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No. 34796-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

**Edwin Blatt,**

Appellant.

Lewis County Superior Court

Cause No. 06-1-00156-1

The Honorable Judge Nelson E. Hunt

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The statutory and judicial scheme criminalizing assault in the second degree violates the separation of powers doctrine.
2. The Information was constitutionally deficient.
3. The trial court erred by giving Instruction No. 5, which reads as follows:

To convict the defendant of the crime of Assault in the Third Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4<sup>th</sup> day of March, 2006, the defendant assaulted a law enforcement officer;
2. That at the time of the assault the law enforcement officer was performing his official duties; and
3. That the acts occurred in Lewis County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 5, Supp. CP.

4. The court's "to convict" instruction omitted an essential element of Assault in the Third Degree.
5. Mr. Blatt was denied his constitutional right to a jury trial because the jury did not determine whether or not he acted under circumstances not amounting to Assault in the First or Second Degree, an essential element of Assault in the Third Degree.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

The Washington legislature has criminalized assault, but has not defined the elements of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century,

defined the elements of the crime, and has expanded and refined that definition without input from the legislature.

1. Does legislature's failure to define the core elements of the crime of assault violate the separation of powers doctrine?  
Assignment of Error No. 1.

2. Does the judicially created definition of the elements of the crime of assault violate the separation of powers doctrine?  
Assignment of Error No. 1.

The Information charging Mr. Blatt with Assault in the Third Degree did not allege that he acted "under circumstances not amounting to assault in the first or second degree." Similarly, the "to convict" instruction did not instruct the jury to determine whether or not Mr. Blatt acted under circumstances not amounting to assault in the first or second degree.

3. Did the Information omit an essential element of Assault in the Third Degree? Assignment of Error No. 2.

4. Did the court's "to convict" instruction omit an essential element of Assault in the Third Degree? Assignments of Error Nos. 3, 4, 5.

5. Was Mr. Blatt denied his constitutional right to a jury determination of all the essential elements of Assault in the Third Degree? Assignments of Error Nos. 3, 4, 5.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On March 14, 2006, Edwin Blatt was accused of Assault in the Third Degree and Obstructing a Law Enforcement Officer in Lewis County. CP 14-16. The operative language of the Information charging Assault in the Third Degree read as follows:

...in that defendant on or about March 04, 2006, in Lewis County, Washington, then and there assaulted 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, to-wit: assaulted Officer Rodocker when he was performing his official duties; against the peace and dignity of the State of Washington. CP14.

Mr. Blatt's case proceeded to a jury trial in May of 2006. At trial, the court instructed the jury was as follows regarding the elements of Assault in the Third Degree:

To convict the defendant of the crime of Assault in the Third Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4<sup>th</sup> day of March, 2006, the defendant assaulted a law enforcement officer;
2. That at the time of the assault the law enforcement officer was performing his official duties; and
3. That the acts occurred in Lewis County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.  
Instruction No. 5, Supp. CP.

Mr. Blatt was convicted and sentenced. CP 4-13. This timely appeal followed. CP 3.

### ARGUMENT

#### **I. MR. BLATT WAS CONVICTED UNDER A STATUTE THAT VIOLATES THE CONSTITUTIONAL SEPARATION OF POWERS.**

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

The purpose of the doctrine of separation of powers is to prevent one branch of government from aggrandizing itself or encroaching upon the “fundamental functions” of another. *Moreno*, at 505. A violation of separation of powers occurs whenever “the activity of one branch threatens the independence or integrity or invades the prerogatives of another.” *Moreno*, at 506, *citations omitted*. Judicial independence is threatened whenever the judicial branch is assigned or allowed tasks that are more properly accomplished by other branches. *Moreno at 506, citing*

*Morrison v. Olson*, 487 U.S. 654 at 680-681, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988).

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

The legislature has criminalized assault; however it has not defined that crime. *See, generally*, RCW 9A.36.<sup>1</sup> Instead, it has allowed the judiciary to define the core meaning of the crime; the judiciary has done so, enlarging the definition over a period of many years. This violates the separation of powers. *Moreno, supra*.

At the turn of the last century, Washington’s criminal code included a definition of assault. In 1906 the Supreme Court noted that “An assault is defined by the Code to be an attempt in a rude, insolent, and

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<sup>1</sup> There are some sections of the statute, not applicable here, which specifically define the elements of certain types of assaults. *See, e.g.*, RCW 9A.36.011(1)(b): “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: ...Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance.”

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

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

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

*Howell v. Winters* was a civil case. It was not until 1922 that the common law definition adopted by *Howell v. Winters* was approved by the Supreme Court for use in a criminal case. In *State v. Shaffer*, 120 Wash. 345 at 348-350, 207 P. 229 (1922), the Supreme Court, consistent with its holding in *Howell v. Winters*, expanded the criminal definition of assault to cover situations where the defendant lacked the actual ability to inflict bodily injury. The same definition was endorsed again in two cases from 1942. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942) was a civil action for malicious prosecution which turned in part on the criminal law's definition of assault; *State v. Rush*, 14 Wn.2d 138, 127 P.2d 411 (1942) was a criminal case described by the court as being "indistinguishable" from *Shaffer, supra*. *State v. Rush*, at 140.

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

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

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

The second concept is that an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.' The concept is thought to have been assimilated into the criminal law from the law of torts. It is usually required that the apprehension of harm be a reasonable one. *State v. Frazier*, at 630-631.

Following *Frazier*, Washington's judicially-created definition of assault was enlarged to include (1) actual battery (consisting of an unlawful touching with criminal intent, not necessarily injurious), (2) an attempt to commit a battery (whether or not injury was intended), and (3) placing another in apprehension of harm (whether or not injury was intended). *See, e.g., State v. Garcia*, 20 Wn.App. 401 at 403, 579 P.2d 1034 (1978); *State v. Strand*, 20 Wn.App. 768 at 780, 582 P.2d 874 (1978). These three definitions make up the core definition of the crime of assault today. *See* WPIC 35.50; *see also State v. Nicholson*, 119 Wn.App. 855 at 860, 84 P.3d 877 (2003).

Since the legislature removed the statutory definition of assault from the criminal code in 1909, the judiciary has stepped in to fill the

vacuum and has undertaken to define the crime. This violates the separation of powers because it encroaches on a core legislative function.

*Moreno, supra; Wadsworth, supra.*

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

When our Supreme Court ruled that the Legislature defines the elements of a crime, it meant that the Legislature must set out in the statute the essential elements of a crime... It has never been the law in Washington that courts cannot provide definitions for criminal elements that the Legislature has listed but has not specifically defined. Nor has this practice generally been viewed as a judicial encroachment on legislative powers. On the contrary, the judiciary would be acting contrary to the Legislature's legitimate, express expectations, as well as failing to fulfill judicial duties, if the courts did not employ long-standing common-law definitions to fill in legislative blanks in statutory crimes. The Legislature is presumed to know this long-standing common law. *State v. David*, 2006 Wash. App. LEXIS 1705, pp. 15-16 (2006), *citations and footnotes omitted.*

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

In *State v. Chavez*, 2006 Wash. App. LEXIS 1849 (2006), Division II issued a part-published opinion in which it drew an analogy to the crimes of bail jumping, protection order violations, and criminal contempt:

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

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

from the assault statute, in which the legislature has failed to define the core crime even in general terms.

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

The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution. Because the legislature failed to define the core meaning of the crime of assault, the statutory and judicial scheme under which Mr. Blatt was convicted is unconstitutional; his conviction must be reversed and the case dismissed with prejudice.

**II. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO ALLEGE AN ESSENTIAL ELEMENT OF ASSAULT IN THE THIRD DEGREE.**

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution, as well as Article I, Section 3 and Article I, Section 22 (amend. 10) of the Washington State

Constitution. A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93 at 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Kjorsvik*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Kjorsvik*, at 105-106. If the Information is deficient, no prejudice need be shown, and the case must be dismissed without prejudice. *State v. Franks*, 105 Wn.App. 950, 22 P.3d 269 (2001).

Under RCW 9A.36.031(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 [commits the acts outlined in the statute.]”

When a statute is clear and unambiguous, its meaning is to be derived from the language of the statute alone and it is not subject to judicial construction. *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000). In *Azpitarte*, the Supreme Court examined *former* RCW 10.99.040(4)(b), which punished as a class C felony any assault in violation of a no contact order “that [did] not amount to assault in the first or second degree.” *Former* RCW 10.99.040(4)(b). The Court of Appeals concluded that *any* assault could be punished under this section; the Supreme Court disagreed:

[W]ithout a showing of ambiguity, we derive the statute's meaning from its language alone.... By finding that any assault can elevate a violation of a no-contact order to a felony, the Court of Appeals reads out of the statute the requirement that the assault "not amount to assault in the first or second degree." We will not delete language from a clear statute even if the Legislature intended something else but failed to express it adequately. *Azpitarte*, at 142.

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the third degree assault statute any acts which constitute Assault in the First or Second Degree. RCW 9A.36.031(1). Accordingly, the absence of a higher degree of assault is an essential element of the crime that must be alleged in the Information.

In this case, the operative language of the Information alleges that Mr. Blatt "assaulted a law enforcement officer... who was performing his or her official duties at the time of the assault..." CP 14. It does not allege that the assault was committed "under circumstances not amounting to assault in the first or second degree," as required under the statute. Because of this, the Information is deficient, and reversal is required even in the absence of prejudice. *Kjorsvik, supra*. The conviction must therefore be reversed and the case dismissed. *Kjorsvik*.

**III. THE TRIAL COURT'S "TO CONVICT" INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF ASSAULT IN THE THIRD DEGREE.**

The Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of every element of the charged offense. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). *State v. Smith*, 155 Wn.2d 496 at 502, 120 P.3d 559 (2005). A "to convict" instruction must contain all the elements of the crime, because it serves as a "yardstick" by which the jury measures the evidence to determine guilt or innocence. *State v. Lorenz*, 152 Wn.2d 22 at 31, 93 P.3d 133 (2004). The jury has the right to regard the "to convict" instruction as a complete statement of the law. Any conviction based on an incomplete "to convict" instruction must be reversed. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997). The adequacy of a "to convict" instruction is reviewed *de novo*. *State v. Deryke*, 149 Wn.2d 906 at 910, 73 P.3d 1000 (2003). Furthermore, the failure to instruct on all the elements of an offense is a constitutional error that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1 at 6, 109 P.3d 415 (2005).

Here, the "to convict" instruction for Assault in the Third Degree was set forth in Instruction No. 5, Supp. CP. The court did not require the jury to find that the assault was committed "under circumstances not

amounting to assault in the first or second degree.” as required by RCW 9A.36.031(1).

Instructional error of this type is harmless only if the state can establish beyond a reasonable doubt that the error did not contribute to the verdict. *Mills*, at 15 n.7. Under the facts of this case, this showing cannot be made; accordingly, the conviction must be reversed and the case remanded for a new trial. *Mills, supra*.

**CONCLUSION**

For the foregoing reasons, Mr. Blatt’s conviction must be reversed and his charge of Assault in the Third Degree dismissed with prejudice.

Respectfully submitted on September 25, 2006.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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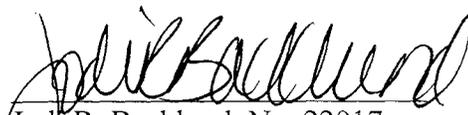
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 25, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 25, 2006.

  
Jodi R. Backlund, No. 22917  
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