

NO. 47966-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEROME BEECHUM,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	
1. Factual History	2
2. Procedural History	3
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT ENTERED THAT PORTION OF FINDING OF FACT NO. 31 WHEREIN IT FOUND THAT MR. BEECHUM INTENTIONALLY PUNCHED MS WHITE "AS HARD AS HE COULD" BECAUSE THAT PORTION OF THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE	14
II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT FOUND HIM GUILTY OF SECOND DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT RECKLESSLY INFLICTED SUBSTANTIAL BODILY INJURY	16
E. CONCLUSION	22
F. APPENDIX	
1. RCW 9A.08.010(1)	23
2. RCW 9A.36.021	24
G. AFFIRMATION OF SERVICE	25

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 16

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 17

State Cases

State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011) 18

State v. Agee, 89 Wn.2d 416, 573 P.2d 355 (1977) 14

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 16

State v. Dempsey, 88 Wn.App. 918, 947 P.2d 265 (1997) 14

State v. Ferreira, 69 Wn.App. 465, 850 P.2d 541 (1993) 19

State v. Ford, 110 Wn.2d 827, 755 P.2d 806 (1988) 14

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994) 14

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 16

State v. Nelson, 89 Wn.App. 179, 948 P.2d 1314 (1997) 14

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 17

State v. Woo Won Choi, 55 Wn.App. 895, 781 P.2d 505 (1989),
review denied, 114 Wn.2d 1002, 788 P.2d 1077 (1990) 19

Constitutional Provisions

Washington Constitution, Article 1, § 3 16
United States Constitution, Fourteenth Amendment 16

Statutes and Court Rules

RCW 9A.04.110 18
RCW 9A.08.010 19
RCW 9A.36.021 17-19

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it entered that portion of Finding of Fact No. 31 wherein the court found that Mr. Beechum intentionally punched Ms white “as hard as he could” because that portion of the finding is not supported by substantial evidence.

2. The trial court violated the defendant’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it found him guilty of second degree assault because substantial evidence does not support the conclusion that the defendant acted recklessly when he inflicted substantial bodily injury upon another person.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it enters findings of fact unsupported by substantial evidence?

2. Does a trial court violate a defendant’s right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it finds the defendant guilty of second degree assault under RCW 9A.36.021(1)(a) when substantial evidence does not support the conclusion that the defendant acted recklessly when he or she inflicted substantial bodily injury upon another person?

STATEMENT OF THE CASE

Factual History

At about 7:30 pm on December 14, 2014, Aberdeen Police Officer Michael Caranto was called out to an assault report at the Ansonia Apartments directly behind the Aberdeen Police Department. RP 10-12.¹ Upon arrival he went to unit 202 and spoke with a number of people present, including Heather White, who was in the bathroom bleeding from an injury to her left eye. RP 13-15. Upon taking a short statement from those present, Officer Caranto called for backup and medical assistance. *Id.* Once backup arrived he and the responding officers went to apartment 104 in search of the defendant Jerome Beechum, who Ms White claimed had hit her once in her eye with his right hand. RP 18-19.

The officers eventually gained entry into apartment 104 and found three people present, one of whom was the defendant. RP 28-30. They then placed the defendant under arrest, searched him incident to arrest, and found a padlock in his pocket. *Id.* They asked the defendant what had happened. *Id.* He stated that he and Ms White had been in a dispute, during which she

¹The record on appeal includes four volumes of verbatim reports, with each volume starting with a new page one. These volumes are: (1) 5/18/15 jury waiver hearing; (2) 7/9/14 bench trial; (3) 7/31/15 bench trial on aggravators, and (4) 8/24/15 sentencing. The 7/19/15 verbatim report of the bench trial is referred to herein as “RP [page #].” The remaining volumes are referred to herein as “RP [date] [page #].”

had fallen and hit her head against the front door jamb of the apartment. *Id.* He denied hitting her. *Id.* At this point one of the assisting officers took the defendant to the jail and Officer Caranto returned to speak with Ms White, who was then being treated by medical personnel. RP 16-17. During this conversation she told them that she believed her eye socket was broken. *Id.* A later x-ray at the hospital revealed that she had indeed suffered a number of small fractures to her left eye. RP 41-46. The treating physician did not believe the injuries consistent either with Ms White falling on a door jamb or with being hit with the padlock the police took from the defendant. RP 47, 56-57. Rather, he found them consist with having been struck by someone's fist. RP 47-48.

Procedural History

By information filed December 16, 2014, and amended on May 11, 2015, the Grays Harbor County Prosecutor charged the defendant with one count of second degree assault (DV) under RCW 9A.36.021(1)(a), alleging that he had "intentionally assaulted a family or household member, to wit: Heather White, and thereby recklessly inflicted substantial bodily harm." CP 1-2, 31-32. The state also alleged two aggravators under RCW 9.94A.535(3). CP 31-32. The first was that the "current offense was part of an ongoing pattern of psychological or physical abuse of a victim or multiple victims manifested by multiple incidences over a prolonged period of time" under

RCW 9.94A.535(3)(h)(i). *Id.* The second was that “the defendant committed the offense shortly after being released from incarceration” under RCW 9.94A.535(3)(t). *Id.*

One week after the state filed the amended information in this case the defendant appeared in court with counsel and filed a jury waiver. RP 5/18/15 4-5; CP 39. Following a short colloquy, the court accepted the waiver and resent the matter for trial to the bench. CP 40, 41.

On July 9, 2015, the court called this case for trial before the bench. CP 57-58; RP 1. During this trial the state called five witnesses: Officer Caranto, Heather White, the two assisting officers and Dr. Robert Falconer, who treated Ms White in the emergency room. CP 10, 25, 41, 63, 87. The defendant then took the stand on his own behalf, after which the state called one of the responding officers in very short rebuttal. RP 90, 119. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. In addition, while on the stand both Heather White and the defendant provided conflicting versions of what had happened that night, and both admitted that they had not been truthful to the officers in a number of statements. RP 63-87, 90-119. The following examines that evidence.

According to both Ms. White and the defendant, they had been in a relationship for many years and had a number of children together. RP 64,

90-95. At the time of the incident they were homeless, although Ms White was then staying temporarily at one of the apartments where the incident occurred. *Id.* On the night in question both of them used methamphetamine and marijuana, facts that they had not told the police. RP 65, 72, 105. In addition, during their testimony, both Ms White and the defendant admitted that during the evening they got into a dispute while with the apartment owner and a couple other people. RP 68, 95.

In her testimony Ms White claimed that the dispute arose because the defendant was intoxicated and verbally abusive to her, calling her a bad mother as one of a number of disparaging remarks. RP 68, She went on to claim that at one point she slapped the defendant, then hit him in the chest, and unsuccessfully attempted to “kick him in the nuts” when he got between her and the front door as she tried to leave. RP 68, 81. She then went out into the hall with the defendant following behind. RP 68-69. As she got out into the hall she turned to see the defendant behind her. *Id.* As she turned and saw him, he hit her in her right eye either with his fist or some other object. *Id.* The blow knocked her down, after which the defendant left and she went back into the apartment to ask those inside to summon medical aide. *Id.*

In his testimony the defendant claimed that he had not been verbally abusive to Ms. White. RP 95/ Rather, he claimed that she had become

abusive, that she had hit him in the face, after which she hit him in the chest a couple of times. RP 95. After this she did kick him in the groin, causing a great deal of pain. RP 97-98, 117. According to the defendant he responded to the kick by hitting her with his right fist in an attempt to prevent her from further assaulting him. RP 97-98, 112. He denied that he had anything in his hand when he struck her and he claimed that he took the action in self defense. RP 98-99. While on the stand he admitted that he had lied to the police when he told them that he had not hit her. RP 116.

Following closing argument by counsel in this case the court took the matter under advisement. RP 150. The court later found the defendant guilty as charged and entered the following written findings and conclusions in support of that verdict:

1. On Dec. 1, 2014, Mr. Jerome Anthony Beechum, the defendant, and Ms. Heather White, along with about four other people were in Apt. #104 of the Ansonia Apartments, at 215 E. First Street, Aberdeen, Washington.

2. Two of those other persons were Leona Starr and Kenneth Pickernell. Both were transients known to reside generally in Aberdeen. Both were heavily intoxicated. Christine Gilcrest and the tenant of the apartment were also present.

3. Mr. Beechum and Ms. White are the parents of one or more children in common.

4. Mr. Beechum, Ms. White and others in Apt #104 had been drinking and smoking methamphetamine and marijuana. Mr. Beechum and Ms. White had primarily smoked marijuana and methamphetamine.

5. Mr. Beechum and Ms. White had been in a small room off of the main room of the apartment discussing their relationship and other things. At various points of their conversation arguments erupted and abusive language was used. In particular, Mr. Beechum belittled Ms. White and her parenting in front of the others, and told her she was “worthless.”

6. During the course of their conversation and arguments in the room, in response to abusive language directed at her by Mr. Beechum, Ms. White slapped Mr. Beechum on the face and hit Mr. Beechum in the chest. Ms. White also attempted to kick Mr. Beechum in the groin area, but missed.

7. Ms. White walked out of the apartment into the hallway just in front of the threshold and began to check her cell phone.

8. Mr. Beechum followed her out the door.

9. Ms. White turned around. Mr. Beechum then punched Ms. White in her left eye with his right fist with such force that Ms. White lost consciousness, fell to the ground and suffered substantial injuries to her eye and eye socket that were detailed by the testimony of Dr. Richard Falconer.

10. While Ms. White was on the floor of the hallway, she said to Mr. Beechum, “You fucking hit me.”

11. Mr. Beechum ran into apartment 103, got someone to come out with him, and said to Ms. White, “You did this to yourself.”

12. Ms. White stood back up and ran to where she knew people were to get help.

13. Mr. Jerome is 6' 1" tall.

14. Ms. White is 5' 3" tall.

15. Dr. Falconer observed obvious signs of blunt force trauma to Ms. White’s face. He reviewed results of a CAT scan of Ms. White’s head and face which revealed multiple fractures, including of the cheekbone - zygoma - left side of her face. There were three

other fractures, to the inferior wall, lateral wall, & below the cheekbone.

16. Dr. Falconer's opinion is that Ms. White suffered a more focused injury - focal trauma to that part of her face - and was the result of blunt force trauma. Her injuries are not consistent with "running into" a wall or a door jamb. The amount of force needed to cause such bone breakage was substantial, similar to what he has seen resulting from traffic collisions.

17. I considered carefully the testimony of Ms. White and Mr. Beechum. The credibility of both is suspect because of their convictions of crimes involving dishonesty and/or false statements, and the admission of both of having used methamphetamine prior to the incident at issue.

18. Officer Caranto did not notice any indication that Ms. White was intoxicated, either from alcohol or other substances.

19. A hospital blood test showed Ms. White's blood alcohol to be 0.01.

20. Mr. Beechum's first statements about the incident to police were to deny punching Ms. White. He said he was assaulted by Ms. White, but he denied having any injuries. He stated that Ms. White had fell and hit her head on the door jamb. He did not say Ms. White had kicked him in the groin or complain of any injury or pain from a kick to his groin.

21. The police took photographs of every place on Mr. Beechum's body where he said he had been hit by Ms. White. There are no photographs of his groin area.

22. Mr. Beechum had plenty of time to sit and think about what he was going to say when the police came. He testified that after Ms. White left, he went back into the apartment to wait for the police.

23. Both Dr. Falconer and Officer Caranto noted swelling around the joints and small abrasions to the knuckles of Mr. Beechum's right hand which are consistent with having punched Ms. White.

24. Mr. Beechum told police that he had been involved in some “street” fighting that had caused the injuries to his hand.

25. Mr. Beechum testified at trial that both he and Ms. White were still inside the apartment near the front door when Ms. White kicked him in the groin and hurt him. He then swung at her while both were still inside of the room. Ms. White went down, hit the door frame and landed outside the door.

26. Mr. Beechum testified he only struck Ms. White once in order to “prevent a continued assault.” He also stated, “I swung in immediate reaction” to the kick.

27. I find Mr. Beechum’s testimony of being kicked in the groin and swinging in immediate reaction to prevent further assaults not credible.

28. It would have been very simple for Mr. Beechum to have told the police, “She kicked me in the groin, so I hit her,” or something to that effect. Instead, he didn’t say anything about hitting her or being kicked in the groin. Mr. Beechum clearly and intentionally lied to the police with his initial version of what happened: that Ms. White fell and hit her face on the door jamb, which caused her injuries. Even in the face of the obvious swelling and abrasion to his right hand, he lied again and said his hand injuries had happened “street fighting.” This shows his knowledge of guilt and his knowledge that he did not act in defense of himself.

29. Ms. White made several statements against her interest, admitting that she slapped and punched Mr. Beechum during their conversation/argument. She admitted to attempting to kick him in the groin, but missing. These statements are more credible and support the court finding that she had left the apartment and was outside of the threshold when Mr. Beechum followed her out and struck her in the left eye with his right fist.

30. The blood found on the front door jamb to Apt. 104 shown in Exhibit 12 does not show any smearing. It is on the flat portion of the jamb. There is no other blood around it. It most likely is a drop of blood that landed at the top of the blood trail and then gravity took over. As the drops of blood on the hallway floor show (Exhibits 7,

8, 9, 10, & 11), the punch took place there.

31. The amount of force used by Mr. Beechum in punching Ms. White was excessive and not reasonable or necessary under the circumstances. In light of the blunt force required to cause such extensive injuries to Ms. White, Mr. Beechum intentionally punched her as hard as he could. Mr. Beechum was not preventing or attempting to prevent Ms. White from assaulting him. Instead, at the least, he knew and disregarded the substantial risk that a serious injury would result from punching Ms. White as hard as he could.

32. I find beyond a reasonable doubt that on December 1, 2014, in Aberdeen, Washington, the defendant Jerome Beechum, intentionally assaulted Heather White and thereby recklessly inflicted substantial bodily harm on Heather White, and Jerome Beechum and Heather White were, at the time of the assault, family or household members.

33. I find beyond a reasonable doubt that Jerome Anthony Beechum was not acting in self-defense.

34. I find the defendant, Jerome Anthony Beechum, guilty of the crime of Assault in the Second Degree - Domestic Violence.

CP 61-64.

On July 31, 2015, the court again called the case for trial, this time on the state's alleged aggravators. RP 7/31/15 2-42. During this trial the state called two witnesses: Heather White and Detective David Cox. RP 7/31/15 17-27. During her testimony, Ms White claimed that the defendant had physically and emotionally abused her for many years while they were living together, mostly when he was intoxicated. RP 7/31/15 2-42. Detective Cox testified and presented documentary history of the defendant's lengthy criminal history, including his most recent incarceration prior to the current

case. RP 7/31/15 17-27.

Following this testimony the court took the matter under advisement. RP 7/31/15 41. The court later entered the following written findings in support of its verdict that the state had not proven the recent recidivism aggravator, but the state had proven beyond a reasonable doubt that the current offense was part of an ongoing pattern of psychological or physical abuse of a victim or multiple victims manifested by multiple incidences over a prolonged period of time under RCW 9.94A.535(3)(h)(j). RP 76-77.

1. I incorporate the findings and conclusions from my written decision finding Mr. Beechum guilty of Assault in the Second Degree - Domestic Violence.
2. Mr. Beechum and Ms. White are the parents of four children in common and have had a relationship over the past twelve years.
3. On November 13, 2014, Mr. Beechum was booked into the City of Aberdeen Jail. Exhibit 1.
4. On November 17, 2013, Aberdeen Municipal court issued an order related to two cause numbers, 4Z0711908 Theft 3" and "4Z0822357 Ast4." The order indicates 7 days under 4Z0711908 and "3NC" days on 4Z08822357, for a total of 10 days. Exhibit 1.
5. Mr. Beechum was released from the City of Aberdeen Jail on November 19, 2014, after serving no more than 6 days. A notation indicates "time served." Exhibit 1
6. The abstract of judgment in Aberdeen Municipal Court Case No. 4Z0822357 shows that Mr. Beechum was sentenced for Assault 4th Degree Domestic Violence on August 28, 2014. A part of the sentence included "to serve 364 days with 358 suspended." Exhibit 2.

7. Both the current offense and Aberdeen Municipal Court Case. No. 4Z0822357 involved the same victim and domestic violence.

8. I find the record not clear as to the reasons for Mr. Beechum's incarceration in the City of Aberdeen jail. Mr. Beechum may have been serving a sentence of incarceration imposed for a conviction of certain misdemeanor offenses, or Mr. Beechum may have been held "pre-trial or pre-disposition" in lieu of bail, or Mr. Beechum may have been serving time imposed for failure to comply with a previous sentence (apparently imposed on Aug. 28, 2015 in case no. 4Z0822357) by not paying legal financial obligations.

9. Being released from "incarceration" as punishment for failure to pay or merely as a result of the inability to post bail does not necessarily show a "disdain for the law" when a new offense is committed.

10. Under these circumstances I cannot conclude beyond a reasonable doubt that Mr. Beechum committed the current offense shortly after being released from incarceration. RCW 9.94A.535(3)(t).

11. I adopt Mr. Beechum's record of convictions of domestic violence-related offenses with Heather White as the victim (Exhibits 1-10) and Phath Vong as the victim (Exhibits 11 & 12) as findings of fact.

12. Based on the testimony of Heather White as to the circumstances of her relationship with Mr. Beechum and the multiple incidence of domestic violence related offenses committed against her over the past twelve years, I conclude beyond a reasonable doubt that the current offense involved domestic violence and the offense was part of an ongoing pattern of psychological and physical abuse of Ms. White and Ms Vong manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(h)(i).

CP 76-77.

The court later called the case for sentencing. RP8/24/15. Based upon the one aggravator the court previously found pled and proven, the court

imposed an exceptional sentence upward of 81 months on a range of 42 to 57 months. CP 85-95. The defendant thereafter filed timely notice of appeal. CP 103.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT ENTERED THAT PORTION OF FINDING OF FACT NO. 31 WHEREIN IT FOUND THAT MR. BEECHUM INTENTIONALLY PUNCHED MS WHITE “AS HARD AS HE COULD” BECAUSE THAT PORTION OF THE FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The purpose of findings of fact and conclusions of law is to aid an appellate court on review. *State v. Agee*, 89 Wn.2d 416, 573 P.2d 355 (1977). The Court of Appeals reviews these findings under the substantial evidence rule. *State v. Nelson*, 89 Wn.App. 179, 948 P.2d 1314 (1997). Under the substantial evidence rule, the reviewing court will sustain the trier of facts' findings “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988). In making this determination, the reviewing court will not revisit issues of credibility, which lie within the unique province of the trier of fact. *Id.* Finally, findings of fact are considered verities on appeal absent a specific assignment of error. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

By contrast, an appellant need not assign error to a specific conclusion of law by number in order to preserve the issue on appeal because this argument presents an issue of law that the appellate court reviews de novo. *State v. Dempsey*, 88 Wn.App. 918, 947 P.2d 265 (1997). However, when a conclusion of law contains an assertion of fact, it functions as a finding of

fact and is reviewed under the substantial evidence rule and requires an assignment of error for consideration on review. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

In the case at bar, appellant assigns error to that portion of Finding of Fact No. 31 shown in bold and italics:

31. The amount of force used by Mr. Beechum in punching Ms. White was excessive and not reasonable or necessary under the circumstances. In light of the blunt force required to cause such extensive injuries to Ms. White, Mr. Beechum intentionally punched ***her as hard as he could***. Mr. Beechum was not preventing or attempting to prevent Ms. White from assaulting him. Instead, at the least, he knew and disregarded the substantial risk that a serious injury would result from punching Ms. White ***as hard as he could***.

CP 64.

A careful review of the record fails to show how much force the defendant had available when striking a person. While the treating physician did testify that the injury he saw would require the application of substantial force, he did say the injury was consistent with a strike from a closed fist and nothing more. He did not speculate on the amount of force with which the defendant could strike another and he did not speculate on the defendant's ability to strike a person. Consequently, no evidence in the record supports the court's finding that the defendant struck Ms White "as hard as he could."

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS WHEN IT FOUND HIM GUILTY OF SECOND DEGREE ASSAULT BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT RECKLESSLY INFLICTED SUBSTANTIAL BODILY INJURY.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar the defendant argues that substantial evidence does not support his conviction for second degree assault because the evidence presented at trial does not support a conclusion that the defendant recklessly inflicted substantial bodily injury. Specifically, the defendant argues that the evidence that he struck the complaining witness after she slapped him, hit him and then either tried to or did kick him in his groin is insufficient to prove that he acted recklessly, even though the injury the complaining witness sustained did constitute substantial bodily injury. The following addresses this argument.

In the case at bar the state charged the defendant by amended information with second degree assault under RCW 9A.36.021(1)(a). This provision states:

(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 . . .

RCW 9A.36.021(1)(a).

The gravamen of the offense of second degree assault under this first alternative in the statute is to (1) “intentionally assault another,” and thereby (2) “recklessly inflict[]”, (3) “substantial bodily injury.” These are three separate and distinct elements. *State v. McKague*, 159 Wn. App. 489, 246 P.3d 558 (2011). In this case the defense concedes that substantial evidence supports the first and the third elements. In his own testimony the defendant admitted that he intentionally struck Heather White, although he claimed that he acted in self-defense. Since the court as the trier of fact found that the state had proved beyond a reasonable doubt that the defendant did not act in self-defense, the defendant’s testimony alone supports the first element of the offense, as does Ms White’s testimony. Thus, the first element is not at issue as part of this appeal.

In addition, under RCW 9A.04.110(4)(b), the term “substantial bodily harm” includes any injury constituting “a fracture of any bodily part.” Thus, in this case, the evidence from Ms White and from the attending physician that Ms White sustained a fracture as a result of the defendant hitting her constitutes substantial evidence on the third element for proving second

degree assault under RCW 9A.36.021(1)(a). Thus, this third element is not at issue as part of this appeal. By contrast, what is at issue is the second element that required that the record contain substantial evidence that the defendant acted “recklessly” when he inflicted the injury. As the following explains, substantial evidence does not support this conclusion in this case.

In RCW 9A.08.010 the Washington legislature created a four level hierarchy of *mentes reae* necessary to prove criminal conduct in this state. These mental elements are: (1) intent, (2) knowledge, (3) recklessness, and (4) criminal negligence. Under RCW 9A.030.010(1)(c), the legislature defined this third mental element as follows:

(c) RECKLESSNESS. 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 his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(c) (capitalization in original).

Evidence supporting the existence of the *mens rea* element of any offense “is to be gathered from all of the circumstances of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats.” *State v. Ferreira*, 69 Wn.App. 465, 468, 850 P.2d 541 (1993) (quoting *State v. Woo Won Choi*, 55 Wn.App. 895, 906, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). The undisputed evidence presented at trial on the “manner and

act of inflicting the wound” was that the defendant struck Ms White once on her left eye with his closed right fist. The defendant had redness and slight swelling on the knuckles of his right hand shortly after the incident and the treating physician specifically testified that this action was consistent with the injuries he saw on Ms White. This same physician testified that the injuries were not consistent with either Ms White falling into a door jamb or the defendant hitting her with the padlock the police found in his pocket at the time of his arrest. Thus, in this case the “manner and act of inflicting the wound” was a single hit to the eye.

In addition, Ms White’s testimony does not reveal that the defendant had leveled any threats toward her on the night in question. Although she claimed that he had been verbally abusive she did not claim that he would injure her. Rather, her undisputed evidence was that just prior to the defendant hitting her she had assaulted him three times. The first was when she slapped him. The second was when she hit him in the chest. The third was when she attempted to kick him in the groin. These facts, in conjunction with a single hit from a fist, do not support a conclusion that the defendant acted in “disregard of such substantial risk” or that his disregard was “a gross deviation from conduct that a reasonable person would exercise in the same situation.” This is not to say that it was “reasonable” or “legally acceptable” for the defendant to follow Ms White out the front door of the apartment and

strike her a single blow to the side of her head, even after she assaulted him three times in a row. Certainly it was not “reasonable” or “legally acceptable.” However, to rise to the level of recklessness, the defendant’s conduct had to be a “gross deviation” from the conduct of a reasonable person and the defendant must have disregarded a “substantial risk” that the injury would occur, not merely a “risk” that the resultant injury would happen.

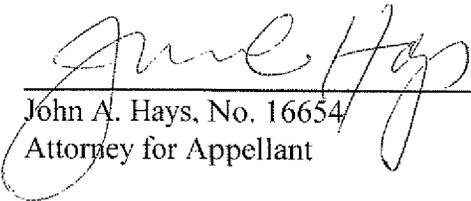
Had the defendant struck Ms White with a weapon or object, or had he hit her more than once in the same area with his fist, then that conduct might rise to the level of a “gross deviation” and a disregard of a “substantial risk.” However, neither of these facts was present. Thus, to find recklessness in the facts of this case the trial court simply conflated the separate element of recklessness into the element of “substantial bodily injury” and used the latter as *ipso facto* proof of the former. This approach had the effect of eliminating the element of recklessness under circumstances in which it was not proven. Thus, the trial court in this case erred when it found the element of recklessness and when it found the defendant guilty of second degree assault. As a result, this court should vacate the defendant’s conviction and remand for entry of judgment on the lesser crime of fourth degree assault.

CONCLUSION

Substantial evidence does not support the element of recklessness in this case. As a result this court should vacate the defendant's conviction and remand for entry of judgment on the lesser crime of fourth degree assault.

DATED this 14th day of January, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

RCW 9A.08.010(1) General Requirements of Culpability

(1) Kinds of Culpability Defined.

(a) **INTENT.** A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) **KNOWLEDGE.** A person knows or acts knowingly or with knowledge when:

(i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

(c) **RECKLESSNESS.** A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) **CRIMINAL NEGLIGENCE.** A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.36.021

Assault in the second degree.

(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) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 47966-4-II

vs.

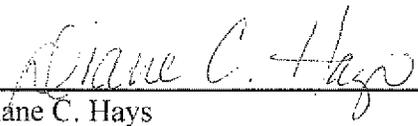
**AFFIRMATION
OF SERVICE**

JEROME BEECHUM,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Ms Katherine Svoboda
Grays Harbor County Prosecuting Attorney
102 West Broadway Ave., Suite 102
Monteseno, WA 98563
ksvoboda@co.grays-harbor.wa.us
2. Jerome Beechum, No.847431
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

Dated this January 14, 2016, at Longview, WA.



Diane C. Hays

HAYS LAW OFFICE

January 14, 2016 - 3:11 PM

Transmittal Letter

Document Uploaded: 4-479664-Appellant's Brief.pdf

Case Name: State v. Jerome Beechum

Court of Appeals Case Number: 47966-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Diane C Hays - Email: jahayslaw@comcast.net

A copy of this document has been emailed to the following addresses:

ksvoboda@co.grays-harbor.wa.us