 140 Wn.2d 229, 243, 996 P.2d 571 (2000) (even under strict standard of construction, charging document alleging “assault” conveys the requirement of an intentional or knowing act). “[L]anguage alleging assault contemplates *knowing, purposeful* conduct...assault” is *not* commonly understood as referring to an *unknowing* or *accidental* act.” *Davis*, 119

Wn.2d at 663, 835 P.2d 1039 (internal citations omitted, emphasis in original).

Here, the State failed to establish that Mr. Knight's actions which set the truck in motion were performed with an intent to harm the deputies. It was uncontroverted that the clearing was very dark and Mr. Knight was awakened by Deputy Darby shining a light in his eyes. It was also uncontroverted that the whole time Mr. Knight was in the truck the deputies were shining their lights in his face. Mr. Knight would have been blinded by the deputies' flashlights and unable to ascertain the deputies' location. Without a knowledge of where the deputies were located it would be impossible for Mr. Knight to form the intent to move the truck with the intent to run the deputies over.

The only evidence presented by the State that Mr. Knight intended to run over the deputies was the testimony of the deputies that the truck initially turned toward them but then swerved away after they shot at it. However, the deputies' testimony is suspect in light of the testimony of the lead forensic investigator for the Pierce County Sheriff's Department and the testimony of an accident reconstructionist for the Pierce County Sheriff's Department that the "plainly visible" tire tracks that the truck left in the "dust" (RP 303) showed no evidence of swerving or sudden acceleration or deceleration (RP

307) and that there was no evidence the truck made any “sudden turns.” RP 371.

Taking the State’s uncontroverted forensic evidence in a light most favorable to the State establishes that the truck did not swerve or change directions. There is no evidence establishing that Mr. Knight intended to move to the truck at all, and even if he did, there is no evidence that he moved it with the intent of assaulting the deputies. The inference that Mr. Knight moved the truck with the intent to assault the deputies cannot be reasonably drawn from the evidence presented at trial.

The State presented insufficient evidence for a rational finder of fact to conclude beyond a reasonable doubt that Mr. Knight moved the truck with the intent to assault the deputies. “Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). This court should vacate Mr. Knight’s convictions for second degree assault and dismiss those charges.

**2. The trial court abused its discretion in not giving Mr. Knight’s requested jury instructions.**

The Court of Appeals reviews a trial court’s decision to reject a party’s requested jury instruction for abuse of discretion. *State v. Picard*, 90

Wn.App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021, 969 P.2d 1065 (1998).

A trial court abuses its discretion when it bases its decision on manifestly unreasonable or untenable grounds. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999).

Under *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978), a defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the charged offense (a legal test) and (2) the evidence supports an inference that the defendant committed the lesser offense (a factual test). If it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime. *State v. Harris*, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

Where a defendant is entitled to instruction on a lesser included crime and the trial court refuses to give the instruction, the remedy is reversal and remand. *State v. Warden*, 133 Wn.2d 559, 562, 565, 947 P.2d 708 (1997).

a. *The trial court abused its discretion in failing to instruct the jury that resisting arrest is a lesser included crime of third degree assault.*

“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 or another person, assaults another.” RCW 9A.36.031.

“A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him.” RCW 9A.76.040.

Assault under RCW 9A.36.031(1)(a) necessarily requires an assault; resisting arrest does not. But, resisting arrest requires no proof independent of that also required for an assault charge under RCW 9A.36.031(1)(a). Thus, resisting arrest is a lesser-included charge of assault under RCW 9A.36.031(1)(a).

*State v. Godsey*, 131 Wn.App. 278, 289, 127 P.3d 11 (2006). *See also State v. Marshall*, 37 Wn.App. 127, 128, 678 P.2d 1308 (1984) (recognizing, without analysis, that resisting arrest is a lesser-included offense of assault under RCW 9A.36.031(1)(a)).

Here, Mr. Knight was charged with assaulting Deputy Tompkins when he allegedly flailed his arms and knocked Deputy Tompkins’ glasses from his face while Deputy Tompkins was clubbing Mr. Knight with his flashlight in an attempt to arrest Mr. Knight. Under these facts, Mr. Knight’s actions meet the elements of both resisting arrest and third degree assault: by flailing his arms, Mr. Knight attempted to prevent Deputy Tompkins from

arresting him (the elements of resisting arrest), but Mr. Knight's actions could also be interpreted as resisting the execution of a lawful apprehension of himself and in the process assaulting Deputy Tompkins (the elements of third degree assault). The jury could have inferred that being touched by an arrestee would not be a harmful or offensive touching to a police officer, and therefore conclude that Mr. Knight merely resisted arrest rather than assaulted Deputy Tompkins.

This court should vacate Mr. Knight's conviction for third degree assault and remand for a new trial.

*b. The trial court abused its discretion in failing to give Mr. Knight's Proposed Jury Instruction No. 2.*

A defendant has a right to have the jury instructed on his theory of defense if the instruction is supported by substantial evidence and is an accurate statement of law. *State v. Valentine*, 132 Wn.2d 1, 30, 935 P.2d 1294 (1997).

"An arrest is not competent evidence of either conviction of crime or of misconduct. It is, in effect, only a charge or accusation of wrongdoing. The law presumes one so accused to be innocent until his guilt has been established in a court of competent jurisdiction, by legally admissible evidence, beyond reasonable doubt." *Lundberg v. Baumgartner*, 5 Wn.2d

619, 623, 106 P.2d 566 (1940).

Here, Mr. Knight requested that the court give the following instruction: “Evidence has been produced that the defendant was arrested. The fact that a person is arrested is not evidence of guilt, and you are not to consider it as evidence of guilt.” CP 106. Mr. Knight requested this instruction be given in light of the fact that Deputy Tompkins erroneously informed the jury that there was a felony arrest warrant for Mr. Knight. RP 100-101, 103-109, 474. The trial court declined to give this instruction because it didn’t “really have a lot of time for additional argument or anything,” and it had “never been asked to include it before” and “never had included it before” and the court didn’t “have a WPIC that it’s based on.” RP 517.

This instruction was necessary to clearly indicate to the jury that Mr. Knight was presumed innocent and was also necessary to combat the prejudice caused to Mr. Knight by Deputy Tompkins’ highly prejudicial and false statement that there was a felony arrest warrant for Mr. Knight.

The trial court’s lack of familiarity with a proposed jury instruction is an untenable basis for a trial court to deny giving the instruction. The trial court’s decision to not give the instruction because it had never heard of the instruction before was an abuse of discretion.

**V. CONCLUSION**

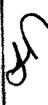
For the reasons stated above, this court should vacate and dismiss Mr. Knight's convictions for second degree assault and vacate the third degree assault conviction and remand for a new trial on the third degree assault charge only.

DATED this 14<sup>th</sup> day of August, 2006.

Respectfully submitted,

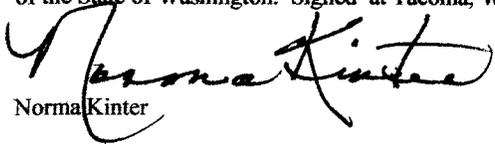


Sheri Arnold  
WSBA No. 18760  
Attorney for Appellant

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STATE OF WASHINGTON  
BY  DEPUTY

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 14, 2006, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U. S Mail to appellant, Tor Kildal Knight, Rancho L'Abrei, P. O. Box 217, Dulzwa, California, 91917, true and correct copies of this document. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on August 14, 2006.



Norma Kinter