

original

No. 35498-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
Kevin Lee Roller
Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

Lewis County Superior Court

Cause No. 06-1-00559-1

The Honorable Judge H. John Hall

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

The statement of the case set out in the Appellant's brief is adequate for purposes of responding to this appeal.

ARGUMENT

I. The State Concedes that the Jury was Instructed Improperly as to the Definition of "in a reckless manner" on the Attempting to Elude Charge, but Because the Jury Convicted the Defendant Using the Higher "Willful and Wanton" Standard, the Error is Harmless.

The Defendant claims the jury was improperly instructed as to the "driving in a reckless manner" element of the Attempting to Elude charge. The State concedes that the jury instructions given as to the Attempting to Elude charge were not an accurate statement of the current law as to this crime. RCW 46.61.024. However, the State believes the instructional error should be seen as harmless because the Defendant was convicted using a higher standard of proof on this charge.

Although the State does not believe there are any published cases to date that support the Defendant's argument, the State is well aware of the rule that jury instructions must accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). A Court reviews *de novo* a court's

refusal to give a defendant's proposed jury instruction. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). Jury instructions can be subject to a harmless error analysis. State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990).

In the present case the trial court instructed the jury-- and the jury convicted the Defendant-- by using the higher standard "willful and wanton disregard" instruction as to the felony eluding charge. Instruction No. 12, Supp. CP; CP 4-14. There was no objection by the defendant as to the jury instructions at trial in this case. Therefore, because the jury convicted the Defendant using a higher standard of proof, it cannot be said that the State was relieved of its burden" in this case and the improper jury instruction should be viewed as harmless error. State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990) (even if instruction involved constitutional issue, it was harmless beyond a reasonable doubt). Accordingly, the felony eluding conviction should be affirmed. On the other hand, if this Court finds that the erroneous jury instructions constitute reversible error as to the felony eluding charge, that charge alone should be remanded for a new trial.

II. There Was no Violation of the "Separation of Powers" Doctrine When the State Used the Common Law Definition of "Assault" in This Case.

The Defendant also 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 not correct, and the State is not aware of any on-point authority that holds otherwise.

Indeed, this identical constitutional argument that the Defendant is now putting forth as to the definition of assault was rejected entirely by this Court in State v. Chavez, 134 Wn.App. 657, 142 P.3d 1110 (2006). The Chavez Court rejected this same violation of the separation of powers doctrine argument when it held:

[T]he legislature has acquiesced to the courts' common law definition of assault, both by not changing the definition and by enacting RCW 9A.04.060. . . . When the legislature enacted RCW 9A.04.060 in 1975, Smith, 72 Wash. App. at 241, 864 P.2d 406, we presume it was aware of the common assault definitions the courts had been using for the preceding half century. See state v. Carlson, 65 Wash.App. 153, 157-58, 828 P.2d 30 (1992). 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, 134 Wn.App. at ____, 142 P.3d at 1116. "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 the common law." Id. See also State v. David, 134 Wn.App. 470, 141 P.3d 646 (2006).

Therefore, because the Chavez Court held there was no violation of the separation of powers doctrine because "the legislative and judicial branches have cooperated in defining the offense of "assault" and because here, just as in Chavez, the Appellant "has presented no authority to show that this established practice is unconstitutional beyond a reasonable doubt," this Court should again reject Appellant's identical argument in the present case, and should affirm the Appellant's Assault in the Third Degree conviction.

Because the same arguments raised by the Defendant as to the Assault in Second Degree charge were rejected on appeal in the Chavez case, the same should occur here, and the Defendant's Assault in the Second degree charge should be affirmed.

CONCLUSION

The State concedes that the jury was improperly instructed on the higher-standard of "willful and wanton disregard" as to the felony eluding charge. However, this error should be seen as harmless and the felony eluding charge should be affirmed. The Assault in the Second Degree conviction should also be affirmed because the arguments raised by the Defendant have already been rejected by a reviewing Court.

RESPECTFULLY SUBMITTED this 21st day of June, 2007.

L. MICHAEL GOLDEN
Lewis County Prosecutor

by:



LORI SMITH, WSBA 27961
Deputy Prosecutor

07 JUN 22 AM 11:45

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON
BY *CMM*
DEPUTY

STATE OF WASHINGTON,)	NO. 35498-II
Respondent,)	
vs.)	
)	
KEVIN LEE ROLLER,)	DECLARATION OF
Appellant.)	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 June 21, 2007, I mailed a copy of the Brief of Respondent by depositing said document in the United States Mail, postage pre-paid, to the attorney for the Appellant at the name and address indicated below:

Jodi R. Backlund
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Backlund and Mistry
203 East Fourth Avenue, Suite 404
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DATED this 21 day of June, 2007, at Chehalis, Washington.

Lori Smith
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Lewis Count Prosecutor's Office
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Declaration of
Mailing