

NO. 41742-1-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

JOHN M. ZORN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR MASON COUNTY  
The Honorable Toni A. Sheldon, Judge  
Cause No. 10-1-00329-1

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SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

The trial court erred in giving an incorrect reckless jury instruction: court's instruction 9.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENT OF ERROR

Whether by giving an incorrect reckless jury instruction, the State was relieved of it's burden of proving an essential element of the crime of assault in the the second degree?

C. SUPPLEMENTAL STATEMENT OF THE CASE

For purposes of this Supplemental Brief, Appellant John M. Zorn (Zorn) incorporates and adopts by reference the statement of the case established in his opening brief, the verbatim report of proceedings and the clerk's papers filed herein.

D. SUPPLEMENTAL ARGUMENT

BY GIVING AN INCORRECT RECKLESS JURY INSTRUCTION, THE STATE WAS RELIEVED OF IT'S BURDEN OF PROVING AN ESSENTIAL ELEMENT OF THE CRIME OF ASSAULT IN THE SECOND DEGREE.

This court reviews alleged errors of law in jury instructions *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518, U.S. 1026 (1996). Jury instructions are to be read as a whole, and each one is read in the context of all others given.

State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Jury instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). “It is reversible error to instruct the jury in a manner that would relieve the State (of its) burden” to prove “every essential element of a criminal offense beyond a reasonable doubt.” State v. Pirtle, 127 Wn.2d at 656. This court presumes that a “clear misstatement of the law” in a jury instruction is prejudicial. State v. Wanrow, 88 Wn.2d 221, 239, 559 P.2d 548 (1977). And while Zorn did not object to the instructions below, this error is of constitutional magnitude and may be raised for the first time on appeal. RAP 2.5(a); State v. Holzknrecht, 157 Wn. App. 754, 760-62, 238 P.3d 1233 (2010); State v. Brett, 126 Wn.2d 136, 171, 892 P.2d 29 (1995).

The trial court’s instructions to the jury included the “to convict” instruction, jury instruction 13, for second degree assault:

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about October 18, 2010, the defendant intentionally assaulted Adrian E. Leonard; and
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Adrian E. Leonard; and
- (3) That this act occurred in the State of Washington.

[CP 42].

Jury instruction 9 defined “recklessness” as:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. (emphasis added)

When reckless is required to establish an element of a crime, the element is also established if the person acts intentionally or knowingly.

[CP 38].

Defense did not submit any instructions and neither party objected to the instructions given the jury. [RP 140-41].

Per this court’s opinion issued earlier this week in State v. Harris, 2011 WL 4944038 (Oct. 18, 2011), the “wrongful act” portion of the above reckless instruction, which is drawn directly from RCW 9A.08.010(1)(c), does not effectively convey the mental element for assault in the first degree under RCW 9A.36.120(1)(b)(i), and by logical extension second degree assault under RCW 9A.36.021(1)(a), the crime for which Zorn was convicted. State v. Harris, 2011 WL 4944038 at \*4.

To convict Zorn of second degree assault, the jury had to find that he recklessly disregarded the substantial risk that “substantial bodily harm” would occur to Adrian E. Leonard as a result of his actions under RCW 9A.36.021(1)(a), not that a “wrongful act” would occur, with the

result that the reckless instruction, court's instruction 9, misstated the law regarding assault in the second degree.

Critically, the instruction effectively precluded defense counsel of an opportunity to argue in closing that the State was required to prove that Zorn had disregarded a substantial risk that substantial bodily harm would result from his actions, rather than the less difficult proof required to prove that "a wrongful act may occur." [CP 38]. The difference is significant.

As this court noted in Harris, 2011 WL 4944038 at \*5, a trial court should use the language drawn from a statute "'where the law governing the case is expressed in the statute.'" (quoting State v. Hardwick, 74 Wn.2d 828, 830, 447 P.2d 80 (1968)). Court's instruction 9, even when read with court's instruction 13, thereby relieved the State of its burden of proving an essential element of assault in the second degree, with the result that Zorn's conviction must be reversed and the case remanded for a new trial.

E. CONCLUSION

For the reasons stated herein, Zorn respectfully request this court to reverse his conviction for assault in the second degree and remand for a new trial.

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DATED this 21<sup>st</sup> day of October 2011.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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**October 21, 2011 - 3:36 PM**

## Transmittal Letter

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