

original

No. 35498-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Kevin Lee Roller,

Appellant.

APPELLANT'S
COURT OF APPEALS
DIVISION II
07 MAR 23 PM 12:58
STATE OF WASHINGTON
BY DEPUTY

Lewis County Superior Court

Cause No. 06-1-00559-1

The Honorable Judge H. John Hall

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316

PM 3/21/07

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ASSIGNMENTS OF ERROR

1. Mr. Roller's conviction for Attempting to Elude violated due process because the prosecutor was not required to prove all essential elements beyond a reasonable doubt.
2. The trial court's "to convict" instruction omitted elements of Attempting to Elude.
3. The trial court's "to convict" instruction misstated elements of Attempting to Elude.
4. The trial court erred by giving Instruction No. 13, which reads as follows:

To convict the defendant of Attempting to Elude a Pursuing Police Vehicle as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of August, 2006, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle, equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others;
- (6) That the acts occurred in the State of 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. 13, Supp CP.

5. The trial court's instructions as a whole allowed conviction without proof of all essential elements of Attempting to Elude.
6. The trial court's instructions as a whole misstated the applicable law on Attempting to Elude.
7. The Information was constitutionally deficient as to Counts I and II because it omitted elements of Assault in the Second Degree.
8. Mr. Roller's convictions for Assault in the Second Degree violated due process because the prosecutor was not required to prove all essential elements beyond a reasonable doubt.
9. The trial court's "to convict" instructions omitted an element of Assault in the Second Degree.
10. The trial court erred by giving Instruction No. 7, which reads as follows:

To convict the Defendant of the crime of assault in the second 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 23rd day of August, 2006, the defendant assaulted Officer Croy with a deadly weapon; and
2. That this act occurred in the State of 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 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. 7, Supp. CP.

11. The trial court erred by giving Instruction No. 8, which reads as follows:

To convict the Defendant of the crime of assault in the second degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the 23rd day of August, 2006, the defendant assaulted Officer Lowrey with a deadly weapon; and

2. That this act occurred in the State of 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 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. 8, Supp. CP.

12. The trial court's instructions as a whole allowed conviction without proof of all essential elements of Assault in the Second Degree.

13. Mr. Roller was denied his constitutional right to a jury trial in Counts I and II because the jury did not determine whether or not he acted under circumstances not amounting to Assault in the First Degree, an essential element of Assault in the Second Degree.

14. The statutory and judicial scheme criminalizing Assault in the Second Degree violates the separation of powers doctrine.

15. The trial court erred by instructing the jury with a definition of "assault" created and expanded by the judiciary.

16. The trial court erred by giving Instruction No. 10, which reads as follows:

An assault is an intentional touching or striking 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 is offensive, if the touching or striking would offend an ordinary person who is not unduly sensitive.

An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it, and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and

imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.
Instruction No. 10., Supp CP.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Kevin Roller was charged with Attempting to Elude a Pursuing Police Vehicle. The trial court's "to convict" instruction did not require proof that Mr. Roller drove "in a reckless manner." Nowhere in the instructions did the court inform the jury that conviction required proof that Mr. Roller drove "in a rash or heedless manner, indifferent to the consequences." The "to convict" instruction did not require proof that Mr. Roller was given a visual or audible signal to stop, or that he attempted to elude and drove in a reckless manner *after* being given such a visual or audible signal.

1. Did the trial court's "to convict" instruction omit and misstate essential elements of Attempting to Elude a Pursuing Police Vehicle? Assignments of Error Nos. 1-6.
2. Was Mr. Roller denied due process of law by the trial court's failure to include in the "to convict" instruction all essential elements of Attempting to Elude? Assignments of Error Nos. 1-6.
3. Did the trial court's instructions as a whole allow conviction without proof of all essential elements of Attempting to Elude a Pursuing Police Vehicle? Assignments of Error Nos. 1-6.

Mr. Roller was also charged with two counts of Assault in the Second Degree. The Information did not allege that the assaults were committed under circumstances not amounting to Assault in the First Degree. The "to convict" instructions did not require proof that the assaults were committed under circumstances not amounting to Assault in the First Degree.

4. To obtain a conviction for Assault in the Second Degree, must the state allege and prove that the assault occurred under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 7-13.

5. Were Counts I and II of the Information constitutionally deficient because they omitted an essential element of Assault in the Second Degree? Assignments of Error Nos. 7-13.

6. Did the trial court's "to convict" instructions omit an essential element of Assault in the Second Degree? Assignments of Error Nos. 7-13.

7. Did Mr. Roller's convictions for Assault in the Second Degree violate due process because the prosecutor was not required to prove all essential elements beyond a reasonable doubt? Assignments of Error Nos. 7-13.

8. Was Mr. Roller 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 Degree? Assignments of Error Nos. 7-13.

The Washington legislature has criminalized assault, but has not defined the core meaning of that crime. In the absence of a legislative definition, the judiciary has, over the course of more than a century, defined and expanded the core meaning of assault without input from the legislature.

9. Does legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 14-16.

10. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 14-16.

11. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 14-16.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On August 23, 2006, Kevin Roller was parked in the parking lot at Providence St. Peter's Hospital in Centralia. Officer Croy asked him his name around 4 am, and Mr. Roller gave a false name. RP (10/16/06) 21-22. Mr. Roller left, and the hospital reported he was back in the lot at 6 am. Officer Croy returned, having determined Mr. Roller's identity and that he had a warrant, and saw the car in the lot. RP (10/16/06) 23-25. Mr. Roller put the car into reverse when he saw the officer, who ordered him to turn the ignition off. RP (10/16/06) 25-26. Officer Croy pointed his gun at Mr. Roller. Mr. Roller said: "...are you going to shoot me over this shit? That's fucked up. I'm not going back to jail." RP (10/16/06) 27.

Mr. Roller put the car into drive and came forward, from a distance of 25 to 30 feet, at 5 miles per hour. The officer side-stepped the car and Mr. Roller went around him and left the lot. RP (10/16/06) 28. The officer said that the closest the car came to him was 15 or 20 feet. RP (10/16/06) 29, 40.

Officers Panco and Lowery arrived and pursued Mr. Roller. RP (10/16/06) 30. During the pursuit, Mr. Roller went through stop signs and at one point up onto a curb, traveling between 30 and 40 miles per hour. RP (10/16/06) 33. There was no traffic on the roads. RP (10/16/06) 50.

According to Officer Lowery, Mr. Roller swerved toward him but did not hit him. RP (10/16/06) 71. Officer Lowery hit Mr. Roller's car and it came to a stop. Mr. Roller was arrested. RP (10/31/06) 34-35.¹

Mr. Roller was charged with two counts of Assault in the Second Degree, Attempting to Elude a Pursuing Police Vehicle, and Driving While License Suspended. CP 25-26. Counts I and II of the Information read alleged (in part) that Mr. Roller "assaulted Officer [Croy/Lowrey] with a deadly weapon..." CP 25-26.

At trial, Mr. Roller testified that the officer was never directly in front of him in the hospital parking lot. RP (10/16/06) 81. Mr. Roller also stated that he was aware of his warrant, that he was afraid and frustrated with his own actions, and that he did not assault either officer. RP (10/16/06) 80, 84. Mr. Roller did not contest the eluding or DWLS charges. RP (10/16/06) 79-89; RP (10/17/06) 8-15.

The judge instructed the jury as follows regarding the Attempting to Elude charge:

A person commits the crime of Attempting to Elude a Pursuing Police Vehicle when he willfully fails to bring his vehicle to a stop after being given a visual or audible signal to bring the vehicle to a stop by a

¹ Officer Lowery noted that he did not try the spin move sooner because Mr. Roller was traveling within the speed limits. RP (10/16/06) 65.

police officer, and while attempting to elude a pursuing police vehicle he drives his vehicle in a reckless manner.

A signal to stop given by a police officer may be by hand, voice, emergency light, or siren. The police officer giving such a signal must be in uniform and the officer's vehicle must be equipped with lights and siren.

Instruction No. 12, Supp CP.

To convict the defendant of Attempting to Elude a Pursuing Police Vehicle as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 23rd day of August, 2006, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle, equipped with lights and siren;
- (4) That the defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others;
- (6) That the acts occurred in the State of 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. 13, Supp CP.

The instructions relating to the Assault in the Second Degree charges did not include the requirement that the state prove they were committed under circumstances not amounting to Assault in the First Degree. Instructions Nos. 6-8, Supp. CP.

The jury convicted Mr. Roller on all counts, and he was sentenced on October 24, 2006. CP 15-24. This timely appeal followed. CP 4-14.

ARGUMENT

I. THE TRIAL COURT’S ERRONEOUS “TO CONVICT” INSTRUCTION OMITTED ELEMENTS OF THE CRIME OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555 at 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821 at 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67; 941 P.2d 661 (1997). 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). The error is presumed to be prejudicial. *State v. Kiehl*, 128 Wn. App. 88 at 91, 113 P.3d 528 (2005). Reversal is required unless the prosecution can establish that the error was harmless beyond a reasonable

doubt. *State v. Jones*, 106 Wn. App. 40 at 45, 21 P.3d 1172 (2001). See *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed. 2d 35 (1999); *Pope v. Illinois*, 481 U.S. 497, 107 S.Ct. 1918, 95 L.Ed. 2d 439, (1987).

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. *State v. Smith*, 131 Wn.2d 258 at 263, 930 P.2d 917 (1997) (“*Smith I*”). 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).

Mr. Roller was charged with Attempting to Elude a Pursuing Police Vehicle, under RCW 46.61.024(1), which provides as follows:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

The phrase “in a reckless manner,” although not defined by the motor vehicle code, is “well settled.” *State v. Roggenkamp*, 153 Wn.2d

614 at 621-622, 106 P.3d. 196 (2005).² “ ‘[D]riving in a reckless manner’ means ‘driving in a rash or heedless manner, indifferent to the consequences.’ ” *Roggenkamp*, at 622, quoting *State v. Bowman*, 57 Wn.2d 266 at 270, 271, 356 P.2d 999 (1960).³

In this case, the court’s “to convict” instruction lowered the prosecution’s burden. Instead of requiring proof that Mr. Roller drove “in a reckless manner,” the “to convict” instruction erroneously allowed conviction upon proof that Mr. Roller “drove his vehicle in a manner indicating a wanton or willful disregard for the lives or property of others.” Instruction No. 13, Supp. CP.⁴ The statute requires proof of actual reckless driving; under Instruction No. 13, by contrast, conviction is

² Although *Roggenkamp* discussed the meaning of the phrase as used in the vehicular homicide and vehicular assault statutes, its reasoning is (for the most part) applicable in this context as well.

³ Driving “in a reckless manner” differs from “reckless driving,” which means driving “in willful or wanton disregard for the safety of persons or property...” RCW 46.61.500. Indeed, in 2003, the legislature amended the eluding statute, which had previously included a “wanton or willful” standard. Compare RCW 46.61.024 with former RCW 46.61.024; see Laws of 2003 Chapter 101 Section 1.

⁴ The instruction was apparently based on former RCW 46.61.024, which was effective until July 27, 2003. Under that statute, “[a]ny driver of a motor vehicle who wilfully [sic] fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wilful [sic] disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and his vehicle shall be appropriately marked showing it to be an official police vehicle.” Former RCW 46.61.024, *emphasis added*.

permitted if the jury can infer a culpable mental state (wanton or willful disregard) from the manner of driving.

In addition, the jury was not instructed that conviction required proof that Mr. Roller drove “in a rash or heedless manner, indifferent to the consequences,” as required under *Roggenkamp, supra*. The jury may have viewed the “wanton or willful” standard (found in the body of Instruction No. 13) to be less onerous than *Roggenkamp*’s “rash or heedless and indifferent” standard.

Finally, the “to convict” instruction also omitted or misstated other elements of the offense. First, the court did not instruct the jury that conviction required proof the officer gave “a visual or audible signal” to stop. Instruction No. 13, 14, Supp. CP. Second, the instruction did not require proof that Mr. Roller’s attempt to elude occurred *after* he was signaled to stop. Instruction No. 13, 14, Supp. CP. Third, the instruction did not require proof that Mr. Roller drove in a reckless manner *after* he was signaled to stop. Instruction No. 13, 14, Supp. CP.

The “to convict” instruction does not correctly set forth the essential elements of the crime and does not contain a complete statement of the law. The instructions as a whole do not properly inform the jury of the applicable law. Because of this, Mr. Roller’s constitutional right to due process was violated, and prejudice is presumed. *Lorenz, supra*;

Douglas, supra; Brown, supra; Kiehl, supra. The jury applied the wrong legal standard in convicting Mr. Roller. Because of this, the conviction must be reversed and the case remanded for a new trial. *Brown, supra; Jones, supra.*

II. ASSAULT IN THE SECOND DEGREE REQUIRES PROOF THAT THE DEFENDANT ACTED UNDER CIRCUMSTANCES NOT AMOUNTING TO ASSAULT IN THE FIRST DEGREE.

The elements of an offense are determined with reference to the language of the statute. *See State v. Leyda*, 157 Wn.2d 335 at 346, 138 P.3d 610 (2006); *State v. Stevens*, 127 Wn. App. 269 at 274, 110 P.3d 1179 (2005). The meaning of a statute is a question of law reviewed *de novo*. *State Owned Forests v. Sutherland*, 124 Wn. App. 400 at 409, 101 P.3d 880 (2004). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen*, 153 Wn.2d 186 at 194, 102 P.3d 789, (2004). If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *Sutherland, supra*, at 409; *see also State v. Punsalan*, 156 Wn.2d 875, 133 P.3d 934 (2006) ("Plain language does not require construction;" *Punsalan*, at 879, *citations omitted*). The court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Sutherland*, at 410.

In *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000), 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 Supreme Court gave effect to the plain language of the statute, and held that the prosecution was required to allege and prove an assault not amounting to assault in the first or second degree to obtain a conviction for Assault in Violation of a Protection Order:

[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.

RCW 9A.36.021(1)(c) defines Assault in the Second Degree as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
...(c) Assaults another with a deadly weapon.

Here, as in *Azpitarte*, the statute is clear and unambiguous: it exempts from the second-degree assault statute any acts that constitute Assault in the First Degree. RCW 9A.36.021 (1). Accordingly, the

absence of a First Degree Assault is an essential element of the crime that must be alleged in the Information, included in the “to convict” instructions, and proved to a jury beyond a reasonable doubt. *Azpitarate, supra.*

In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court reinterpreted *Azpitarate*, restricting its application in certain limited circumstances. Applying convoluted logic, the Court in *Ward* held that the language at issue in *Azpitarate* (“does not amount to assault in the first or second degree”) was only an essential element of Assault in Violation of a No Contact Order if the defendant was also charged with Assault in the First or Second Degree.

Under *Ward*, if the defendant was not also charged with Assault in the First or Second Degree, the state was not required to allege or prove that the assault in violation of the no contact order did “not amount to assault in the first or second degree.” The legislature’s goal, according to the Supreme Court, was to punish assault in violation of a no contact order as a felony, but not if the defendant was already charged with another felony assault:

Since the State did not charge Ward or Baker with 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... The omitted language is not necessary to find felony violation of a no-contact order because the State did not additionally charge first

or second degree assault. Accordingly, all elements of the crime were submitted to the jury for a finding beyond a reasonable doubt. *Ward, supra, at 813-814.*

It is difficult to imagine how *Ward's* reinterpretation of *Azpitarte* would apply to this case. As the Supreme Court made clear in *Ward*, its holding was based on the assumption that a defendant could be convicted of Assault in the First (or Second) Degree, or of Assault in Violation of a No-Contact Order, but not of both.

RCW 9A.36 cannot be read in the same fashion. Nothing in the statute permits the state to charge a defendant with Assault in the First Degree and with Assault in the Second Degree for the same conduct.⁵ Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.36, and has no bearing on Mr. Roller's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36. The substantive crime addressed in *Ward* was the “[w]illful violation of a court order issued under [certain provisions authorizing such orders].” *Former* RCW 10.99.040(4) (1997) and *former* RCW 10.99.050(2) (1997). Other provisions of each statute varied the penalty depending on the circumstances; these provisions did not create separate crimes, but instead enhanced the sentence for the base crime. *Ward*,

⁵ The only exception is for alternative charges.

supra, at 812-813. By contrast, there is no single statute defining a base crime of assault and setting varying penalties based on the circumstances of the crime. *See* RCW 9A.36 generally. Instead, the phrase “under circumstances not amounting to assault in the first or second degree” is contained in the very provision defining the substantive crime itself. RCW 9A.36.021. It is not set forth in a separate provision establishing penalties for a base crime. Accordingly, these circumstances are an element of the charged crime. This court is not free to disregard the legislature’s choice of language. *Sutherland, supra*.

A. The Information was deficient as to Counts I and II because it omitted an essential element of Assault in the Second 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).

In this case, the operative language of the Information alleges that Mr. Roller “assaulted Officer [Croy/Lowrey] with a deadly weapon...” CP 25-26. It does not allege that the crime occurred “under circumstances not amounting to assault in the first degree,” as required by RCW 9A.36.021. Because of this, the Information is deficient and dismissal is required, even in the absence of prejudice. *Kjorsvik, supra*. Counts I and II must therefore be reversed and the case dismissed without prejudice. *Kjorsvik*.

B. The “to convict” instructions omitted an essential element of Assault in the Second Degree, as charged in Counts I and II.

As noted above, due process requires proof beyond a reasonable doubt of every essential element, and “to convict” instructions should contain a complete statement of the applicable law. *In re Winship, supra*; *Smith I, supra*. Omissions that relieve the state of its burden require reversal unless they are harmless beyond a reasonable doubt. *Brown, supra*.

The “to convict” instructions for Counts I and II did not require the jury to find that either assault was committed “under circumstances not amounting to assault in the first degree,” as required by RCW 9A.36.021

(1). Instructions Nos. 7 and 8, Supp. CP. Under the facts of this case, the prosecutor cannot show that the error was harmless beyond a reasonable doubt.

Under RCW 9A.36.011(1)(a), a person commits assault in the first degree if, with intent to inflict great bodily harm, he “[a]ssaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.”⁶ Because the state’s case was based on an assault with a deadly weapon, the state was required to produce evidence that Mr. Roller did not act with intent to inflict great bodily harm. RCW 9A.36.011(1). Officer Croy testified that Mr. Roller put the car in drive, did not slow down, came straight at him, and would have hit and killed him if the officer had not sidestepped. RP (10/16/06) 29-30, 43-44. Officer Lowery testified that when he drove alongside, Mr. Roller swerved at him (going 5 feet into Lowery’s lane) and would have hit him had Lowery not swerved into the oncoming lane. RP (10/16/06) 71.

Given this evidence, the state cannot establish that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be

⁶ The state did present sufficient evidence to prove that the circumstances did not amount to Assault in the First Degree by infection with HIV or by infliction of great bodily harm. RCW 9A.36.011(1)(b) and (c).

reversed and the case remanded for a new trial. *Jones, supra; Brown, supra.*

III. RCW 9A.36.021(1)(C) VIOLATES THE SEPARATION OF POWERS.

A. The legislature has failed to define the core meaning of the crime of assault.

The doctrine of separation of powers is derived 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 the core meaning of that crime. *See, generally*, RCW 9A.36.⁷ Instead, it has allowed the judiciary to define the conduct that is criminalized. The appellate courts have done so, enlarging the definition to criminalize more and more conduct over a period of many years. This violates the separation of powers. *Moreno, supra*.

⁷ There are some statutes, not applicable here, which specifically define the elements of certain assault-like crimes, without using the word “assault” in the definition. *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.” *See also, e.g.*, RCW 9A.36.031 (1)(d): “A person is guilty of assault in the third degree if he or she... With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm.” Because these subsections define the core conduct giving rise to criminal liability, they do not violate the separation of powers.

- B. The judiciary has enlarged the definition of “assault” to criminalize more and more conduct over the past 100 years.

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 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. Smith*, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 199 (2007) (“*Smith II*”).

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.

C. Two recent cases incorrectly limit the legislature's responsibility to define crimes.

Two recent decisions address the legislature's responsibility to define crimes. In *State v. David*, the Court of Appeals interpreted

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*, 134 Wn. App. 470 at 481, 141 P.3d 646 (2006), *citations and footnotes omitted*.

In *State v. Chavez*, 134 Wn. App. 657, 142 P.3d 1110 (2006), the court expanded on *David*. In a part-published opinion, the court drew an analogy between the assault statute and those statutes defining 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... *Chavez*, at 667.

In each of these situations-- bail jumping, protection orders, and contempt-- 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.

Bail jumping, protection order violations, and contempt of court are qualitatively different from the assault statutes, and Division II's analogy to these crimes is inappropriate. The case-specific facts in these

crimes stem from judicial action, but otherwise are no different from other (nonjudicial) facts such as the posted speed limit in a reckless driving case, or the ownership of a building in a burglary case. There are no core terms undefined by the legislature in any of these statutes.

The *Chavez* court also found the statute constitutional because the legislature “has instructed that the common law must supplement all penal statutes.” *Chavez*, at 667, 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 the court suggested. *Chavez*, at 667. The legislature and the judiciary may cooperate to define assault; however, their cooperation must comply with the constitution.

David and *Chavez* should be reconsidered. The two cases improperly limit the legislature’s responsibility, allow the judiciary to determine what conduct constitutes the core of a crime, and give the appellate courts the power to criminalize more and more conduct, as has occurred with the crime of assault over the past century.

D. This court should adopt a rule requiring the legislature to adequately define the conduct that constitutes a crime.

Under *David* and *Chavez*, the legislature need only set forth the elements of the crime without any further guidance. *David, supra, at 481.*

In many cases, this will adequately define the conduct constituting a crime. In fact, two examples of such crimes are found in RCW

9A.36.021:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
...(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child....
...(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
...(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.
RCW 9A.36.021.

Because these subsections adequately define the core conduct giving rise to criminal liability, they do not violate the separation of powers. By contrast, RCW 9A.36.021 (1)(c), the section under which Mr. Roller was charged, uses a circular definition of assault: a person is guilty of assault in the second degree if he “[a]ssaults another with a deadly weapon.” RCW 9A.36.031(1)(c). The circularity is even more stark in RCW 9A.36.041: a person is guilty of assault in the fourth degree if “he or she assaults another.”

The problem with such circular formulations is that the core of the crime remains undefined, and the judiciary remains free to expand the crime (as it did in the case of assault.) Indeed, without legislative action, appellate courts could continue to expand the definition of assault to cover more behaviors not currently criminal. Or, again without legislative action, appellate courts could restrict the definition of assault, criminalizing only that conduct that was considered assaultive at the turn of the last century.

This court should adopt a rule that requires the essential elements of a crime to be defined with something more than a bare circular reference to the crime itself. For example, the problems with RCW 9A.36 could be ameliorated with a statutory definition of the term "assault." The legislature has done just that in the theft statute. Like the assault statutes, the statutes criminalizing theft (RCW 9A.56.030 *et seq.*) declare that a person is guilty of theft if he or she commits theft. *See, e.g.,* RCW 9A.56.030, .040, .050. Unlike the assault statutes, however, the legislature has defined the term "theft." *See* RCW 9A.56.020. In the context of the theft statutes, this definition solves the circularity problem and complies with the constitutional separation of powers.

E. Counts I and II must be reversed and the charges dismissed.

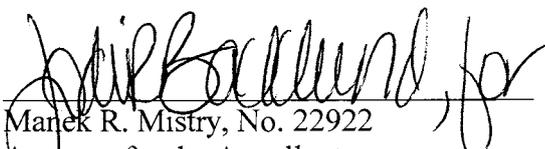
The statutory scheme criminalizing assault violates the constitutional separation of powers. Because Mr. Roller was convicted under an unconstitutional statute, his assault convictions must be reversed and the charges dismissed with prejudice.

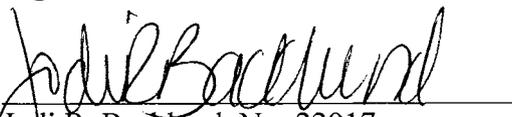
CONCLUSION

For the foregoing reasons, Mr. Roller's three felony convictions must be reversed. Counts I and II must be dismissed without prejudice, because the Information was deficient. All three counts must be remanded for a new trial because of errors in the court's instructions.

Respectfully submitted on March 21, 2007.

BACKLUND AND MISTRY


Marek R. Mistry, No. 22922
Attorney for the Appellant


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

CERTIFICATE OF MAILING

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

Kevin Roller, DOC# 976093
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

and to:

Lewis County Prosecuting Attorney
MS:pro01
360 NW North Street
Chehalis, WA 98532-1925

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

All postage prepaid, on March 21, 2007.

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 March 21, 2007.



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

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