IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

NO. 35222-2-II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY

STATE OF WASHINGTON,

Respondent,

vs.

MARK THOMAS KEEND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 06-1-00130-2

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

On March 31, 2006, Daniel Reeves left his job as a Certified Nurses Aid and went to a bar in downtown Port Angeles to visit a friend and his mother, who was the bartender there. RP 07/18/06 @ 22. He left 20 or 30 minutes later to head home. He crossed the street where he was approached by the defendant. RP 07/18/06 @ 23-24. The defendant approached him from the right and started to ask questions about whether or not he knew the defendant's sister, and where his car was. Mr. Reeves answered no to both questions – the next thing he knew, was that the defendant had hit him in the jaw. RP 07/18/06 @ 24.

Mr. Reeves went to the emergency room at Olympic Medical Center, where he was told that his jaw had been fractured and that he needed to go to Harborview Medical Center for further treatment. RP 07/18/06 @ 29-30. At Harborview, he was told that his jaw would have to be wired shut for two and a half weeks, and that he would have to wear braces for an additional three week period. RP 07/18/06 @ 30-31. The defendant testified that he acted in self-defense. RP 07/18/06 @ 81.

II. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

A. The Court's Instruction On "Recklessly" Did Not Relieve The State Of Its Burden To Prove Each Element Beyond A Reasonable Doubt.

B. Defense Counsel Was Not Ineffective For Failing To Object To The Court's Instruction.

C.& D. The Trial Court Properly Denied The Instruction On The Lesser Offense Of Assault In The Fourth Degree And Defense Counsel Was Not Ineffective When He Did Not Argue With The Court After Its Decision Denying Such An Instruction.

E. The Information Was Not Constitutionally Deficient When It Did Not Include Language From The Statute Which States, "Under Circumstances Not Amounting To Assault In The First Degree.

F. The Trial Court's "To Convict" Instruction Did Not Omit An Essential Element Of Assault In The Second Degree.

G. The Statute Under Which The Defendant Was Convicted Did Not Violate The Separation Of Powers Doctrine.

III. ARGUMENT

A. The Court's Instruction On "Recklessly" Did Not Relieve The State Of Its Burden To Prove Each Element Beyond A Reasonable Doubt.

The defendant herein was charged with Assault in the Second Degree; i.e., that the defendant intentionally assaulted another, and thereby did recklessly inflict substantial bodily harm. The Court instructed the jury on the definitions of both "intentionally" and "recklessly". See Instructions No.'s 9 and 10. The instruction on

recklessly included the language, "recklessness also is established if a person acts intentionally or knowingly".

The defendant argues that the instruction conflated the two mental states, and unconstitutionally relieved the prosecution of its burden to establish the recklessness element. For this proposition, the defendant relies on *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, an Assault in the Third Degree case, the Court held that combining the intentional instruction with the knowledge instruction relieved the State of its burden of proving that Goble knew of the victim's status as a law enforcement officer, if it found the assault was intentional. *Goble*, @ 203. That is not true in this case; the facts are different.

In *Goble*, there were facts that were specific to the issue of differing mental states. There actually was a dispute over whether the defendant knew that the victim was a law enforcement officer – so in *Goble*, when the "knowingly" instruction also included language, "that when someone acts knowingly, that person also acts intentionally", there could have been some confusion by the jury; i.e., that if the offensive touching was intentional, that the defendant must have known that the victim was a law enforcement officer. In fact, there was evidence that the jury was actually confused by the instruction. *Goble*, @ 200.

The defense asserted in *Goble* – that the defendant did not know that the victim was a law enforcement officer – was particularly prone to cause a conflagration of mental states.

In the case herein, there was no such confusion. The jury was instructed on both mental elements in two separate instructions, Instructions 9 and 10. There is no reason to think that the jury was confused by the instructions or conflated the two mental states. It is well established law that juries are presumed to follow the instructions provided. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Moreover, in contrast to what happened in *Goble*, the instruction at issue here, was not a misstatement of the law, as was held by the Court in *Goble*. *Goble*, @ 202. Here, the "reckless" instruction reflected the exact language of the statute (see RCW 9A.08.010(1)(c)). And, as also set forth in the statute, the instruction included language that when recklessness suffices to establish an element, such element is also established if a person acts intentionally or knowingly. RCW 9A.08.010(2).

In the instant case, there was no conflagration of mental states, and the State wasn't unconstitutionally relieved of its burden to prove each element beyond a reasonable doubt. The jury was provided with an instruction that exactly reflected the language in the statute. Under the law, juries are presumed to follow the law. Not only was the instruction proper and did not conflagrate the mental states on its face, there is no reason to believe that the jury was confused and did not follow the law as instructed.

Even if it was error to include the additional language on "intentionally" within the "reckless" instruction, the error was harmless.

Here, the jury would have reached the same verdict even if the error had not occurred. *Goble*, @ 203, citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985).

B. Defense Counsel Was Not Ineffective For Failing To Object To The Court's Instruction.

To prevail on the claim of ineffective assistance of counsel, the defendant must show, inter alia, that but for defense counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 674 (1984).

As indicated above, even if it was error to include the extra language in the "reckless" instruction, had the language not been included, the outcome of the trial would not have been different.

C.& D. The Trial Court Properly Denied The Instruction On The Lesser Offense Of Assault In The Fourth Degree And Defense Counsel Was Not Ineffective When He Did Not Argue With The Court After Its Decision Denying Such An Instruction.

As indicated by the defendant, a defendant is entitled to a lesser offense instruction if each element of the lesser offense is a necessary element of the greater offense (the legal prong) and the evidence supports an inference that only the lesser offense was committed (the factual prong) (emphasis added). *State v. Pittman*, 134 Wn.App. 376, 384, __ P.3d __ (2006). To satisfy the factual requirement, the defendant must show that the evidence, viewed in the light most favorable to him,

would allow the jury to find the defendant not guilty of the charged offense but guilty of the lesser offense. *State v. McDonald*, 123 Wn.App. 85, 89, 96 P.3d 468 (2004).

As agreed by both the Court, prosecution, and defense, the legal prong of the test supported the lesser offense; it was the factual prong that was not met. Here, the defendant punched the victim in the mouth and broke his jaw (the victim's jaw had to be wired shut for two and a half weeks). RP 07/18/06 @ 24, 30. No evidence was presented to contradict this evidence.

Clearly, even viewed in a light most favorable to the defendant, the facts presented here should not have allowed the jury to find the defendant guilty of <u>only</u> Assault in the Fourth Degree. *Pittman*, @ 384. Pursuant to the jury instructions, the defendant was guilty of Assault in the Second Degree if he intentionally assaulted another and thereby recklessly inflicted substantial bodily harm. See Instructions 5 and 6. Substantial bodily harm was defined for the jury as bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part. See Instruction 8. Here, there was no question that the defendant inflicted substantial bodily harm; i.e., he fractured the defendant's jaw. Without any evidence to the contrary, there was no question that the jury would not have found the defendant guilty of only Assault Fourth Degree.

The defendant argues that we should not focus on the fact that the defendant intentionally assaulted the victim and broke his jaw, but rather we should believe that when one man punches another in the jaw, there is not a substantial risk that the blow will result in "a temporary but substantial disfigurement", or "temporary but substantial loss or impairment", or "a fracture". The State disagrees. When one man punches another in the face, it may not necessarily result in a temporary disfigurement, impairment or fracture, but there is no question that there is a substantial risk that such an injury may be inflicted.

After sitting through the trial, defense counsel concluded that the facts did not support giving the jury the instruction on Assault in the Fourth Degree, and conceded that point when the trial judge declined to give such an instruction. This was not ineffective assistance of counsel.

Under the Rules of Professional Conduct, a lawyer shall not assert or controvert an issue unless there is a basis for doing so that is not frivolous. RPC 3.1. Clearly under the circumstances, making an argument for an Assault in the Fourth Degree instruction would have been frivolous.

Additionally, even if the Court would have given the lesser offense instruction, it would not have changed the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Here, the defense was that the defendant acted in self-defense when he broke the victim's jaw. The evidence of the fracture was not contradicted. The jury would have either found that the

defendant acted in self-defense or not – under these facts, the jury would not have found the defendant guilty of Assault in the Fourth Degree.

The Court properly denied an instruction on Assault in the Fourth Degree, and defense counsel was not ineffective for conceding this issue under the facts of this case.

E. The Information Was Not Constitutionally Deficient When It Did Not Include Language From The Statute Which States, "Under Circumstances Not Amounting To Assault In The First Degree.

The defendant argues that the Information was constitutionally deficient because it did not include the language, "under circumstances not amounting to Assault in the First Degree." This is incorrect.

When the Information is challenged after the verdict, the reviewing court construes the document liberally. *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). In adopting this standard, the Court said that, "we further include in that standard both an essential elements prong and an inquiry into whether there was actual prejudice." *Kjorsvik*, @ 105.

The language "under circumstances not amounting to Assault in the First Degree", is not an essential element of the crime of Assault in the Second Degree. This language is merely introductory language and does not proscribe specific conduct.

The defendant argues that because the Court has held that 10.99 RCW specifically excludes First and Second Degree Assaults from the

felony charge of Assault in Violation of a No-Contact Order, that under the Second Degree Assault statute, the language "under circumstances not amounting to Assault in the First Degree" is an essential element of the crime. This is not correct.

In the situation presented under 10.99 RCW, the Court is simply saying that pursuant to the statute, a first or second degree assault that occurs during a violation of a no-contact order must be charged as a First or Second Degree Assault. It is not an essential element of the crime that must be referenced in the Information. See *State v. Azpitarte*, 140 Wn.2d 138, 955 P.2d 31 (2000). Likewise, the introductory language, "under circumstances not amounting to Assault in the First Degree" is also not an essential element of the crime.

If this Court is inclined to find that the language, "under circumstances not amounting to Assault in the First Degree" is an essential element of the crime charged, the Information filed in the case herein was still sufficient to fully inform the defendant of the accusation made against him. *Kjorsvik*, @ 98. "The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *Kjorsvik*, @ 101.

When an essential element is missing from the Information, the Court has adopted a two-prong test to determine, whether despite the missing element, that the Information is still sufficient. "The standard of review we here adopt will require at least some language in the Information giving notice of the allegedly missing element(s), and if the

language is vague, an inquiry may be required into whether there was actual prejudice." *Kjorsvik*, @ 106.

Here at the very least, the language is merely vague. Given that the defendant was charged with Assault in the Second Degree, there would be a pretty strong inference on the part of the defendant that his conduct did not amount to circumstances of Assault in the First Degree. As merely vague, the test for the sufficiency of the Information becomes whether there was actual prejudice to the defendant. *Kjorsvik*, @ 106. Here, clearly there was no actual prejudice to the defendant. The defendant does not even attempt to argue that he was prejudiced. Despite the fact that the Information did not include the language, "under circumstances not amounting to Assault in the First Degree", the defendant was nevertheless fully informed of the nature of the accusations against him, and was more than able to present his defense of self-defense.

The Information was not constitutionally deficient when it did not include language from the statute which states, "under circumstances not amounting to Assault in the First Degree."

F. The Trial Court's "To Convict" Instruction Did Not Omit An Essential Element Of Assault In The Second Degree.

The defendant argues that because the language, "under circumstances not amounting to Assault in the First Degree", was not

included in the "to-convict" instruction, an essential element was omitted from that instruction.

As argued by the State above, this language is not an essential element of Assault in the Second Degree. Again, this language is merely introductory language and is not an essential element of Assault in the Second Degree. The addition of this language to the Information would do nothing to promote the goal of providing the accused of the nature of the crime that he must be prepared to defend against. *Kjorsvik*, @ 101. Even without that language, the defendant was fully on notice of the conduct of which he was being accused of having committed; i.e., that he intentionally assaulted another and thereby did recklessly inflict substantial bodily harm.

The "to-convict" instruction did not omit an essential element of the crime. Moreover, if this court were to find that this language is an essential element of the crime, the error committed by leaving this out of the instruction is harmless. Clearly the error did not contribute to the verdict. *State v. Mills*, 154 Wn.2d 1, 109 P.3d 415 (2005).

G. The Statute Under Which The Defendant Was Convicted Did Not Violate The Separation Of Powers Doctrine.

The defendant argues that because the definition of assault has been derived from the common law and is not the product of the Legislature, that the separation of powers doctrine has been violated, and

therefore the statute under which the defendant has been convicted is unconstitutional. This is not correct.

A party challenging the constitutionality of a statute bears the burden of proving that the statute is unconstitutional beyond a reasonable doubt. *State v. Chavez*, 134 Wn.App. 657, __ P.3d __ (2006), citing *State v. ex rel. Peninsula Neighborhood Association v. Department of Transportation*, 142 Wn.2d 328, 335, 12 P.3d 134 (2000).

Although the Washington Constitution contains no express separation of powers clause, the doctrine has been presumed throughout the State's history. The principle is violated when the activity of one branch threatens the independence of the other; however, the doctrine does not require that the various branches be hermetically sealed off from one another. *Chavez*, @ 666.

Although the Legislature's function is to define the elements of the crime, the Legislature has established a practice of defining prohibited acts in general terms, leaving the judicial and executive branches the task of establishing specifics. Moreover, the Legislature has instructed that the common law must supplement all penal statutes (RCW 9A.04.060). *Chavez*, @ 667.

This statute affirmatively defines the elements of criminal statutes as containing common law definitions. *Chavez*, @ 667, citing *State v. Smith*, 72 Wn.App. 237, 241, 864 P.2d 406 (1993). "Accordingly, the Legislature has not delegated to the judiciary the task of defining "assault", but rather has instructed the judiciary to define

assault according to common law. *Chavez*, @ 667-668. Moreover, the Legislature has allowed the common law definition of assault to survive by both not changing the definition and by enacting RCW 9A.04.060. *Chavez*, @ 668. "Had the Legislature believed its institutional integrity was being threatened by the courts' definition, it could have inserted its own definition into the statute. Instead, it enacted a general provision endorsing the courts' historical use of the common law to define assault." *Chavez*, @ 668.

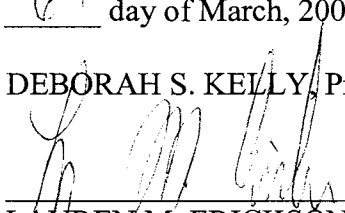
The defendant here has not proven beyond a reasonable doubt that the statute under which he was convicted was unconstitutional.

III. CONCLUSION

The defendant's conviction should be affirmed.

DATED this 6th day of March, 2007.

DEBORAH S. KELLY, Prosecuting Attorney



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STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 6th day of March, 2007, affiant deposited in the mail of the United tes of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 6th day of March, 2007.

Elaine L Sundt
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Residing at Port Angeles, Washington
My commission expires: 09/10/2010