

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

NO. 35739-9-II

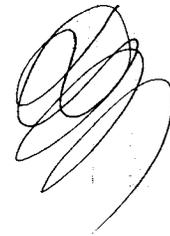
STATE OF WASHINGTON,

Respondent,

vs.

EDWARD STEWARD,

Appellant.



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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY  
CAUSE NO. 06-1-00395-0

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**BRIEF OF RESPONDENT**

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## I. STATEMENT OF THE CASE

On April 10<sup>th</sup> or 11<sup>th</sup>, 2006, Edward Steward went with Harold Herring and Travis Reader to recover money from Scott Schroeder, who was at the house of Mike Doty. Steward believed that Schroeder had ripped him off in a drug deal. RP (11/7/06) 18, 58-60, 100-101, 104-105, 165-167. When Steward called Reader and told him he had located Schroeder, Reader grabbed a heavy hammer and Herring grabbed a pistol, and they went to Doty's house to beat up Schroeder. RP (11/7/06) 167.

Accounts differed as to what happened when the three reached Doty's house. According to Doty, Herring, Reader and Schroeder, the three 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.

Steward, however, testified that Herring and Reader went into the house without him while he parked the car. RP (11/8/06) 149. According to him, when he entered the house a minute later, he 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. Steward told Reader to sit down, and then yelled at Schroeder himself, demanding his money and threatening to "kick his ass" if he did not pay. RP (11/8/06) 151-152.

The witnesses agreed that Schroeder then called his girlfriend and told her to give Steward money hidden in a closet at their house, and that

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

According to Doty, Schroeder suggested that Herring and Reader hold him until Steward got the money, and 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 Steward instructed them to keep Schroeder at Doty's. RP (11/7/06) 111, 177; RP (11/8/06) 28. According to Herring and Reader, Steward told them to watch Schroeder until he recovered the money, and later told them to take Schroeder to Kenny Stark's house. RP (11/7/2006) 111-113.

After Steward had been gone for some time, 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 Steward had instructed him over the phone to take Schroeder to another house. RP (11/7/06) 112-113. Schroeder testified that Herring made a phone call and received instructions (from Mr. Steward) to take Schroeder to another house. RP (11/8/06) 32. Schroeder also 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.

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.

Steward testified to 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. His attorney, Mr. Sund, requested discovery on September 15, 2006, from Ms. Kelly. RP (9/15/06) 4. The week after Mr. Sund received discovery, he stated, “I have received a written plea offer from the State, discussed it with my client yesterday and my client will reject it.” RP (9/22/06) 4.

In the 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'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. 26, 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 the fact 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.

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.

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. 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 pre-sentence 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 on sentence on Count II. RP (12/15/05) 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. This appeal follows.

## II. ARGUMENT

### A. **The Court's Instructions On Knowledge Were Not Defective, Did Not Create A Conclusive Presumption, And Did Not Relieve The State Of Its Burden Of Proof.**

The defense cites to the highly idiosyncratic case of *State v. Goble*, 131 Wn.App. 194 (2005), and argues that instruction #21 was defective because it could possibly have allowed the jury to become confused and convict the defendant based upon the commission of any intentional act such as driving his co-defendants to the victim's location whether he was aware of their intentions or not.

Neither the facts of the case, the instruction given, *Goble*, or the arguments of counsel support such a tortured application. The *Goble* decision was largely fact-driven, and in that case the jury expressed actual confusion over the knowledge instruction. There, the “knowledge” instruction allowed the jury to presume *Goble* knew the victim’s status as a law enforcement officer if it found he had intentionally assaulted the victim. The knowledge instruction in *Goble* was deemed defective because it operated directly upon one of the two elemental mental states and effectively conflated them into one. This court has distinguished *Goble* where there was no second mental element to conflate. See *State v. Gerdts*, \_\_\_ Wn.App. \_\_\_, 2007 Wn.App. (33751-7-11); and *State v. Boyd*, \_\_\_ Wn.App. \_\_\_ 2007 Wn.App. (34158-1-11). The Court should also distinguish this case.

The *Goble* dilemma simply does not exist here. In this case, the jury was instructed in part:

“To convict the Defendant of the crime of KIDNAPPING IN THE FIRST 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 a period of time between April 1, 2006 and April 20, 2006, the Defendant, or one with whom he was an accomplice, intentionally abducted another person;

(2) That the Defendant abducted that person with intent to hold the person for ransom or reward; and,

(3) That the acts occurred in the State of Washington.

And Instruction No. 24

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.

In *Goble*, the alleged defective definition of knowledge acted directly upon the Assault III elements instruction. Here, the defense has to show that the alleged defect irreparably compromised the accomplice instruction which when inserted into the elements instructions for Kidnapping I and Assault II, permitted the jury to convict the Defendant without any knowledge that his co-defendants ever intended to commit those crimes.

The defense cannot force all the links to that chain and simply makes the following argument:

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.<sup>1</sup>

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<sup>1</sup> Not entirely true since the jury could find that Mr. Steward solicited, commanded, encouraged, or requested his co-defendants to commit the crimes, or that with

Unfortunately, under Instruction No. 21, the jury was required to infer knowledge from the intentional act, even if Mr. Steward were (sic) actually ignorant of his friends' intentions.<sup>2</sup>

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. C.P. Thus, if the jury found that Mr. Steward did any intentional act that helped further the 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.<sup>3</sup> This relieved the prosecution of its burden to produce the requisite mental state."

Defense Brief , p. 11.

The argument becomes even sillier when the elements instruction for First Degree Kidnapping is examined. Element two of the instruction required the State to prove "that the Defendant abducted that person with the intent to hold the person for ransom or reward." Tellingly, defense counsel does not attempt to explain how the jury could have found that

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knowledge/intent to facilitate, he was standing by ready to assist. Indeed, the evidence was very clear that Steward, Reader and Herring were going out to collect his debt. RP 11/08/07, p. 147-148.

<sup>2</sup> This is a huge stretch, given the entire language of Instruction #14. In particular, the last sentence stated, "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. "Thus, the instruction clearly provided a minimum threshold by which the jury had to find at least that Steward knew of his co-defendants' intentions, and was ready to assist.

<sup>3</sup> This argument is strained and nonsensical. The only logical way in which Instruction No. 21 could operate on Instruction No. 14 would produce the following construct: The defense essentially argues that the Court's knowledge instruction (No. 21) was defective because it [correctly] instructed the jury that knowledge is established if a person acts intentionally. Thus, the accomplice liability instruction would correctly read "A person is an accomplice in the commission of the crime if, with knowledge or intent that it will promote or facilitate the crime,..."

the Defendant could have committed an intentional act that furthered the crime of kidnapping with the intent to hold the victim for ransom or reward without knowledge of the criminal intentions of his co-defendants.

Instead, defense counsel engages in a flight of fancy that the jury could have believed Steward attempted to commit a robbery that furthered the assault and kidnapping, although he was ignorant of them. One could conceivably construct such an argument had the jury been instructed on robbery, but there were not. The only crimes on which the jury was instructed were the kidnapping, the assault, and their lessers. Thus, there is no basis to draw the conclusions asserted by defense counsel.

Defense counsel also ignores closing argument by both attorneys. Both prosecutor and Steward's attorney told the jury that if they believed the defendant, they should acquit. RP (11/9/06). 31, 45. No one argued that if Steward committed any intentional act without knowledge of the plan to kidnap/assault, that the jury should convict. RP 11/9/96. And unlike *Goble*, the jury evidenced no confusion over the instruction. Thus, there is simply no evidence that the knowledge instruction, even if defective which the State does not concede, impacted the deliberations in any way. Beyond a reasonable doubt, and without conceding error, if there was any, it was harmless.

Moreover, not every omission or misstatement relieves the State of its burden. *State v. Thomas*, 150 Wn.2d 821. A jury instruction, that

is claimed to be erroneous, which omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) "[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. The *Neder* test for determining harmless error (where the claimed error is of constitutional magnitude) is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 15. When applied to omissions or misstatements of elements in jury instructions, "the error is harmless if that element is supported by uncontroverted evidence." *State v. Brown*, 147 Wn.2d 300, 341. Thus, in *Brown*, the error in the accomplice liability instruction was harmless beyond a reasonable doubt where there was sufficient evidence in the record indicating the particular Defendant was the principal actor in certain charges. *Id.* at 341.

In *Brown*, Baker was charged with four crimes. *Id.* at 343. Baker unlawfully entered the motel room with Phipps with the intent to commit a crime. *Id.* Baker was as active as a co-defendant in ordering Rodgers out of the room and into the vehicle, which Baker drove. *Id.* Under those facts, any error in the accomplice instruction as to robbery, kidnapping, and burglary was harmless beyond a reasonable doubt. *Id.* In addition to being an accomplice, Baker was also a principal in the perpetration of the crimes. *Id.* Because there was sufficient evidence to show that

Baker was a principal and an accomplice any misstatement or omission was a harmless error. *Id.*

Similar to *Brown*, the Defendant could be viewed as either the principal or an accomplice in the perpetration of the kidnapping and assault charges. The evidence is sufficient to show the Defendant acted as a principal. The defense argues that Mr. Steward's theory of the case was that Herring and Reader had their own reasons for disliking Schroeder, and acted on their own. However, the motivations behind the crimes do not matter. It is only relevant that three men went to see Schroeder with the intent to collect money, and restrained him with deadly force or the threat of deadly force in furtherance of this act.

**B. Steward's Claim That He Was Denied Effective Assistance Of Counsel Because His Attorney Failed To Review Discovery Or Discuss The Case With Him Is Incredible, Not Supported By Caselaw, And Should Not Be Resolved On An Incomplete Record.**

An appellate court will presume the Defendant was properly represented. *Strickland v. Washington*, 466 U.S. 68, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996); *State v. Lord*, 117 Wn.2d 829, 883. A criminal Defendant must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the Defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel's

deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The Defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

An appellant claiming ineffective assistance must show that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness considering all the circumstances; and 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, 130, 101 P.3d 80 (2004); citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 30 L. Ed. 2d 674 (1984).

The Defendant bases his claim for ineffective assistance of counsel on two grounds. First, the Defendant contends that defense counsel should have objected and taken exception to Instruction No. 21 (the knowledge is intentional instruction). Second, the Defendant believes that his attorney's failure to review the discovery and discuss the case with him was ineffective assistance. The Court should find that counsel was sufficient and deny the Defendant's argument.

First, counsel was not ineffective because he was correct in not objecting to Instruction No. 21. In the discussion above on the mandatory presumption issue the State showed that there was no error and that even if there were, it was harmless error.

Second, counsel was not ineffective in discovery review. There is no rule or procedure that requires the defense counsel to go over all of the discovery with his client. The State points to the record that Mr. Sund requested discovery on September 15, 2006 from Ms. Kelly. RP (9/15/06) 4. The following week after Mr. Sund received discovery he stated, "I have received a written plea offer from the State, discussed it with my client yesterday and my client will reject it." RP (9/22/06) 4. The Defendant's assertion that the outcome of the case would have been different is pure speculation. When the Defendant argues, "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." The record shows that Mr. Sund did discuss the discovery, and this argument is pure speculation. The Defendant's argument for ineffective assistance of counsel on both grounds should be denied.

While appellate counsel correctly points out that Steward claimed his attorney, Mr. Sund, failed to perform the basic functions of a defense attorney. It is equally true that there is precious little else in the record with respect to that claim. The State respectfully suggests that the trial court and State did not inquire into the claim because it was simply one more incredible claim in a series of many. The statement was given no

weight given the trial court's knowledge of Mr. Sund and the remaining record. Moreover, the Defendant never made this claim again, so the trial court may well have believed the Defendant was not seriously advancing this issue.

The outburst during cross-examination was the sole instance where the Defendant complained about his counsel; indeed at sentencing, he thanked Mr. Sund for believing in him and being his only friend. RP (12/15/06) 31-32. It is patently unbelievable that Defendant would feel this way if counsel had failed to discuss the evidence with him. At status hearing, defense counsel stated he had discussed the plea offer with Steward (RP 9/22/06, p. 4); and, at sentencing, made statements implying that there had been more than one such discussion. RP (12/15/06) 28. Steward even acknowledged that Mr. Sund's wife went out and bought clothes for him (Steward) so that he would look presentable at trial. RP (12/15/06) 32.

Because there is no explicit requirement that a defendant be provided police reports, and indeed a bar on doing so absent permission of the court and/or prosecutor, CrR 4.7(h)(3), the apparent satisfaction at the trial of the Defendant with Mr. Sund, and the indications in the record by Mr. Sund that he had discussed the plea offer with the Defendant, this court should not reverse Steward's conviction based upon an implausible outburst during cross-examination. If the court does have concerns, it should remand to the trial court for a reference hearing so that a complete record could be fully developed. At such a hearing,

Mr. Sund would have the ability to respond, and the State would have the ability to present evidence from the jail as to the number and duration of contacts between Mr. Sund and the Defendant.

**C. The Information And Instructions For Assault II Were Sufficient Containing All Essential Elements Of The Crime.**

Steward argues that the charging documents and instructions were defective as they did not include statutory language that the assault did not amount to assault in the first degree. For this proposition, he relies upon *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000), and attempts to distinguish *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003). This attempt to distinguish *Ward* was rejected by this court in *State v. Blatt*, 2007 WACA 34796-2-II (07/03/07), where appellate counsel argued that the information and instructions for assault in the third degree were defective because they did not include statutory language excluding first or second degree assault. See also *State v. Teeser*, 2007 WACA 33961-7-II (05/22/07) (rejecting argument that absence of premeditation is an essential element of second degree murder) and *State v. Tinker*, 155 Wn.2d 219, 118 P.3d 885 (2005) (rejecting argument that value of property taken is an essential element of theft in the third degree).

This argument is flawed also flawed because the Defendant relies upon *Kjorsvik* to support his position but fails to note that both prongs of the *Kjorsvik* test are not satisfied. Quoting *Kjorsvik*,

“A close reading of the federal cases shows that the federal standard is, in practice, often applied as a 2-prong test: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the Defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Id* at 106.

All necessary facts for the Defendant to understand the crime were included in the information, and the Defendant does not make a claim of any prejudice by the claimed omission. *Kjorsvik* continues:

“Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.

Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from language within the charging document. Many cases utilize the *Hagner* standard and hold that if the necessary facts appear in any form, or by a fair construction can be found within the terms of the charge, then the charging document will be upheld on appeal. Thus, when an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.” *Id* at 104.

In *Kjorsvik*, the essential elements rule requires that an information allege facts supporting all the elements and to identify the charged crime. *117 Wn.2d 93, 99 (1991)*. When a charging document is challenged for the first time on review, however, the document is liberally construed in favor of validity. *Id.* at 105. In *State v. Unosawa*,

29 *Wn.2d* 578, 589 (1948) the court held that under the common understanding rule an information is sufficient if a person of common understanding can, from the information, know the full extent of the charge against him. *State v. Davis*, 60 *Wn. App.* 813, 817 (1991) properly summarizes all of these rules stating that an information sufficiently charges a crime if it allows people to understand with reasonable certainty the nature of the accusation so they may prepare a proper defense.

The Defendant, by virtue of the arguments made in this case displayed that he understood the charges against him. Since the defense only now objects to the information, the charging document should be liberally construed in favor of validity for the State. *Kjorsvik*. If he did not understand the charges then he should have made the motion at the start of the trial. Since the Defendant can not show prejudice and an apparently missing element may be fairly implied from the language within the charging document the information was sufficient.

**D. The Assault II Statute Does Not Violate Separation Of Powers And Is Not An Unconstitutional Delegation Of Authority By The Legislature To The Judiciary.**

Stewart argues that because the second degree assault statute does not define the term assault, and the courts have supplied the common law definition, that this judicial definition of an essential element violates separation of powers doctrine. This exact argument was recently rejected by this court in *State v. Chavez*, 2006 WACA 33240-0-

II (08/22/06), and a similar argument was rejected in *State v. David*, 2006 WACA 33403-8-II (08/08/06). This court has adhered to these rulings, *Blatt, supra*, and should continue to do so.

### III. Conclusion

Based upon the forgoing argument and authorities, the State respectfully requests that the Court affirm the Defendant's convictions. Should the Court have concerns about the claim that trial counsel failed to discuss the case or discovery with his client, the Court should remand for a reference hearing.

DATED this 11<sup>th</sup> day of September, 2007.

  
DEBORAH S. KELLY WBA #8582  
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Attorney for Respondent

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

STATE OF WASHINGTON,  
Respondent,  
vs.  
EDWARD STEWARD,  
Appellant.

NO. 35739-9-II

AFFIDAVIT OF SERVICE BY MAIL

○

STATE OF WASHINGTON )  
: ss.  
County of Clallam )



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

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 11th day of September, 2007, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

Mr. David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Jodi Backlund/Manek Mistry  
Backlund & Mistry  
203 Fourth Ave. East, Suite 404  
Olympia, WA 98501

Edward Steward, DOC #300307  
Washington State Penitentiary  
1313 N. 13th  
Walla Walla, WA 99362

Elaine I. Sundt  
Elaine I. Sundt

SUBSCRIBED AND SWORN TO before me this 11th day of August, 2007.

Linda J. Mayberry  
(PRINTED NAME:) Linda J. Mayberry  
NOTARY PUBLIC in and for the State of Washington  
Residing at Port Angeles, Washington  
My commission expires: 10/30/2007