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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove assault in the second degree: specifically that the victim had apprehension or fear of harm.

2. There was insufficient evidence to prove assault in the second degree: specifically that the defendant while armed with a deadly weapon intended to cause apprehension or fear of harm..

3. There was insufficient evidence to prove assault in the second degree: specifically that the defendant attempted to strike Ms. Gepford with a deadly weapon.

4. The jury instructions relieved the state of proving the essential element of intent to cause fear in the assault in the second degree charge.

5. The jury instructions relieved the state of proving the essential element of the victim's reasonable fear of harm in the assault in the second degree charge.

6. The jury instructions relieved the state of proving the essential element of intent to strike with a deadly weapon in the assault in the second degree charge.

7. The jury instructions relieved the state of proving the essential element of being armed with a deadly weapon in the assault in the second degree charge.

Issues Presented on Appeal

1. Did the state prove beyond a reasonable doubt the element of fear and apprehension of harm by the victim in the assault in the second degree charge?
2. Did the state prove beyond a reasonable doubt the element of intent to create in the victim fear and apprehension of harm in the assault in the second degree charge?
3. Did the state prove beyond a reasonable doubt the element of being armed while committing assault in the second degree?
4. Did the state prove beyond a reasonable doubt the element of intent to create bodily injury in the assault in the second degree charge?
5. Did the jury instructions relieve the state of proving all essential elements of assault in the second degree?
6. Was appellant denied his right to a fair trial by the state failing to delineate the essential elements of the crime of assault in the second degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Efrain Medina was charged and convicted of assault in the second degree with a deadly weapon enhancement and with assault in the fourth degree. CP 1-2. Mr. Medina was convicted as charged. CP 40-43. Mr. Medina stipulated to his prior record. CP 44-46. Following a jury trial, Mr. Medina was sentenced within the standard range. CP 47-60. This timely appeal follows. CP 61.

2. SUBSTANTIVE FACTS

On September 2, 2009, Cassie Gepford went to Efrain Medina's apartment to retrieve a dog Mr. Medina had purchased for them while they were romantically involved. RP 85, 89. After the relationship ended Mr. Medina was upset that Ms. Gepford was romantically involved with Ms. Poland. RP 88. Ms. Gepford has epilepsy and has daily seizures that impair her memory and leave her incoherent. RP 99. After attempting to get the dog back from Mr. Medina and failing, Ms. Gepford and Ms. Poland went to a friend Ms. Stephens' house to ask for a ride. RP 103, 177, 179, 289-91. Ms. Poland testified that she never liked Mr. Medina. RP 210.

On September 2, 2009 Mr. Medina was very drunk, a 10 out of 10 according to Ms. Poland. RP 86, 98, 215. Ms. Gepford was in a neck brace on

September 2, 2009 due to Poland fracturing Ms. Gepford's neck the night before during a fight. RP 87, 212. Ms. Stephens drove Ms. Poland and Ms. Gepford back to Mr. Medina's apartment to try to retrieve the dog. RP 103. Ms. Stephens and Ms. Gepford went upstairs to Mr. Medina's front door while Ms. Poland stayed the car, hiding in the back seat so Mr. Medina could not see her. RP 103, 186. Ms. Poland could not see inside the apartment and Ms. Stephens never entered the apartment. RP 103, 188.

Neither Ms. Poland nor Ms. Stephens entered Mr. Medina's apartment and neither saw Ms. Gepford inside the apartment. RP 103, 105, 113. 188, 225. Ms. Gepford was alone inside Mr. Medina's apartment . Ms. Gepford was afraid for her dog because the dog was soaked in beer Mr. Medina pushed Ms. Gepford against the couch but she was not afraid for herself, only for her dog. RP 90, 98. Mr. Medina had a knife that he threw on the couch but that he never tried to stab Ms. Gepford and she was not afraid for herself. RP 97. Ms. Gepford stated that Mr. Medina did not threaten her with the knife, did not try to stab her and did not threaten her verbally. RP 103-04. . Ms. Stephens did not hear any threats or yelling from Mr. Median. RP 317.

Ms. Gepford wanted to get out of the apartment because she felt a seizure coming on. Ms. Gepford unlocked the apartment and left while

screaming at Mr. Medina. RP 112-13. Mr. Median grabbed at Ms. Gepford's shirt and got a hold of her hair. RP 112. Ms. Poland came up and tackled Mr. Medina on the porch. RP 112. When Ms. Poland tackled Mr. Medina, Ms. Gepford got up and went down the stairs where she collapsed on to the ground and had a seizure. RP 199-203.

Ms. Stephens saw Ms. Poland on the ground having multiple seizures just after the police arrived. Ms. Gepford was not able to speak with the police very much because of the onset of the seizures. RP 308-09. Ms. Poland saw Ms. Gepford collapse on the ground and have a seizure as the police arrived. RP 199, 203. Ms. Gepford becomes incoherent when she has a seizure. RP 99.

Scott Mock a Univeristy Place police officer testified that he tried to talk to Ms. Gepford while she was on he ground but her breathing was troubled and she was gasping for air. RP 258. According to Mock, Ms. Gepford stated that she was not stabbed but that Mr. Medina tried to stab her. RP 259. Ms. Gepford stated that Mr. Medina never tried to stab her. RP 97. No one saw Mr. Medina threaten Ms. Gepford with a knife.

C. ARGUMENT

1. THE JURY INSTRUCTIONS WHEN READ TOGETHER RELIEVED THE STATE OF PROVING ESSENTIAL ELEMENTS OF

THE CRIME OF ASSAULT IN THE
SECOND DEGREE AS CHARGED IN THE
INSTANT CASE.

Mr. Medina was charged with assault in the second degree by “intentionally assaulting Cassie M. Gepford with a deadly weapon” contrary to RCW 9A.36.021(1)(c). CP 1. In Medina’s case, the trial court committed reversible error because it failed to instruct the jury that the state had the burden of proving beyond a reasonable doubt that Mr. Media: (1) intended to create in his Ms. Gepford’s mind apprehension of bodily harm; (2) that Ms. Gepford had a reasonable apprehension of harm; (3) that Mr. Medina was armed while committing assault in the second degree; or (4) that Mr. Medina attempted to inflict harm to Ms. Gepford.

Before the jury can be instructed on and allowed to consider the various ways of committing a crime, there must be sufficient evidence to support the instructions. State v. Linehan, 147 Wn.2d 638, 653, 56 P.3d 542 (2002); citing, State v. Golladay, 78 Wash.2d 121, 137, 470 P.2d 191 (1970).

Whether a jury instruction correctly states the applicable law is a question of law that we review de novo. State v. Pirtle, 127 Wash.2d 628, 656, 904 P.2d 245 (1995). The instructions at issue misled the jury as to the law. State v. Acosta, 101 Wash.2d 612, 619-20, 683 P.2d 1069 (1984). A

constitutional error is not harmless when the Court is not convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error. State v. Easter, 130 Wash.2d 228, 242, 922 P.2d 1285 (1996).

A person commits the crime of assault by either (1) attempt, with unlawful force, to inflict harmful or injurious contact (attempted battery); (2) unlawful touching with criminal intent (actual battery); or (3) intentionally putting another in apprehension of harm whether or not one intends to inflict or is capable of inflicting that harm (common law assault). State v. Wilson, 125 Wash.2d 212, 217-18, 883 P.2d 320 (1994), citing, State v. Bland, 71 Wn. App. 345, 353, 860 P.2d 1046 (2993), overruled in part by State v. Smith, 159 Wn.2d 778, 786-87, 155 P.3d 873 (2007).

Under the third definition, the state had to prove beyond a reasonable doubt that Mr. Medina acted with intent to create in Ms. Gepford's mind a reasonable apprehension of harm and that Ms. Gepford experienced such fear. State v. Byrd, 125 Wn.2d 707, 712-13, 887 P.2d 396 (1995). The Supreme Court in Byrd held that "specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree." Byrd, 125 Wn2d at 713.

Similarly, under the first definition, intent to inflict injury is an essential element of the crime of assault in the second degree. *Id.* The state

bears the burden of proving every essential element of a crime beyond a reasonable doubt, and it is reversible error to instruct the jury in a manner that relieves the state of this burden. Byrd, 125 Wn.2d at 713-14; State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988).

Errors of constitutional magnitude may be raised for the first time on appeal under RAP 2.5(a)(3) when the error is a “manifest error affecting a constitutional right.” Id. An instruction which prejudicially relieves the state of its burden of proof upon a significant and disputed issue impacts the defendant's right to a fair trial. Thus, the error in the assault instructions may be raised for the first time on appeal. State v. Byrd, 72 Wn.App. 774, 782, 868 P.2d 158 (1994), aff'd, 125 Wash.2d 707 (1995).

In Medina's case, one of the disputed instructions, the to-convict instruction number #11 merely required the state to prove that “the defendant assaulted Cassie Gepford with a deadly weapon”. CP 17-39. Jury instruction #7 described assault as commissionable in three separate ways:

An assault is an intentional touching or striking or cutting of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting is offensive, if the touching or striking or cutting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present

ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, done with intent to create in another a reasonable apprehension and fear if 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.

(Emphasis added) CP 23. (Jury instruction # 7).

While the Court in State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007), held that for purposes of jury unanimity, jury instruction #7 which defines assault did not provide alternate means of committing assault, the Court in Smith did not hold that the definitions of assault are not essential elements of the crime of assault, and the Court in Smith did not overrule Byrd. The Court in Smith limited its holding to cases with facts similar to those presented in Smith, and to the issue of whether the different definitions of assault constituted alternate means of committing that crime. Smith, 159 Wn.2d at 791-92.

The Court in Smith “supported” its conclusion that the definitions of assault to not create alternate means by reasoning that in Smith’s case the only evidence of assault presented at trial was limited to only one means of committing assault with a deadly weapon and the jury unanimously rejected the assault in the first degree charge in favor of the assault in the second

degree charge. Smith, 159 Wn.2d 788, 791. Thus the Court was not concerned with a lack of jury unanimity. Id.

[A]ny underlying concerns that we may have had that Smith's jury avoided specific factual discussions about what unlawful conduct Smith may or may not have engaged in or concern that the jury did not fairly consider the elements of second degree assault by means of a deadly weapon, have been put to rest by the separate "to convict" and assault definition jury instructions, by the unanimous guilty verdict on the second degree assault charges alone, and by the unanimous return on the deadly weapon special verdict. **Under the factual circumstances of this case**, the record does not support Smith's assertion that she was denied her Washington Constitution article I, section 21 right to jury unanimity on the question of her guilt or innocence. This is because, under the trial court's instructions and the verdict forms submitted for its deliberation, Smith's jury not only had to unanimously agree as to Smith's guilt but it also had to unanimously agree to the one means of committing second degree assault presented for its consideration-assault by means of a deadly weapon. Consequently, we determine that the jury could not have been misled as to or confused about the unanimity requirement, and the guilty verdicts were clearly premised on the jury finding that Smith committed one means of committing the offense of criminal assault in the second degree. Therefore, we uphold each of Smith's three assault convictions.

(Emphasis added) Smith, 154 Wn.2d at 791-92. The Court did not however rule that where there is evidence of different ways of committing an assault, it is permissible to relieve the state of its burden of proving each essential element of the crime charged. Smith, 159 Wn.2d 788, 791-92.

In Medina's case unlike in Smith, the jury here did not have the

opportunity to unanimously reject an assault in the first degree charge because such a charge was not presented. Thus, this Court unlike in Smith, cannot rely on the knowledge that the jury was acting together in any manner. Additionally, in Medina's case the evidence at trial was not limited to a single act. Rather the evidence indicated that: (1) Mr. Medina picked up a knife and threw it on the couch; (2) that he grabbed Ms. Gepford by the hair; (3) that he pushed Ms. Gepford against the couch; and (4) that he engaged in a physical struggle with Ms. Poland. RP 90, 97, 103, 104, 108-09, 191, 198. Given these facts, unlike in Smith, the jury here was likely confused about what conduct the state was alleging was criminal.

The trial record and the prosecutor's argument indicated that the state presented different factual scenarios as alternatives for proving second degree assault. RP 90, 97, 103, 104, 108-09, 191, 198; 353-54, 357-9, 360, 362, 365. Additionally, the prosecutor told the jury that there were only two elements of assault: "assault" and "deadly weapon". RP 357. This was incorrect and contravenes the Supreme Court in Byrd, 125 Wn.2d at 713.

Even though Mr. Medina's case is factually distinguishable from the Smith case, it is important to note that the majority's analysis in Smith is legally flawed. Justice Bridge in her dissent correctly notes that the common law definitions of assault

are fundamental definitions that identify the very act of assault and do so in alternative ways. Like the definition of theft we considered in Linehan,¹ the common law assault definitions create alternative means of committing the crime. Regardless of the degree of assault charged, the defendant's actions must necessarily fall into one or more of these definitions.

(Footnote added) Smith, 154 Wn.2d at 795 (Justice Bridge dissenting).²

In Medina's case, regardless of whether the definitions of assault create alternate means, the definitions do describe essential elements. Byrd, 125 Wn.2d at 713.

It is well settled that a defective to-convict jury instruction may be cured by reading the jury instructions together to find the missing elements of the crime charged. "Jury instructions are to be read as a whole and each instruction is read in the context of all others given." State v. Brown, 132 Wash.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

In Medina's case, the jury instructions when read together provided

¹ 147 Wn.2d 638, 156 P.3d 542 (2002).

² See *State v. Nicholson*, 119 Wash.App. 855, 860, 84 P.3d 877 (2003); *State v. Putnam*, noted at 122 Wash.App. 1031, 2004 WL 1576505 at *2-3, 2004 Wash.App. LEXIS 1471, at *5-9; *City of Spokane v. White*, 102 Wash.App. 955, 964-66, 10 P.3d 1095 (2000); *State v. Rivas*, 97 Wash.App. 349, 352, 984 P.2d 432 (1999); *State v. Trujillo*, noted at 87 Wash.App. 1074, 1997 WL 1189243, 1997 Wash.App. LEXIS 2157, at *7-8; *State v. Bland*, 71 Wash.App. 345, 352-53, 860 P.2d 1046 (1993); *State v. Hupe*, 50 Wash.App. 277, 282, 748 P.2d 263 (1988). Simultaneously, Division One has declined to find alternative means cases exist where the defendant presented a "means within a means" or "definition within a definition" argument. See *State v. Laico*, 97 Wash.App. 759, 762, 987

that : [a] person commits the crime of assault in the second degree when he or she assaults another with a deadly weapon.”. CP 17-39 (instruction #6) . This instruction mirrors the to-convict instruction. Neither enumerates the essential elements of: (1) intent to create fear; and (2) the creation of fear in the victim or (3) the attempt to inflict injury. Thus as instructed the jury would logically look to the definition of “assault” to determine what the state needed to prove for the jury to find guilt. Because the definition of “assault” was described in three distinct manners, it was not possible for the jury to ascertain the essential elements of the crime charged.

Reading the jury instructions presented in Mr. Medina’s case as a whole, the jury was not instructed that it had to find either that Mr. Medina attempted to strike Ms. Gepford with a knife, or that he intended to create fear of harm and did in fact create such fear. The instructions also failed to instruct the jury that Mr. Medina committed a battery against Ms. Poland. Rather the jury instructions permitted the jury to find guilt based on any combination of the five elements presented as constituting an assault: : (1) assault by an intentional touching causing substantial bodily injury; (2) , by an intent to cause injury, but failing to do so; and (3), by an intent to cause fear which in fact does create fear. CP 17-39 (jury instruction # 7). Unlike in

Smith, it is likely that the jury in Mr. Medina's case did not fairly consider all of the essential elements of second degree assault.

There was insufficient evidence to establish any of the elements beyond a reasonable doubt, but some evidence of each element was presented: (1) an intentional touching by Mr. Medina grabbing Ms. Gepford; (2) Mr. Medina pushing Ms. Gepford into a couch; (3) Mr. Medina picked up a knife and threw on the couch; (4) officer's testimony that Ms. Gepford as she was having a seizure stated that Mr. Medina tried to stab her; and (5) that Mr. Medina engaged in a physical struggle with Ms. Poland in which she received minor scratches. The evidence of each of these acts was controverted and limited.

Applying these facts to the law, without guidance or direction, the jury had to guess at which elements the state was required to prove to establish guilt of assault in the second degree.

In Linehan, a theft case, where the trial court used the definition of embezzlement, it was required the ensure that the state alleged and proved "the appropriate relationship or agreement between Linehan and Washington Mutual and instructed the jury accordingly. To do otherwise was to relieve the state of its burden to prove every element of the offense." Linehan, 147

Wn.2d at 653.3 In Mr. Medina's case as in Linehan, the state alleged presented three definitions of assault which encompassed multiple elements of assault. Byrd, supra. As such as in Linehan, the state was required to prove these elements.

In Byrd, a defendant charged with second degree assault objected to the jury instruction that: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." Byrd, 125 Wash.2d at 714. The Court of Appeals agreed with the defendant that the instruction impermissibly removed the element of intent from the jury: The Court stated that it was not enough to instruct a jury that an assault requires an intentional unlawful act because "[e]ven where an act is done unlawfully and the result is reasonable apprehension in another, it still is not sufficient to convict because the act must be accompanied by an actual intent to cause that apprehension. This is the required element about which the jury was never told." Byrd, 125 Wn.2d at 715-16.

The Washington Supreme Court in Byrd, affirmed the reversal because "the jury was not instructed that the defendant must have intended to create in his or her victim apprehension of bodily harm ... the jury may not have understood that it must acquit Byrd of second degree assault if it failed

3 Court held error harmless because there was enough evidence of only one method of

to find he intended to create present apprehension in [the victim].” Byrd, 125 Wn.2d at 715. While Byrd is factually distinguishable from Mr. Medina’s case, it is legally on point and controlling in the instant case because the import of the decision in Byrd, was to require the trial court to present the jury instructions in a manner that held the state to its burden of proving all essential elements beyond a reasonable doubt.

In Mr. Medina’s case, the jury was not instructed that the state had to prove intent to create fear and the creation of fear or intent to commit attempted battery. Rather it was instructed that there were three ways of committing assault. The jury was not however instructed that each description of assault in jury instruction # 7 contained essential elements that the state was required to prove beyond a reasonable doubt. As in Byrd, this effectively relieved the state of proving the essential elements of the crime of assault in the second degree. A defendant is denied a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved. State v. Johnson, 100 Wash.2d 607, 623, 674 P.2d 145 (1983) (holding that the specific crime intended is not an “element” of burglary), overruled on other grounds in State v. Bergeron, 105 Wash.2d 1, 711 P.2d 1000 (1985).

theft and none of embezzlement. Linehan, 147 Wn.2d at 654.

The following cases each addressed different scenarios where the defendants were charged with assault in the second degree. A review of these cases reveals that a jury would not be able to determine the specific elements of an assault in the second degree charge unless the court delineated those elements for the jury in the jury instructions because assault in the second degree may be committed in many different ways. .

The intent to injure is not always an element of second degree assault. State v. Morreira 107 Wash.App. 450, 27 P.3d 639. (2007); Second degree assault requires proof of an intentional assault, which thereby recklessly inflicts substantial bodily harm. State v. R.H.S. 94 Wn.App. 844, 974 P.2d 1253 (1999); Assault by battery does not require specific intent to inflict substantial bodily harm or cause apprehension. State v. Daniels, 87 Wn.App. 149, 940 P.2d 690, review denied 133 Wn.2d 1031, 950 P.2d 476. (1997). Under assault statute, second-degree assault by battery requires intentional touching that recklessly inflicts substantial bodily harm. State v. Esters, 84 Wn.App. 180, 927 P.2d 1140, as amended , review denied 131 Wash.2d 1024, 937 P.2d 1101 (1996) Intent is essential element of assault charge; State v. Chaten, 84 Wn.App. 85, 925 P.2d (1996). To prove second-degree assault by attempt to cause injury, state must show specific intent to cause bodily injury but need not provide evidence of injury or fear in fact.

State v. Eastmond, 129 Wn.2d 497, 919 P.2d 577(1996). Second-degree assault by attempt to cause fear and apprehension of injury requires specific intent to create reasonable fear and apprehension of bodily injury, and jury may infer specific intent to create fear from defendant's pointing gun at victim, unless Id.

In a different case also named State v. Smith, 131 Wash.2d 258, 262, 930 P.2d 917 (1997), which also involved defective and misleading jury instructions, the defendant was charged with conspiracy to commit first degree murder, but the “to convict” instruction required the jury to find beyond a reasonable doubt that the defendant “‘agreed with [two others] to engage in ... the performance of conduct constituting the crime of Conspiracy to Commit Murder in the First Degree.’” Id. Technically, this instruction “described the even more inchoate crime of conspiracy to commit conspiracy to commit murder.” . Smith, 131 Wash.2d at 263.

The Court of Appeals in Smith, acknowledged that this instruction was defective, but held that the instructions as a whole were sufficiently clear to support the conviction. On appeal, the Washington Supreme Court reversed, concluding that “the instruction here is constitutionally defective because it purports to be a complete statement of the law yet states the wrong crime as the underlying crime which the conspirators agreed to carry out.”

Smith, 131 Wash.2d at 263. . In Smith’s case, the jury was allowed to assume an essential element-that the conspirators agreed to commit the crime of murder-need not be proved.

The error in the instant case as in Smith, 131 Wn.2d at 263 was not harmless. An instructional error is presumed to have been prejudicial unless it affirmatively appears that it was harmless. State v. Wanrow, 88 Wash.2d 221, 237, 559 P.2d 548 (1977). “A harmless error is an error which is *trivial*, or *formal*, or *merely academic*, and was not prejudicial to the substantial rights of the party assigning it, and *in no way affected the final outcome of the case*.” Wanrow, 88 Wash.2d at 237, 559 P.2d 548, quoting, State v. Golladay, 78 Wash.2d 121, 139, 470 P.2d 191 (1970) (italics in original). Once an error is presumed to be prejudicial, it is the State's burden to show that it was harmless. State v. Burri, 87 Wash.2d 175, 182, 550 P.2d 507 (1976).

State v. Aumick, 126 Wash.2d 422, 894 P.2d 1325 (1995), is directly on point. In Aumick, this court held that the trial court's failure to instruct the jury that intent was an element of attempted rape was not harmless error. Aumick, 126 Wash.2d at 430, 894 P.2d 1325. Responding to the State's argument that the error was harmless because other jury instructions correctly stated the law, the court stated, “[a] jury is not required to search other instructions to see if another element should have been included in the

instruction defining the crime.” Aumick, 126 Wash.2d at 431, 894 P.2d 1325

Similarly, in State v. Stephens, 93 Wash.2d 186, 191, 607 P.2d 304 (1980), the Supreme court held that an erroneous “to convict” instruction was not a harmless error because, although other instructions correctly stated the law, the court was unable to conclude that the erroneous instruction “ ‘in no way affected the outcome of the case.’ ” Stephens, 93 Wash.2d at 191, quoting, Wanrow, 88 Wash.2d at 237, 559 P.2d 548.) This was especially true because, the “[i]nstruction ... purported to set forth the elements of the crime, structuring the deliberations for the jury.” Stephens, 93 Wash.2d at 191, 607 P.2d 304.

We can only assume that the jury relied upon the “to convict” instruction as a correct statement of the law. The jury was not required to search the other instructions to make sense of the erroneous “to convict” instruction, and we cannot assume that the jury attempted to compensate for the court's error by doing so. We, therefore, cannot say that the error was harmless.

Id.

The Supreme Court recognized that precedent required “that failure to instruct on an element of an offense is automatic reversible error.” Smith, 131 Wn.2d at 265, citing, State v. Eastmond, 129 Wn.2d at 503, where the Court held that the omission of an element of the crime produces a “fatal error” by relieving the State of its burden of proving every essential element beyond a

reasonable doubt. Id. Smith, 131 Wn.2d at 265;

Byrd, 125 Wn.2d at 713-14;

In Medina's case, the to-convict instruction both purported and failed to list all of the essential elements of the charged crime and mirrored the information. The prosecutor also told the jury that there were only two elements the state had to prove: (1) that the defendant assaulted victim, and (2) that he did so with a deadly weapon. The fact that assault was defined as being: (1) a battery; (2) intent to commit battery and failing to commit a battery; and (3) the intent to create fear of harm and the creation of fear of harm, did not inform the jury in any manner of the elements the state had to prove beyond a reasonable doubt. Thus as in Smith, Wanrow, and Byrd, Mr. Medina was denied his right to a fair trial because the state was relieved of its burden of proving all essential elements of the crime charged in the instant case. The remedy is reversal of the conviction and remand for a new trial.

2. THE STATE FAILED TO PROVE BEYOND
A REASONABLE DOUBT THE
ESSENTIAL ELEMENTS OF ASSAULT IN
THE SECOND DEGREE.

For a conviction to be upheld the State must prove every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); State v. Borrero, 147

Wn.2d 353, 364, 58 P.3d 245 (2002); Byrd, 125 Wash.2d at 713. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury decides what evidence is credible. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the jury on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

RCW 94.36.020 describes assault in the second degree in relevant part as:

(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:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) or

(c) Assaults another with a deadly weapon.

The Court in Byrd affirmed recognition of the common law elements of assault not listed in the statute. “We agree and hold specific intent either to create apprehension of bodily harm or to cause bodily harm is an essential element of assault in the second degree.” Byrd, 125 Wn.2d at 713.

As charged, to find Mr. Medina guilty, the state had to prove that he used a deadly weapon during the assault and the jury had to find common law essential elements of assault that: Mr. Medina either (1) the intended to create in apprehension and fear of bodily injury; and (2) did actually create a reasonable apprehension and imminent fear of bodily injury, or (3) intended to commit battery and failed. Byrd, 125 Wn.2d at 713-14.

a. No Intent to Create Fear.

In Mr. Medina’s case, the evidence established that he picked up a knife while Ms. Gepford was in his apartment. RP 103-04. There was no evidence that Mr. Gepford attacked Ms. Gepford or threatened her in any manner with the knife. CP108-09. Rather the evidence indicated that Mr. Medina picked up the knife and threw it on the couch. There was also evidence that Mr. Medina pushed Ms. Gepford into the couch but there was no evidence that Mr. Medina intended to create fear or that Ms. Gepford had any fear.

Ms. Gepford testified that Mr. Medina did not try to stab her and that she was not coherent when talking to the police because she was about to have a seizure. RP 99. These facts do not establish the essential element of intent to create apprehension and fear of bodily injury.

b. No Reasonable Apprehension of Fear by Victim

Ms. Gepford testified that she was never afraid of Mr. Medina and did not feel threatened when he picked up the knife and threw it on the couch. RP 90. An officer testified that Ms. Gepford stated that Mr. Medina attempted to stab her. There was however no testimony that Ms. Gepford was ever afraid and Ms. Poland who was not present during this scene heard Ms. Gepford yelling “let go” “what are you doing”. RP 188. While Ms. Poland may have been afraid for Ms Gepford, this is irrelevant to proving whether Ms. Gepford feared bodily injury. State v. Nicholson, 119 Wn. App. 855, 857, 84 P.3d 877 (2003).

In Nicholson, the defendant placed a knife blade close to the stomach of a 20-month-old child and taunted the child's mother. At trial on a charge of second degree assault of a child, the trial court instructed the jury on all three alternative means of assault and the State argued that the elements of common law assault were met if the jury found that the child's mother was placed in fear and apprehension of injury to the child. Nicholson, 119 Wn.

App. at 861-63. Because the trial court erred in permitting the state to argue that fear and apprehension occurring in a third party rather than the victim supported a finding of the fear and apprehension element of common law assault, and the general verdict did not allow a determination of whether the jury relied on that evidence, this court reversed the conviction and remanded the case for a new trial. Nicholson, 119 Wn. App. at 863-64.4

c. No Attempt to Inflict Substantial Bodily Injury.

Mr. Medina may have held a knife for a moment and he may have pushed Ms. Gepford, but there was insufficient evidence to establish beyond a reasonable doubt intent to inflict substantial bodily injury.

The facts presented at trial did not establish beyond a reasonable doubt the essential elements of: (1) intent to create fear of harm; (2) fear by Ms. Gepford; or (3) intent to strike; or (4) any of the above with a deadly weapon. Because the state failed to prove essential elements of the crime charged beyond a reasonable doubt, the conviction for assault in the second degree must be reversed and the charge dismissed with prejudice.

D. CONCLUSION

Mr. Medina respectfully requests this Court reverse his conviction for assault in the second degree for insufficient evidence and dismiss with

4 In Mr. Medina's case the prosecutor did not even try to argue that any of the common

prejudice, or in the alternative, reverse the conviction and remand for a new trial with appropriate jury instructions.

DATED this 3rd day of June 2009.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

CO. JUN 11 11 12 AM '09
STATE OF WASHINGTON
BY _____
DEPUTY CLERK
COURT OF APPEALS
1ST DISTRICT

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 Efrain Medina DOC# 778481 Stafford Creek Corrections Center 191 Constantine Way Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on June 3, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature