

No. 43511-0-II

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IN THE WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

DOUGLAS L. BAUER

Appellant.

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APPEAL FROM THE SUPERIOR COURT

OF KITSAP COUNTY

Cause No. 12-1-00290-6

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REPLY BRIEF OF APPELLANT

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WAYNE C. FRICKE  
WSB #16550

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant  
1008 South Yakima Avenue, Suite 302  
Tacoma, Washington 98405  
(253) 272-2157

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**I. STATEMENT OF THE CASE**

Appellant adopts the statement of the case as set forth in his opening brief.

**II. ARGUMENT**

**A. The Assault Statute does not Apply to the Conduct at Issue in this Case.**

The state, in its response, has done nothing more than restate its position in the trial court, while ignoring virtually every issue that the defense has raised. For instance, it has not even addressed the issue as to whether the legislature even made the acts complained of a crime. Appellant's brief at 16. In fact, the legislature has not made the conduct at issue here a crime. Other states have, however.

For example, many states have enacted statutes that specifically criminalize the failure to secure a firearm, where a minor then uses the firearm and causes injury or death. See, e.g., I.C.A. § 724.22(7) (Iowa statute making it "unlawful for any person to store or leave a loaded firearm ... if such person knows or has reason to believe that a minor under the age of fourteen years is likely to gain access to the firearm ... and the minor ... uses the firearm unlawfully to cause injury or death to a person."); F.S.A. § 784.05(3) (Florida statute: "Whoever violates subsection (1) by storing or leaving a loaded firearm within the reach or easy access of a minor commits, if the minor obtains the firearm and uses it to inflict injury or death upon himself or herself or any other person, a felony of the third degree"); Cal. Penal Code § 25100(a) (California

statute creating the crime of “criminal storage of a firearm of the first degree” if: (1) the person keeps any loaded firearm within any premises that are under the person’s custody or control; (2) the person knows or reasonably should know that a child is likely to gain access to the firearm without the permission of the child’s parent or legal guardian; and (3) the child obtains access to the firearm and thereby causes death or great bodily injury to the child or any other person); W.S.A. 948.55(Wisconsin crime of leaving or storing a loaded firearm within the reach or easy access of a child: “whoever recklessly stores or leaves a loaded firearm within the reach or easy access of a child is guilty of a Class A misdemeanor if all of the following occur: (a) A child obtains the firearm without the lawful permission of his or her parent or guardian or the person having charge of the child: (b) the child under par; (a) discharges the firearm and the discharge causes bodily harm or death to himself, herself, or another.”). Other states criminalize leaving a loaded firearm such that a child can access it. See, e.g., VA Code Ann. § 18.2-56.2(Virginia); Md. Code Ann., Crim. Law § 4-104 (Maryland); N.J.S.A. 2C:58-15 (New Jersey).

Washington has not adopted a similar statute. Instead, the State is trying to stretch the assault statute to criminalize this conduct. However, as the defense has argued, and the state has ignored, it is not the prosecutor’s prerogative to legislate—that is the prerogative of the legislature. State v. Wadsworth, 139 Wn.2d 724, 991 P. 2d 80 (2000). Appellant’s brief at 16.

Furthermore, the state refuses to acknowledge that “proximate cause” is not definitional, but merely a legal concept based on policy considerations

established by the judiciary. Herskovits v. Group Health Cooperative of Puget Sound, 99 Wn.2d 609, 637, 664 P.2d 474 (1983). Appellant's brief at 11. It does not correspond to the use of the word "cause" as used by the legislature in the enactment. To reiterate, as most recently stated by the Washington Supreme Court, when a word is undefined the court is to use the plain meaning of the term and consult the dictionary. Cregan v. Fourth Mem'l Church, #86835-2 (9/13/2012). It is almost as if the state is deliberately attempting to mislead the court. Clearly, however, the issues are completely different.

And, finally, the state does not even address Bouie v. City of Columbia, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed. 2d 894 (1964), wherein the United States Supreme Court has held that such attempts to expand the breadth of a statute beyond what has previously been prohibited violates the Ex Post Facto Clause. Thus, even should this court hold that the statute encompasses the conduct at issue here for the first time, it cannot be applied to Mr. Bauer.

Because the state has saw fit not to address these arguments, it presumably does not disagree that the application of the statute is inapplicable to the conduct here and any attempt to expand its application to Mr. Bauer would violate the Ex Post Facto Clause of the United States Constitution. The court should so find. See Adams v. Dep't of Labor & Indus, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995)( court is entitled to make its decision based on the argument and record before it, when a respondent fails to answer the arguments the opponent has placed before the court).

**B. Mr. Bauer did Nothing Affirmatively to Assault or Cause Another to Assault the Victim in this Case.**

The suggestion that one who places a firearm in his residence months, weeks or days prior to it being taken without his knowledge has affirmatively done something to commit an assault is simply ludicrous. Under the state's theory, because he purchased the firearm and brought it home, a person would always be guilty of an assault under the facts of this case because the purchase of the firearm was an affirmative act. Respondent's brief at 22. The issue is not whether there was an affirmative act at some point in time, but whether there was an affirmative act made by a defendant to commit an assault. In that context, it is unequivocal that there was none. As a result, Mr. Bauer cannot be held accountable for the assault. See RCW 9A.08.020.

**C. The Assault Statute is Vague as Applied to the Facts of this Case.**

The parties agree that in determining whether an individual is given notice that his conduct is prohibited by a given statute, he can avail himself to other statutes and legal interpretations. Unfortunately, the state ignores the limitations of third party liability in criminal actions as set forth by the legislature under RCW 9A.08.020. See In the Matter of the Forfeiture of One 1970 Chevrolet Chevelle, 166 Wn.2d 834, 215 P.3d 166 (2009); State v. Bobenhouse 166 Wn2d 881, 889, 214 P.3d 907 (2009). It also ignores the states that have specific statutes dealing with this issue and the undeniable fact that Washington does not.

If there was ever an occasion that a prosecuting attorney's office was following it's own personal predilections, it is here. This, the Due Process Clause

forbids. City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795 P.2d 693 (1990).

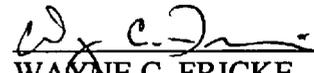
As such, the court should hold that the assault statute is vague as applied to the facts of this case.

**III. CONCLUSION**

Based on the files and records herein, Mr. Bauer requests that the court reverse the trial court and dismiss this action.

RESPECTFULLY SUBMITTED this 14 day of September, 2012.

HESTER LAW GROUP, INC., P.S.  
Attorneys for Appellant

  
\_\_\_\_\_  
WAYNE C. FRICKE  
WSB #16550

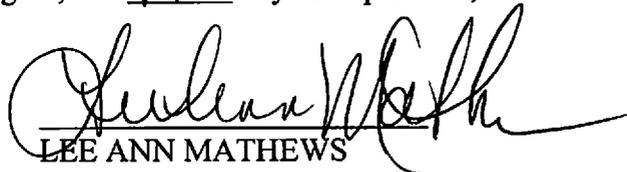
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Jeremy Morris  
Deputy Prosecuting Attorney  
614 Division Street  
Port Orchard, WA 98366-4614

Doug Bauer  
P.O. Box 1885  
Allyn, WA 98524

Signed at Tacoma, Washington, this 14<sup>th</sup> day of September, 2012.

  
LEE ANN MATHEWS

# HESTER LAW OFFICES

**September 14, 2012 - 12:47 PM**

## Transmittal Letter

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