

No. 35739-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Edward A. Steward,**

Appellant.

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STATE OF WASHINGTON  
CLERK OF COURT  
JUL 19 2006  
OLYMPIA, WA

Clallam County Superior Court

Cause No. 06-1-00395-0

The Honorable Judge Kenneth Williams

**Appellant's Opening Brief**

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## ASSIGNMENTS OF ERROR

1. The trial court erred by providing the jury with an erroneous definition of knowledge.

2. The trial court erred by giving Instruction No. 21, which reads as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.  
Instruction 21, Supp. CP.

3. Instruction No. 21 contained an improper mandatory presumption.

4. Instruction No. 21 impermissibly relieved the state of its burden of establishing an element of the offense by proof beyond a reasonable doubt.

5. Mr. Steward was denied the effective assistance of counsel by his failure to object to Instruction No. 21.

6. Mr. Steward was denied the effective assistance of counsel by his attorney's failure to review the discovery with him.

7. Mr. Steward was denied the effective assistance of counsel by his attorney's failure to discuss the case with him.

8. The trial court erred by failing to inquire after Mr. Steward testified that his attorney had not reviewed the discovery or discussed the case with him.

9. The Information was constitutionally deficient as to Count II because it omitted an element of Assault in the Second Degree.

10. Mr. Steward's conviction of Assault in the Second Degree violated due process because the prosecutor was not required to prove that he acted under circumstances not amounting to Assault in the First Degree.

11. The trial court's "to convict" instruction omitted an element of Assault in the Second Degree.

12. The trial court erred by giving Instruction No. 24, 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 a period of time between April 1, 2006 and April 20, 2006 the Defendant, or one with whom he was an accomplice, assaulted Scott Schroeder with a deadly weapon; and

(2) 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 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. 24, Supp. CP.

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

14. Mr. Steward was denied his constitutional right to a jury trial in Count 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.

15. The statutory and judicial scheme criminalizing assault violates the separation of powers doctrine.

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

17. The trial court erred by giving Instruction No. 25, which reads as follows:

An assault is an intentional touching or striking of the person of another that is harmful or offensive. 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 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.

Instruction No. 25, Supp CP.

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

Edward Steward was charged with Kidnapping in the First Degree and Assault in the Second Degree. To prevail on its accomplice theory of liability, the state was required to prove that Mr. Steward provided aid with knowledge that his actions would promote or facilitate the charged crimes. The court's instructions allowed the jury to convict even if Mr. Steward did not know that his actions would promote or facilitate the charged crimes.

1. Did the trial court's instructions create an impermissible mandatory presumption? Assignments of Error Nos. 1-4.
2. Did the trial court's instructions misstate the law and mislead the jury by conflating two *mens rea* elements? Assignments of Error Nos. 1-4.
3. Did the trial court's instructions relieve the state of its burden to establish every element of the offense by proof beyond a reasonable doubt? Assignments of Error Nos. 1-4.
4. Was Mr. Steward denied the effective assistance of counsel when his lawyer failed to object to Instructions No. 21? Assignments of Error Nos. 1-5.

Prior to trial, Mr. Steward was offered a plea bargain involving a reduction of charges, five years in custody, and no enhancements. He rejected the offer. At trial, he testified that his attorney had not reviewed the discovery with him, and had not discussed the case with him. The trial judge did not inquire about these statements, and the prosecutor did not take any steps to ensure that Mr. Steward had been adequately represented prior to and during trial.

5. Was Mr. Steward denied the effective assistance of counsel when his lawyer failed to review the discovery with him? Assignments of Error Nos. 6-8.

6. Was Mr. Steward denied the effective assistance of counsel when his lawyer failed to discuss the case with him? Assignments of Error Nos. 6-8.

Count I did not allege that the assault was committed under circumstances not amounting to Assault in the First Degree. The court's "to convict" instruction did not require proof of this element.

7. 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. 9-14.

8. Was the Information constitutionally deficient as to Count II because it failed to allege that the assault was committed under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 9-14.

9. Did the trial court's "to convict" instruction as to Count II omit an essential element of that charge? Assignments of Error Nos. 9-14.

10. Did Mr. Steward's conviction of Count II violate due process because the prosecutor was not required to prove that it occurred under circumstances not amounting to Assault in the First Degree? Assignments of Error Nos. 9-14.

11. Was Mr. Steward denied his constitutional right to a jury trial because the jury did not determine each element of Count II beyond a reasonable doubt? Assignments of Error Nos. 9-14.

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.

12. Does the legislature's failure to define "assault" violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

13. Does the judicially created definition of "assault" violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

14. Does the judicial expansion of the crime of assault without legislative input violate the constitutional separation of powers? Assignments of Error Nos. 15-17.

15. Does the separation of powers doctrine require the legislature to define crimes with something more than a bare circular reference to the crime itself? Assignments of Error Nos. 15-17.

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sometime prior to April of 2006, Scott Schroeder stole between \$400 and \$500 from Edward Steward. RP (11/7/06) 18, 57, 98-99 (11/8/06) 15-17. Schroeder testified that he offered to buy drugs for Mr. Steward, who sent his friend Harold Herring with cash to complete the deal. Schroeder pocketed the money, called Mr. Steward, and told him "now we're even." RP (11/8/06) 15-16. According to Schroeder, he stole the money in retaliation for a bogus drug deal in which Mr. Steward sold him counterfeit methamphetamine. RP (11/8/06) 15-17.

Schroeder acknowledged that he'd embarrassed Herring by taking the money from under his nose. RP (11/8/06) 16. Herring confirmed that he was angry at Schroeder, felt responsible for the missing money, wanted to save face, and was "quite willing to go out there and mess with Schroeder." RP (11/7/06) 132-133.

On April 10<sup>th</sup> or 11<sup>th</sup>, Mr. Steward went with Herring and Travis Reader to recover his money from Schroeder, who was at the house of Mike Doty. RP (11/7/06) 18, 58-60, 100-101, 104-105, 165-167. Reader had his own reasons for being angry at Schroeder-- Schroeder had allegedly raped a friend of Reader's-- and he'd already been looking for Schroeder on his own. RP (11/7/06) 164. When Mr. Steward called

Reader and told him he'd located Schroeder. Reader grabbed a heavy hammer and went to Doty's house to beat up Schroeder (although not necessarily with the hammer.) RP (11/7/06) 167.

Accounts differed regarding what happened when the three reached Doty's house. According to Doty, Herring, Reader and Schroeder, the three entered or forced their way in, armed with guns and the hammer, and demanded return of the money at gunpoint. RP (11/7/06) 21-22 102-106, 133, 172-174; RP (11/8/06) 19-22.

According to Mr. Steward, Herring and Reader went into the house without him while he parked the car. RP (11/8/06) 149. He was unaware that either of them were armed, and denied having a weapon himself. RP (11/8/06) 148, 155-156. He entered the house a minute later, and found Reader yelling at Schroeder while Herring tried to calm Doty, who was upset that the commotion might result in an eviction. RP (11/8/06) 150-151. Mr. Steward told Reader to sit down, and then yelled at Schroeder himself, demanding his money and threatening to "kick his ass" if it weren't forthcoming. RP (11/8/06) 151-152.

The witnesses agreed that Schroeder then called his girlfriend and told her to give Mr. Steward money hidden in a closet at their house, and that Mr. Steward left to get the money. RP (11/7/06) 27-29, 108-109, 175-177; RP (11/8/06) 23-24, 27, 152-158. According to Mr. Steward, Reader

remained at Doty's with Schroeder because he wanted to discuss the alleged rape, and Herring remained to keep Reader from getting out of control. RP (11/8/06) 154-155.

The other witnesses testified to a different version of events. According to Doty, Schroeder suggested that Herring and Reader hold him until Mr. Steward got the money, and Mr. Steward directed Herring and Reader to keep Schroeder at Doty's house until they heard from him. RP (11/7/06) 28-29. Herring, Reader, and Schroeder all testified that Mr. Steward instructed them to keep Schroeder at Doty's. RP (11/7/06) 111, 177; RP (11/8/06) 28.

After Mr. Steward had been gone for a while, Herring, Reader, and Schroeder left Doty's house in Schroeder's car. RP (11/7/06) 33, 117, 183, 187-188. Doty testified that Herring received a phone call, and then left with Reader and Schroeder. RP (11/7/06) 33. Herring testified that they left because Mr. Steward had instructed him over the phone to take Schroeder to another house. RP (11/7/06) 112-113. Reader testified that they left because they all became paranoid that the police might come, and all of them (including Schroeder) had reasons they didn't want police contact. RP (11/7/06) 181-187. Schroeder testified that he had a warrant for his arrest, and became worried that his girlfriend might direct the police to Doty's house. RP (11/8/06) 31. He told Reader that they should

leave, and offered his car. RP (11/8/06) 32, 34. He testified that Herring made a phone call and received instructions (from Mr. Steward) to take him (Schroeder) to another house. RP (11/8/06) 32. He claimed that Reader dragged him outside while Herring held a gun to the back of his head. RP (11/8/06) 33. While Reader was driving, Schroeder (who was in the front passenger seat) opened the car door and jumped out. RP (11/8/06) 124-125, 188; RP (11/8/06) 35.

Mr. Steward denied that he'd told Herring and Reader to hold Schroeder, denied instructing them to take Schroeder from Doty's to another house, and testified that he had no more contact with any of them until the following day. RP (11/8/06) 138-173.

Mr. Steward was charged with Kidnapping in the First Degree and Assault in the Second Degree. CP 19. The operative language of Count II alleged that "Defendant did intentionally assault another person, to wit: Scott Schroeder, with a deadly weapon." CP 20. The state also alleged that during the commission of both crimes, either he or an accomplice was armed with two firearms and one deadly weapon. CP 19-20.

Prior to trial, the state offered Mr. Steward a plea bargain involving reduced charges, a total of five years in custody, and no firearm or deadly weapon enhancements. RP (12/15/06) 22, 27-28, 36-37. Mr. Steward rejected the proposal. RP (9/22/06) 4. Herring and Reader each

accepted similar offers and testified against Mr. Steward at trial. RP (11/6/06) 12, 14; RP (11/7/06) 93, 148-151, 160-161, 225

Mr. Steward's theory at trial was that he confronted Schroeder to get his money back, that he was unarmed and did not ever see a weapon in possession of either Herring or Reader, and that any kidnapping or assault with a deadly weapon occurred without his involvement after he had left Doty's house. RP (11/6/06) 27-28; RP (11/7/06) 12; RP (11/9/06) 52-55.

During his testimony, Mr. Steward told the jury that his attorney had never reviewed the discovery with him (other than 6 pages out of 115), that he was first hearing the evidence at the same time it was presented to the jury, that he was "just as shocked as everybody else in the courtroom," and that his attorney had "basically" never discussed the case with him. RP (11/8/06) 177-178. The trial judge never clarified these statements, and the prosecution did not take any steps to ensure and/or establish that Mr. Steward was properly represented prior to and during the trial. RP.

In its instructions to the jury, the court defined the term "assault" as follows:

An assault is an intentional touching or striking of the person of another that is harmful or offensive. 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 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.  
Instruction No. 25, Supp. CP.

The court also instructed the jury that “A person commits the crime of ASSAULT IN THE SECOND DEGREE when under circumstances not amounting to Assault in the First Degree, he or she assaults another with a deadly weapon.” Instruction No. 23, Supp. CP. The court did not define Assault in the First Degree. Court’s Instructions, Supp. CP. The court’s “to convict” instruction for Count II read 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 a period of time between April 1, 2006 and April 20, 2006 the Defendant, or one with whom he was an accomplice, assaulted Scott Schroeder with a deadly weapon; and

(2) 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 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. 24, Supp. CP.

Defense counsel submitted an instruction defining knowledge.

The proposed instruction read as follows:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts, or circumstances or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Defendant's Proposed Instructions, Supp. CP.

Instead of giving Mr. Steward's proposed instruction, the court gave a similar instruction that added the following language: "Acting knowingly or with knowledge also is established if a person acts intentionally." Instruction No. 21, Supp. CP.

The court also instructed the jury on accomplice liability.

Instruction No. 14 read as follows:

A person who is an accomplice in the commission of the crime is guilty of that crime whether present at the scene or not.

A person is an accomplice in the commission of the crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime; or

(2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

Instruction No. 14, Supp. CP.

Mr. Steward was convicted of both counts, and the jury returned special verdicts finding that he was armed with two firearms and a deadly weapon other than a firearm during the commission of each crime. Verdict Forms A and D, Special Verdict Forms for Count I and Count II, Supp. CP. Mr. Steward's standard ranges were determined to be 77-102 months (Count I) and 22-29 months (Count II). Following the recommendations of a DOC presentence report, the trial judge imposed an exceptional sentence below the standard range of 48 months on Count I, concurrent with a 25-month standard-range sentence on Count II. RP (12/15/06) 32-38. Consecutive to this base sentence the court reluctantly added a total of 228 months in firearm and deadly weapon enhancements. CP 13; RP (12/15/06) 37-41.

Mr. Steward appealed his conviction. CP 6.

### **ARGUMENT**

**I. THE COURT'S INSTRUCTIONS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. STEWARD KNEW HIS ACTIONS WOULD PROMOTE OR FACILITATE COMMISSION OF THE CRIMES CHARGED.**

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 at 76, 941 P.2d 661 (1997). A jury instruction which misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury. *State v. Savage*, 94 Wn.2d 569 at 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one which requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58 at 63, 768 P.2d 470 (1989). The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820 at 834, 64 P.3d 633 (2003). Furthermore, conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens*, at 834.

Accomplice liability is premised upon an intentional act performed “with knowledge that it will promote or facilitate the commission of the crime...” RCW 9A.08.020. When accomplice liability is submitted to the jury, the instructions must make clear that the defendant acted with the requisite knowledge. *State v. Evans*, 154 Wn.2d 438 at 451-452, 114 P.3d 627 (2005). Instructions that relieve the state of proving the correct knowledge element for accomplice liability require reversal. *Evans*, *supra*; see also *State v. Roberts*, 142 Wn.2d 471, 14 P.3d 713 (2000); *State v. Cronin*, 142 Wn.2d 568, 14 P.3d 752 (2000).

In this case, a mandatory presumption in the court’s knowledge instruction combined with the accomplice liability instruction to relieve the state of its burden of proving that Mr. Steward acted with knowledge that his actions facilitated the charged crimes. Because of this, the convictions must be reversed and the case remanded for a new trial.

*Evans, supra; Cronin, supra.*

To establish accomplice liability, the state was required to prove that Mr. Steward provided “aid,” with knowledge that it would promote or facilitate the commission of the crime.<sup>1</sup> RCW 9A.08.020; Instruction No.

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<sup>1</sup> Accomplice liability can also be premised on an agreement to provide aid, or on soliciting, commanding, encouraging, or requesting commission of the crime. However, since the verdict was in the form of a general verdict, the availability of these alternatives is irrelevant; the jury may have convicted on the theory that Mr. Steward aided the others in

14, Supp. CP. The word “aid” was broadly defined to include “all assistance” (other than mere presence.) Instruction No. 14, Supp. CP. In other words, to prove that Mr. Steward provided “aid,” the state was obligated to present evidence of an intentional act that helped further the charged crimes.

Unfortunately, under Instruction No. 21, the jury was required to infer knowledge from the intentional act, even if Mr. Steward were actually ignorant of his friends’ intentions. Instruction No. 21 provides (in relevant part) that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 21, Supp. CP. Thus if the jury found that Mr. Steward did *any* intentional act that helped further commission of the crime, Instruction No. 21 compelled them to conclude that he acted with knowledge that his act would promote the charged crime, even if he didn’t know what his friends had planned for Schroeder. This relieved the prosecution of its burden to prove the requisite mental state. *See State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005); *Cronin, supra*; *Roberts, supra*.

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committing the charged crimes. *See, e.g., State v. Fernandez*, 89 Wn. App. 292 at 300, 948 P.2d 872 (1997)

The error was not harmless beyond a reasonable doubt, because the evidence of knowledge was contested. Mr. Steward's theory of the case was that Herring and Reader had their own reasons for disliking Schroeder: Reader because Schroeder had allegedly raped a friend, and Herring because Schroeder had previously humiliated him by stealing money intended for a drug purchase. RP (11/8/06) 16, 132-133, 164. Mr. Steward testified that he went, unarmed, to confront Schroeder to recover his money, and that he threatened to "kick his ass" if Schroeder didn't pay up. RP (11/8/06) 148, 150-152, 155-156. According to Mr. Steward, any kidnapping or assault occurred without his knowledge after he'd left the scene. RP (11/8/06) 138-173.

The jury could have believed (1) that Mr. Steward attempted to rob Schroeder, by trying to recover his money through the threatened use of force (*see* RCW 9A.56.190), (2) that Mr. Steward did not intend to kidnap or assault Schroeder, and (3) that the attempted robbery furthered Herring's and Reader's plan (to kidnap and assault Schroeder for their own purposes). Since the attempted robbery was an intentional act, the jury was required (under Instruction No. 21) to conclude that Mr. Steward acted with knowledge that his attempted robbery would promote or facilitate the kidnapping and assault, even if he were actually ignorant of the crimes that Herring and Reader intended.

This is similar to the problem created by the erroneous knowledge instruction in *Goble, supra*, where the accused was charged with assaulting a person whom he knew to be a law enforcement officer.<sup>2</sup> The trial court's "knowledge" instruction included language identical to that in Instruction 21: "Acting knowingly or with knowledge also is established if a person acts intentionally." *Goble, at* 202. The Court of Appeals reversed the conviction because this language could be read to mean that an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.  
*Goble, at* 203.<sup>3</sup>

Here, as in *Goble*, Mr. Steward was charged with an offense that included two mental states: the prosecution was required to prove (1) an

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<sup>2</sup> Although not an element of the charged offense, knowledge was included in the "to convict" instruction and thus became an element under the law of the case in *Goble, Goble at* 201.

<sup>3</sup> In *State v. Gerds*, \_\_\_ Wn.App. \_\_\_, 150 P.3d 627 (2007), the court clarified that *Goble* applies to crimes with more than one *mens rea* element. In such cases, use of the instruction creates the possibility that a jury will conflate the mental elements, thereby relieving the state of its burden.

intentional act that helped further the charged crimes, and (2) knowledge that the act would promote or facilitate the charged crimes. As in *Goble*, the inclusion of the final sentence in Instruction 21 was erroneous; it required the jury to presume that Mr. Steward acted with knowledge (that his actions would promote or facilitate the crimes), based on his intentional act (in confronting Schroeder and/or committing attempted robbery). This unconstitutionally relieved the prosecution of its burden to prove that Mr. Steward's intentional acts were done with knowledge that he was promoting or facilitating the charged crimes. *Goble*.

Furthermore, Instruction No. 21 runs afoul of the rule against conclusory presumptions. *Mertens, supra*. The instruction requires the elemental fact ("Acting knowingly or with knowledge" that he was promoting or facilitating the charged crimes) to be conclusively presumed from the predicate fact ("if a person acts intentionally...") Instruction No. 21, Supp. CP. The use of a conclusive presumption in a jury instruction is harmless only if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. *State v. Deal*, 128 Wn.2d 693 at 703, 911 P.2d 996 (1996). Here, as noted above, conflicting evidence was introduced regarding Mr. Steward's "guilty knowledge." Mr. Steward testified that he was ignorant of

Reader's and Herring's plan to kidnap and assault Schroeder; the others testified that he orchestrated the entire criminal episode.

Given the general verdicts in this case, there is no way of knowing how the jury used the "knowledge" instruction, with its conclusive presumption. Accordingly, the improper instructions were prejudicial. *See, e.g., State v. Reid*, 74 Wn. App. 281 at 289, 872 P.2d 1135 (1994) (where jury may have relied solely on a permissive inference instruction to establish element of fraudulent intent, reversal is required because "[t]here is no way of knowing beyond a reasonable doubt whether the jury relied on the improper basis.")

For all these reasons, the conviction must be reversed and the case remanded for a new trial. *Goble, supra; Mertens, supra; Cronin, supra; Roberts, supra.*

**II. DEFENSE COUNSEL SHOULD HAVE OBJECTED AND TAKEN EXCEPTION TO INSTRUCTION NO. 21.**

The Sixth Amendment to the United States Constitution guarantees that "In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel..." Wash. Const. Article I,

Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, \_\_\_ P.3d \_\_\_ (2006).

To prevail on a theory of accomplice liability, the state was required to prove that Mr. Steward knew his actions promoted the charged crimes. Instruction No. 14, Supp. CP. Despite this, Mr. Steward's attorney failed to object to the court's knowledge instruction, which erroneously contained a mandatory presumption. RP (11/9/06) 11. This

failure to object was deficient performance. A reasonably competent attorney would have been familiar with the requirements of accomplice liability, would have been aware (from the *Goble* case) of the danger that the erroneous knowledge instruction could mislead the jury to presume knowledge from an intentional act,<sup>4</sup> and would have objected and taken exception to Instruction No. 21. *Goble, supra*. Indeed, defense counsel proposed an appropriate instruction, which did not include the offending language, but did not object or take exception when the court inserted the final sentence containing the mandatory presumption. Defendant's Proposed Instructions, Supp. CP.

Mr. Steward was prejudiced by the error. The instructions were misleading and contained an illegal mandatory presumption. As a result, the jury would not have been able to properly to apply the accomplice instruction, and improperly imputed knowledge to Mr. Steward based on his attempt to commit robbery. Defense counsel's failure to object to the improper instruction denied Mr. Steward the effective assistance of counsel. *Strickland*. The conviction must be reversed, and the case remanded for a new trial. *Reichenbach, supra*.

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<sup>4</sup> Trial commenced in November, 2006, 11 months after *Goble* was published.

**III. MR. STEWARD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY FAILED TO REVIEW THE DISCOVERY AND DISCUSS THE CASE WITH HIM.**

As noted above, the Sixth Amendment and Article I, Section 22 guarantee the effective assistance of counsel. In evaluating an attorney's performance, a court may look to the ABA standards for guidance. *Strickland*, at 688.

Reviewing the discovery with the accused should be the first step in any defense investigation, because defense counsel must find out if the client agrees or disagrees with the evidence that might be produced at trial. A reasonably competent attorney reviews police reports (and other discovery materials) with the client, and thoroughly discusses the merits of the case at some point during the representation. This is in keeping with the Rules of Professional Conduct, as well as the ABA's Standards for Criminal Justice. *See, e.g.*, RPC 1.1 ("Competence"), RPC 1.4 ("Communication"), ABA Criminal Justice Defense Standard 4-3.8 ("Duty to Keep Client Informed"), and ABA Criminal Justice Defense Standard 4-5.1 ("Advising the Accused").

Plea bargaining is an essential component of the criminal justice system. *State v. James*, 48 Wn. App. 353 at 362, 739 P.2d 1161 (1987), *citing Santobello v. New York*, 404 U.S. 257 at 260, 30 L. Ed. 2d 427, 92 S. Ct. 495 (1971). The Sixth Amendment to the federal constitution and

Article I, Section 22 of the Washington constitution guarantee the effective assistance of counsel during plea negotiations. *James, supra*, at 362. During plea bargaining, counsel must actually and substantially assist the defendant in deciding whether or not to plead guilty. *James*, at 362. This includes communicating actual offers, discussing tentative offers, and outlining the strengths and weaknesses of the case so that the accused can know what to expect and can make an informed judgment in deciding to reject an offer and go to trial. *James*, at 362. Thus, for example, an attorney's failure to adequately research the legal landscape (including pending petitions for *certiorari* to the U.S. Supreme Court) may require reinstatement of a plea offer. *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006).

Ineffective assistance of counsel during plea bargaining requires reversal whenever confidence in the outcome of the case is undermined. *James, supra*, at 363-364. This standard is met whenever there is a reasonable probability that the accused would have accepted a plea offer in the absence of defense counsel's error. *Hoffman v. Arave*, at 941-942; *James, supra*, at 363-364. Upon remand, the accused must be given the opportunity to accept the plea offer previously made. *Hoffman v. Arave*, at 942-943; *Nunes v. Mueller*, 350 F.3d 1045 at 1057 (9th Cir. 2003); *United States v. Blaylock*, 20 F.3d 1458 at 1469 (9th Cir. 1994).

In this case, Mr. Steward testified that his attorney never reviewed the discovery with him, and never discussed the merits of the case. RP (11/8/06) 177-178. At no point did defense counsel contradict this testimony. Neither the court nor the prosecutor made any inquiry about this testimony to ensure that Mr. Steward was adequately represented.

Prior to trial, Mr. Steward had been offered a plea bargain similar to that accepted by his codefendants, which would have resulted in a five-year sentence, with no enhancements. RP (12/15/06) 22, 27-28, 36-37. By proceeding to trial, Mr. Steward faced a standard range of 77-102 months on Count I, along with four mandatory firearm enhancements and two mandatory deadly weapon enhancements, for a total range of 305-330 months. CP 9. If defense counsel had reviewed the discovery and other police reports with Mr. Steward, there is a reasonable probability that he would have accepted the offer. A candid discussion of the strength of the state's case-- which included testimony from two apparently disinterested eyewitnesses (Doty and his girlfriend Cindy Smith)-- would likely have persuaded Mr. Steward to accept the offer, even in the face of his ongoing protestations of innocence. Accordingly, the conviction must be reversed and the case remanded to the trial court. Prior to a new trial, Mr. Steward must be given the opportunity to plead guilty to the state's plea offer.

*Hoffman v. Arave*, at 942-943; *Nunes v. Mueller*, at 1057; *United States v. Blaylock*, at 1469.

**IV. THE STATE FAILED TO ALLEGE AND THE INSTRUCTIONS FAILED TO REQUIRE PROOF THAT THE ASSAULT OCCURRED 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 crime any acts that constitute a first-degree assault.

RCW 9A.36.021(1). Accordingly, the absence of a first-degree assault is an essential element of the crime, which must be alleged in the

Information, included in the “to convict” instructions, and proved to a jury beyond a reasonable doubt. *Azpitarte, supra*.

In *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003), the Supreme Court reinterpreted *Azpitarte*, restricting its application in certain limited circumstances. Applying convoluted logic, the Court in *Ward* held that the language at issue in *Azpitarte* (“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.36.021 cannot be read in the same fashion. Nothing in the statute permits the state to charge a defendant with both a higher degree charge and a lower degree charge for the same conduct.<sup>5</sup> Thus *Ward's* limitation on *Azpitarte* does not affect RCW 9A.36, and has no bearing on Mr. Steward's case.

Furthermore, the statute in *Ward* was structured differently than RCW 9A.36.021. 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, supra*, at 812-813. By contrast, there is no single statute defining a base crime of assault and setting varying penalties based on the

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<sup>5</sup> The only exception is for alternative charges.

circumstances of the crime. *See* RCW 9A.36 generally. Instead, the phrase “under circumstances not amounting to assault in the first 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.

This structure is identical to the structure used in RCW 9A.36.011, which requires that Assault in the First Degree be committed with intent to inflict great bodily harm:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm...  
[commits one of the acts described in the statute.]  
RCW 9A.36.011

Just as the intent to inflict great bodily harm is an element of Assault in the First Degree, the absence of a first-degree assault is an element of Assault in the Second Degree. This court is not free to disregard the legislature’s choice of language and read this element out of the statute. *Sutherland, supra*.

A. The Information was deficient as to Count II because it omitted an essential element of the charge.

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 Count II alleges that Mr. Steward “did intentionally assault another person... with a deadly weapon...” CP 20. 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 as to Count II and dismissal is required, even in the absence of prejudice. *Kjorsvik, supra*.

B. The “to convict” instruction omitted an essential element of Assault in the Second Degree, as charged in Count II.

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).

The “to convict” instruction for Count II did not require the jury to find that the assault was committed “under circumstances not amounting to assault in the first degree.” as required by RCW 9A.36.021(1). Because the instruction omitted an essential element, the assault conviction must be reversed and the case remanded for a new trial with proper instructions.

*Jones, supra; Brown, supra.*

**V. 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-- the verb “assault.” *See, generally, RCW*

9A.36.<sup>6</sup> Instead, it has employed a circular definition (in effect, an “assault is an assault”), and 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*.

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

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<sup>6</sup> 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.

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*, 159 Wn.2d 778, \_\_\_ P.3d \_\_\_, (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. Steward 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-- hostile and insulting gestures, for example. 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 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.

If this court were to adopt a rule requiring offenses to be clearly defined with something more than a circular definition, the legislature could define assault however it chose. By adopting a noncircular definition, the legislature would avoid the separation of powers problem posed by the current statutory scheme.

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. Steward was convicted under an unconstitutional statute, his assault convictions must be reversed and the charges dismissed with prejudice.

### **CONCLUSION**

Respectfully submitted on May 16, 2007.

**BACKLUND AND MISTRY**

  
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CERTIFICATE OF MAILING

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

Edward A. Steward, DOC# 300307  
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1313 N. 13th St.  
Walla Walla, WA 99362

07 MAY 12 PM 1:59  
COUNTY OF CLALLAM  
STATE OF WASHINGTON  
BY *[Signature]*

and to:

Clallam County Prosecuting Attorney  
223 E. 4th Street, Suite 11  
Port Angeles WA 98362-0149

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

All postage prepaid, on May 16, 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 May 16, 2007.

*[Signature]*  
Jodi R. Backlund, No. 22917  
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