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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 34796-2-II

STATE OF WASHINGTON

Respondent.

vs.

Edwin Ronald Blatt

Appellant.

Lewis County Superior Court Cause No. 06-1-00156-1

Honorable Judge Nelson E. Hunt

STATE'S RESPONSE BRIEF

**JEREMY RANDOLPH
LEWIS COUNTY PROSECUTOR**

Law and Justice Center
345 W. Main St. 2nd Floor, MS: PROO1
Chehalis, WA 98532
360-740-1240

By: Lori Smith
Lori Smith, WSBA 27961

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF THE CASE.....1

ARGUMENT.....1

A. USE OF THE COMMON LAW DEFINITION OF "ASSAULT" DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.....1

B. THE INFORMATION CONTAINS ALL ESSENTIAL ELEMENTS OF THE CRIME OF ASSAULT IN THE THIRD DEGREE UPON A LAW ENFORCEMENT OFFICER.....2

C. THE "TO CONVICT" INSTRUCTION IS PROPER AND CONTAINS ALL ESSENTIAL ELEMENTS OF ASSAULT IN THE THIRD DEGREE UPON A LAW ENFORCEMENT OFFICER.....9

CONCLUSION.....15

TABLE OF AUTHORITIES

<u>State v. Brett</u> , 126 Wash.2d 136, 171, 892 P.2d 29 (1995).....	9
<u>State v. Borrero</u> , 97 Wn.App. 101, 982 P.2d 1187 (1999), rev. granted & remand. to Court of Appeals, 141 Wn.2d 1010 (2000)....	9
<u>State v. Borrero</u> , 147 Wn.2d 353, 58 P.3d 245 (2002).....	3
<u>State v. Brown</u> , 140 Wn.2d 456, 998 P.2d 321 (2000).....	5,12
<u>State v. Campbell</u> , 125 Wn.2d 797, 888 P.2d 1185 (1995).....	4
<u>State v. Chavez</u> , 134 Wn.App. 657, 142 P.3d 1110 (2006).....	1
<u>State v. Hopper</u> , 118 Wn.2d 151, 822 P.2d 775 (1992).....	3
<u>State v. Kjorsvik</u> 117 Wash.2d 93, 104, 812 P.2d 86 (1991).....	3,8
<u>State v. Pirtle</u> 127 Wash.2d 628, 904 P.2d 245,261 (1995).....	9
<u>State v. Taylor</u> , 140 Wn.2d 229, 996 P.2d 571 (2000).....	2,3
<u>State v. Tunney</u> , 129 Wn.2d 336, 917 P.2d 95 (1996).....	3
<u>State v. Vangerpen</u> , 125 Wn.2d 782, 898 P.2d 1177 (1995)...	2,4,10
<u>State v. Ward</u> 148 Wash.2d 803, 64 P.3d 640 (2003).....	7

STATUTES

RCW 9A.36.031(1)(g).....	4,5,11,12
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WASHINGTON PATTERN JURY INSTRUCTIONS

WPIC 35.20 (1994).....	6,7,8,13
WPIC 35.20 (2005 Supp.).....	7
WPIC 35.23.02 (2005 Supp.).....	10,11,12

I. STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of this appeal.

II. ARGUMENT

A. USE OF THE COMMON LAW DEFINITION OF "ASSAULT" DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

The Appellant argues that using the common-law definition of "assault" and the Legislature's failure to statutorily define the core elements of the crime of "assault" violates the separation of powers doctrine. This argument is without merit.

In fact, this identical constitutional argument was rejected by this Court in a recent decision, and must be rejected here as well. See State v. Chavez, 134 Wn.App. 657, 142 P.3d 1110 (2006) ("Chavez has presented no authority to show that this established practice is unconstitutional beyond a reasonable doubt.")

Because the ruling of Chavez applies here, Appellant's argument, too, must be rejected and his conviction should be affirmed.

B. THE INFORMATION CONTAINS ALL ESSENTIAL ELEMENTS OF THE CRIME OF ASSAULT IN THE THIRD DEGREE UPON A LAW ENFORCEMENT OFFICER.

Appellant also argues that the Information filed in this case is "constitutionally deficient" because it fails to allege an "essential element" of the crime of assault in the third degree. This argument is without merit as well.

"[T]he Information must be a plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). Furthermore, "[a] charging document is constitutionally adequate only if all essential elements of a crime, statutory and non-statutory, are included in the document so as to appraise the accused of the charges against [him] and to allow [him] to prepare a defense." State v. Vangerpen, 125 Wn.2d 782, 787, 8988 P.2d 1177 (1995) (emphasis added). This rule that the Information must include all essential elements of a crime "is grounded in the constitutional requirement that defendants be informed of the nature and cause of the accusation against them, in addition to due process concerns regarding notice." State v. Taylor, 140 Wn.2d 229,236, 996 P.2d 571

(2000); State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992).

However, "the charging document need not state the statutory elements of the offense in the precise language employed in the statute, but may use words conveying the same meaning and import as the statutory language." State v. Borrero, 147 Wn.2d at 361, quoting State v. Taylor, 140 Wn.2d at 235-36 (emphasis added). Furthermore, "[w]hen a charging document is challenged for the first time *after* the verdict, it is to be 'liberally construed in favor of validity.'" State v. Borrero, 147 Wn.2d 353, 360, 58 P.3d 245 (2002), citing State v. Kjorsvik, 117 Wn.2d 93, 102, 812 p.2d 86 (1991). "Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document." State v. Kjorsvik 117 Wash.2d 93, 104, 812 P.2d 86 (1991) [other citations omitted].

Analysis begins by asking whether there is at least some language in the information that gives notice of each element. State v. Tunney, 129 Wn.2d 336, 340, 917 P.2d 95 (1996). This court will read the words of the charging

document as a whole and construe them according to common sense and practicality. State v. Campbell, 125 Wn.2d 797, 801, 888 P.2d 1185 (1995). Moreover, "[w]hen a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense." State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995).

The charging document in the present case states as to the assault in the third degree charge:

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of ASSAULT IN THE THIRD DEGREE, which is a violation of RCW 9A.36.031(1)(g), the maximum penalty for which is 5 years in prison and a \$10,000 fine, in that the defendant on or about March 4, 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.

CP 14. As such, the charging document in this case gave the Defendant constitutionally-adequate notice that he was

charged with assaulting a law enforcement officer who was performing his duties at the time of the assault, as described in RCW 9A.36.031(1)(g); see also, State v. Brown, 140 Wn.2d 456, 467, 998 P.2d 321 (2000) (" the circumstances or result described by RCW 9A.36.031(1)(g) is the assault of a law enforcement officer performing his duties at the time of the assault."

Appellant wrongly argues that the charging language in this case left out an "essential element" of the crime and that the State was required to include language stating that the assault was committed "under circumstances not amounting to assault in the first or second degree." Brief of Appellant, p. 11. First of all, Appellant does not cite a single case relating to the actual crime of assault in the third degree upon a law enforcement officer which stands for this proposition. Secondly, the "under circumstances not amounting to assault in the first or second degree" language does not apply to the present case, as discussed more fully below.

Interestingly, the language cited by Appellant as being an "essential element" of the crime of assault in the third

degree appears *in brackets* in a prior version of a Washington pattern jury instruction. See e.g., WPIC 25.30, 11 Washington Practice, Washington Pattern Jury Instructions Criminal (WPIC), at 400 (2nd Ed. 1994). See also, State v. Davis, note 47, 116 Wn.App 81, 96, 64 P.3d 661 (2003), where that Court noted, "[w]hile the WPIC's are not binding on the court, they are persuasive authority," citing State v. L.J.M., 79 Wn. App. 133, 140, 900 P.2d 1119 (1995), rev'd on other grounds, 129 Wn.2d 386, 918 P.2d 898 (1996).

The bracketed language, as it appeared in the 1994 version of WPIC 35.20, stated, in pertinent part, "A person commits the crime of assault in the third degree when **[under circumstances not amounting to assault in {either} the [first] [or] [second] degree] he or she. . .**" Id. (emphasis added). Use of this bracketed language was limited, however, as the "Note on Use" following this instruction explained: "The first bracketed phrase relating to higher degrees of the crime should be used only when third degree assault is being submitted as a lesser included crime along with assault in the first or second degree." WPIC

35.20 at 401 (1994) (emphasis added). In other words, according to the comment to former WPIC 35.20, the bracketed language (which Appellant is now asserting is an "essential element" of the crime) does not apply unless the charged crime is assault in the first or second degree, and assault in the third degree is being submitted as a lesser included crime. Id. That circumstance is not present in the instant case because the charged crime is assault in the third degree for assaulting a police officer. Accordingly, such language is simply not relevant.

Furthermore, this bracketed language, as it appeared in the 1994 version of WPIC 35.20, no longer appears in the latest version of the instruction. See WPIC 35.20 (2005 Supp.) and its comment, which now states, in pertinent part, "the instruction no longer includes the bracketed phrase excluding assaults of a higher degree." See also State v. Ward, 148 Wash.2d 803, 813, 64 P.3d 640 (2003) where that Court upheld the sufficiency of the charging document in a similar situation (but different crime), stating, "[s]ince the State did not charge . . . first or second degree assault, the State was not required to allege that petitioners' conduct did

not amount to assault in the first or second degree. We hold the informations sufficient" (emphasis added).

Simply put, the "under circumstances not amounting to assault in the first or second degree" language is not an "essential element" of the crime of assault in the third degree, and Appellant does not cite any authority which explicitly holds otherwise. Indeed, none of the cases cited by the Appellant in this section of his brief address the specific crime of assault in the third degree upon a law enforcement officer.¹ Moreover, as previously explained, the "Note on Use" in prior WPIC 35.20 shows that the "absence of a higher-degree of crime" language is not applicable to the crime as it is charged in this case, the latest WPIC omits this language entirely, and Courts reviewing such language in other contexts have held that such language is not an essential element that must be pleaded and proved by the State. Ward, supra. Accordingly, Appellant's argument should be rejected and his conviction should be affirmed.

¹ Appellant cites Kjorsvik, Aspitarte and Franks. Kjorsvik is a Robbery 1st Degree case; Aspitarte is a Violation of a No Contact Order Case, and Franks is a Robbery case.

C. THE "TO CONVICT" INSTRUCTION IS PROPER AND CONTAINS ALL ESSENTIAL ELEMENTS OF ASSAULT IN THE THIRD DEGREE UPON A LAW ENFORCEMENT OFFICER.

Similar to his argument regarding the charging document, Appellant also argues that the "to convict" jury instruction submitted on the assault in the third degree charge also omitted an essential element of the crime. This argument, too, is without merit.

Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle 127 Wash.2d 628,656-657, 904 P.2d 245,261 (Wash.,1995) (other citations omitted). It is reversible error to instruct the jury in a manner that would relieve the State of this burden. Id. The challenge to a jury instruction is reviewed de novo, evaluating it in the context of the instructions as a whole. State v. Brett, 126 Wash.2d 136, 171, 892 P.2d 29 (1995). "The purpose of a jury instruction is to provide the jury with the applicable law to be applied in the case." State v. Borrero, 97 Wn.App. 101, 107, 982 P.2d

1187 (1999), rev. granted & remanded to Court of Appeals, 141 Wn.2d 1010 (2000); See also, State v. Davis, note 47, 116 Wn.App 81, 96, 64 P.3d 661 (2003)("while the WPIC's are not binding on the court, they are persuasive authority," citing State v. L.J.M., 79 Wn.App. 133, 140, 900 P.2d 1119 (1995), rev'd on other grounds, 129 Wn.2d 386, 918 P.2d 898 (1996)².

The State's "to convict" instruction in the present case is modeled on Washington Pattern Instruction Criminal (WPIC) number 35.23.02, which states:

To convict the defendant of the crime of assault in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about ____ the defendant assaulted _____.
2. That at the time of the assault _____ was a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties; and
3. That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable

² See also, State v. Vangerpen 125 Wash.2d 782, 791, 888 P.2d 1177, 1182 (1995), note 17 for a comment as to the propriety of using the WPICS as a guideline to essential elements of the crime: "imposing the responsibility to include all essential elements of a crime on the prosecution should not prove unduly burdensome since the "to convict" instructions found in the Washington Pattern Jury Instructions-Criminal (WPIC) delineate the elements of the most common crimes. "

doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all 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.

WPIC 35.23.02 (2005 Supplement). See also, Comment to WPIC 35.23.02 ("RCW 9A.36.031(1)(g) protects only law enforcement officers and employees of law enforcement agencies.")

Compare the above-set-out "to convict" pattern instruction for assault in the third degree--law enforcement officer--to the "to convict" instruction submitted to the jury in the present case, which reads as follows:

To convict the defendant of the crime of Assault in the Third Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 4th 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.

The wording of this instruction is substantially the same as the pattern jury instruction, and also accurately informs the jury of the essential elements of the crime of assault in the third degree upon a law enforcement officer. See, WPIC 35.23.02, Washington Pattern Jury Instruction Criminal, 11 Washington Practice, at 231 (2005 Supp) See also State v. Brown 140 Wash.2d at 468, where that Court upheld the submitted jury instruction in an identically-charged assault in the third degree upon a law enforcement officer case:

In this case, the jury instructions included the essential elements of RCW 9A.36.031(1)(g) with respect to criminal assault. Instruction Number 13 provides in part: 'A person commits the crime of assault in the third degree when he assaults a law enforcement officer who was performing his or her official duties at the time of the assault. . .' This language is substantially identical to the wording of RCW 9A.36.031(1)(g).

Id.

Appellant inexplicably argues that the submitted pattern jury instruction "omitted an essential element of the crime of assault in the third degree" because it did not require the jury to find that the assault was committed "under circumstances not amounting to assault in the first or second degree." Brief of Appellant, p. 12,13. Once again, this is not a correct statement of the law regarding the "to convict" jury instruction for assault in the third degree committed upon a law enforcement officer.

As referenced in the previous section of this brief, the language referred to by the Appellant formerly appeared in brackets in the 1994 version of WPIC 35.20, with explanatory language in the "Note on Use" which followed that instruction setting out under what circumstances that language should be used --none of which present themselves in the present case. See Note on Use following WPIC 35.20 at 401 (1994). And, significantly, this bracketed language no longer appears at all in WPIC 35.20. See current WPIC 35.20 (2005 Supp).

Accordingly, because the "to convict" instruction complies with the "to convict" instruction in the WPICS, and because the State is not required to plead and prove that assault of a law enforcement officer was committed "under circumstances not amounting to assault in the first or second degree," this language was properly omitted from the "to convict" jury instruction in this case. Furthermore, Appellant does not cite any authority which holds that such language is an "essential element" of the crime as it was committed and charged in this case. Consequently, Appellant's arguments to the contrary should be rejected and his conviction should be affirmed.

III. CONCLUSION

The use of the common law definition of "assault" does not violate the "separation of powers" doctrine. Furthermore, the charging document in this case alleged all essential elements of the charged crime, and was not defective. Likewise, the "to convict" instruction submitted to the jury in this case included all essential elements of the crime of assault in the third degree upon a law enforcement officer, and that instruction was complete and proper.

Because all of Appellant's submitted arguments are without merit, this Court should affirm Appellant's convictions.

RESPECTFULLY SUBMITTED this th 11 day of December, 2006.

JEREMY RANDOLPH
LEWIS COUNTY PROSECUTOR



LORI SMITH, WSBA 27961
Deputy Prosecutor
Law and Justice Center
345 W. Main St., 2nd Fl. MS:PROO1
Chehalis, WA 98532-1900
360-740-1240

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_____)

NO. 34796-2-II BY LS
DEPUTY

DECLARATION OF
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County,
Washington, declare under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On this
11th day of December, 2006, I mailed a copy of the State's
Response Brief by depositing same in the United States Mail,
postage pre-paid, to attorney for Appellant at the name and
address indicated below:

Jodi Backlund, Attorney at Law
Backlund & Mistry
203 - 4th Avenue East, Suite 404
Olympia, WA 98501-1189

DATED this 11th day of December, 2006, at Chehalis,
Washington.



Lori Smith, Deputy Prosecutor

Declaration of
Mailing