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DIVISION II

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STATE OF WASHINGTON
BY
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No. 37770-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joshua Hayward,

Appellant.

Clallam County Superior Court Cause No. 07-1-00175-1

The Honorable Judge George L. Wood

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

**I. The court’s instructions relieved the state of its burden
and violated Mr. Hayward’s Fourteenth Amendment
right to due process. 1**

**II. Dr. Wallace’s opinion that Baar suffered a “substantial
loss or impairment of the function of a bodily part”
violated Mr. Swain’s constitutional right to a jury trial
under the Sixth and Fourteenth Amendments and
under Wash. Const. Article I, Sections 21 and 22..... 3**

CONCLUSION 3

TABLE OF AUTHORITIES

FEDERAL CASES

Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288
(1952)..... 1

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)
..... 1

WASHINGTON CASES

State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996) 1, 2

State v. Harris, 122 Wn.App. 547, 90 P.3d 1133 (2004)..... 1, 2

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997)..... 1

State v. Savage, 94 Wn.2d 569, 618 P.2d 82 (1980)..... 1

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 1

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV 1, 3

WASHINGTON STATUTES

RCW 9A.08.010..... 2

ARGUMENT

I. THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN AND VIOLATED MR. HAYWARD’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Due process is violated whenever an erroneous jury instruction relieves the state of its burden to prove an element. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). Instructions must be “manifestly clear,” since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Conclusive presumptions violate due process, conflict with the presumption of innocence, and invade the province of the jury. *State v. Savage*, 94 Wn.2d 569, 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). An instruction creates a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996).

Instruction No. 10 created a mandatory presumption and relieved the state of its burden to prove recklessness for the Assault Two charge. A reasonable juror might have interpreted the instruction to require the jury

to infer that Mr. Hayward was reckless if he intentionally assaulted Baar. Instruction No. 10, CP 33. Because a reasonable juror might have interpreted the instruction this way, the conviction must be reversed. *Deal, supra*. This is so even if, as Respondent asserts, “[t]here is no reason to think that the jury was confused...” Brief of Respondent, p. 5. An expression of “actual confusion” is not a prerequisite to reversal. Brief of Respondent, p. 7.

Furthermore, contrary to Respondent’s assertion, the instruction did not reflect “the exact language of the statute.” Brief of Respondent, p. 5. *Compare* RCW 9A.08.010(2) (“When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly”) *with* Instruction No. 10, CP 33 (“Recklessness also is established if a person acts intentionally.”) Moreover, jury instructions must be “manifestly clear,” even if the statutes upon which they are based are not. *Harris, supra*.

Finally, the error was not harmless beyond a reasonable doubt. The evidence established that Mr. Hayward hit Baar once in the jaw. This is certainly not overwhelming evidence that Mr. Hayward *recklessly* inflicted substantial bodily injury. Respondent’s discussion of harmless error misstates the elements: Respondent argues that Mr. Hayward “intentionally assaulted Mr. Baar and in doing so, inflicted substantial

bodily harm...” Brief of Respondent, p. 9. Respondent is unable to point to anything, other than the intentional assault, that established recklessness in the infliction of substantial bodily harm. Accordingly, the conviction must be reversed and the case remanded for a new trial.

II. DR. WALLACE’S OPINION THAT BAAR SUFFERED A “SUBSTANTIAL LOSS OR IMPAIRMENT OF THE FUNCTION OF A BODILY PART” VIOLATED MR. SWAIN’S CONSTITUTIONAL RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND UNDER WASH. CONST. ARTICLE I, SECTIONS 21 AND 22.

Mr. Hayward stands on the argument set forth in the Opening Brief.

CONCLUSION

Mr. Hayward’s conviction must be reversed, and the case remanded to the superior court for a new trial.

Respectfully submitted on February 20, 2009.

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CERTIFICATE OF MAILING

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

Joshua Hayward
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and to:

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

All postage prepaid, on February 20, 2009.

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 February 20, 2009.



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