

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

NO. 36326-7-II

STATE OF WASHINGTON,

Respondent,

vs.

LORA HASELMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 05-1-00013-8

BRIEF OF RESPONDENT

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I. STATEMENT OF THE CASE

The State agrees with Appellant's Statement of Facts and Prior Proceedings and supplements them as follows. At the scene, Appellant was not permitted to drive her boyfriend's vehicle away because she was intoxicated. RP (4/13/05) 43, 45-46, 48; RP (4/3/07) 33-34. Appellant was not only uncooperative and argumentative but also hostile, swearing and cursing. RP (4/13/05) 47, 49, 58, 99; RP (4/3/07) 34. She threatened to "rip" one officer's "head off." RP (4/13/05) 49, RP (4/3/07) 36.

The two officers who primarily dealt with Ms. Haselman had somewhat differing perceptions and testimony about the events directly prior to her being taken to the ground and handcuffed. The trooper believed that when Appellant was directed to move away from the vehicle, that she instead reached quickly for her purse, causing him to fear she might be reaching for a weapon. RPP (4/13/05) 7-58, RP (4/3/07) 40-41. The deputy who was actually directing her to the front of the vehicle perceived her as attempting to strike him. RP (4/13/05) 101-102; RP (4/3/07) 98.

Appellant moved an arm quickly towards one of the officers who reacted to her apparent attempt to strike him in the face.

II. ARGUMENT

- A. **The Court's Instructions On Knowledge Did Not Relieve The State Of Its Burden Of Proof, Did Not Affect The Verdicts, And Were Harmless Beyond A Reasonable Doubt.**

The defense cites to *State v. Goble*, 131 Wn.App. 194 (2005), and argues that the knowledge instruction given at both trials was defective because it could have allowed the jury to become confused and convict the defendant based upon the commission of any intentional act such as spitting on Deputy Keegan whether she was aware he was a law enforcement officer performing official duties or not. While the State believes the *Goble* decision was primarily decided because the jury expressed actual confusion over the knowledge instruction and should not be applied in these differing circumstances, it must acknowledge that it is governing. 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.

The Court should distinguish this case. Unlike *Goble*, the juries here evidenced no confusion over the knowledge instruction. Thus, there is simply no evidence that the knowledge instruction impacted the deliberations in any way. Beyond a reasonable doubt, if there was any, it was harmless.

Moreover, not every omission or misstatement in a jury instruction 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.

Here, in neither trial was it an issue whether Appellant knew that she was dealing with law enforcement officers engaged in their official duties but rather whether she, in fact, committed acts which obstructed or assaulted, and if so, whether she intended those actions. At both trials, Appellant took the stand and testified that she was aware that the persons she was dealing with were law enforcement officers and that she was aware that they were present at the scene pursuant to the investigation of her boyfriend's drinking and driving. VRP 4/15/2005 6-8. VRP 4/4/2007 78-81. Indeed at the second trial for assault, she responded affirmatively to the question "You knew they were law enforcement, that they were acting in their official capacity; correct?". There was absolutely no evidence in either trial that Appellant did not know the officers she encountered that day were not law enforcement or that she did not know

they were acting in their official capacities. Clearly, the knowledge instruction had no bearing upon her conviction in either trial and any error was harmless beyond a reasonable doubt.

B. The Judicial Definition of Assault Does Not Violate Separation of Powers Because the Legislature Has Historically Left it to the Courts to Define Assault With Common Law Principles.

The division of our state government into three separate but co-equal branches has been “presumed throughout our state’s history to give rise to a vital separation of powers doctrine. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). Our state constitution contains separate provisions establishing the Legislative (Article II), the Executive (Article III), and the Judiciary (Article IV) and, as such, provides for separation of functions. .” *Spokane County v. State of Washington, et al*, 136 Wn.2d 663, 667, 966 P.2d 314 (1998). The doctrine acknowledges three separate branches of government, each of which has individual integrity so as to guarantee the totality of the governing power is not concentrated in singular hands. *Carrick* at 134-35.

While the primary purposes behind the separation of powers doctrine is to ensure that the fundamental functions of each branch remain inviolate, the doctrine does not require the three branches to be “hermetically sealed off from one another.” *Spokane County* at 667, (quoting *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

In cases where a separation of powers violation is alleged, the question to be asked is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. Spokane County at 668. However the separation of powers doctrine allows for some interplay between the branches of government. Spokane County at 672.

In adjudging the potential damage to one branch of government by the alleged incursion of another, it is helpful to examine both the history of the practice challenged as well as that branch's tolerance of analogous practices....Thus, a long history of cooperation between the branches in any given instance tends to militate against finding any separation of powers violation. Carrick, at 136.

The Legislature historically has left it up to the courts to define assault in accordance with common law principles. See, e.g. *State v. Carlson*, 65 Wn.App. 153, 828 P.2d 30 (1992) (noting that the courts must rely upon common law definitions because the criminal code does not define assault). *State v. Brown*, 94 Wn.App. 327, 972 P.2d 112 (1999). Indeed, it is not uncommon for the Legislature to define crimes generally and leave the specifics to the judiciary. *State v. Wadsworth*, 139 Wn.2d 724, 736, 991 P.2d 80 (2000).

In fact, the legislature has instructed that the common law must supplement all penal statutes. RCW 9A.04.060, both ratifies the judicial practice of supplying common law definitions to statutes and affirma-

tively defines the elements of criminal statutes as containing common law definitions. *State v. Chavez*, 134 Wn. App. 657, 667 (2006), review granted, _____ Wn.2d _____, (2007), citing *State v. Smith*, 72 Wn. App. 237, 241, 864 P.2d 406 (1993). Thus, there is no delegation but rather an instruction to the judiciary to define assault according to the common law. Indeed,

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, _____ P.3d _____ (2006), citing *State v. Carlson* 65 Wn. App. 153, 158, 828 P.2d 30, review denied, 119 Wn.2d 1022 (1992).

Moreover, the legislature has acquiesced to this practice for nearly one hundred years as well as ratified it with the enactment of RCW 9A.04.060. While Appellant argues that the judiciary has only recently expanded the definition of assault to include battery, this argument, too, is not well founded. Even under the Code as it existed prior to 1909, our Courts interpreted a completed assault, i.e., a battery, as properly charged as an assault. *State v. Bohn*, 19 Wash. 36, 37 52 P. 325 (S. Ct. 1898).

Haselman argues that the separation of powers has been violated but that is incorrect. Because interplay is allowed between the agencies there is no violation when the Legislative branch has not defined assault

but has instructed the judiciary to define assault according to common law principles.

A party challenging the constitutionality of a statute has the burden of proving it is unconstitutional beyond a reasonable doubt. *Chavez*, at 657, citing, *State ex rel. Peninsula Neighborhood Association v. Department of Transportation*, 142 Wn.2d 328, 335, 12 P.3d 124 (2000). Given the established practice of the Legislature to leave some definitions of elements of the crime to the judiciary through the use of common law, it is apparent that the Appellant has failed to meet her burden.

C. The Information And Instructions For Assault III Were Sufficient and Contained All Essential Elements Of The Crime..

Haselman 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 or second degrees. 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). A similar 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 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.

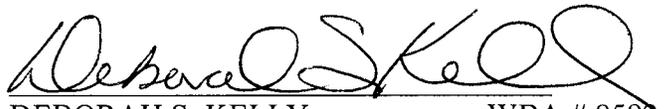
In *Kjorsvik*, the essential elements rule requires that an information allege facts supporting all the elements and to identify the charged crime.

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 she understood the charges against her. 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 she did not understand the charges then she 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.

III. CONCLUSION

Based upon the argument and authorities above, Appellant's conviction should be affirmed.


DEBORAH S. KELLY WBA # 8582
Prosecuting Attorney

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

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STATE OF WASHINGTON,
Respondent,

NO.

vs.

AFFIDAVIT OF SERVICE BY MAIL

LORA HASELMAN,
Appellant.

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STATE OF WASHINGTON)
: ss.
County of Clallam)

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

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 2nd day of January, 2008, 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:

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SUBSCRIBED AND SWORN TO before me this 2nd day of January, 2008.

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(PRINTED NAME:) Lin Mayberry
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 10/30/2011