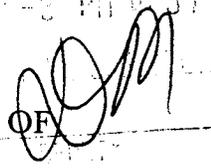


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NO. 32112-2-II

IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON, DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

JAMES DOUGLAS OHLSON,

Appellant.

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APPELLANT'S BRIEF

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MICHELLE BACON ADAMS  
WSBA #25200  
Attorney for Appellant

Law Offices of CRAWFORD,  
McGILLIARD, PETERSON,  
YELISH and DIXON  
623 Dwight Street  
Port Orchard, WA 98366-4693  
(360) 337-7000

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in admitting hearsay testimony of D.L. under the excited utterance exception.
2. The admission of statements made by D.L. violated the Confrontation Clause of the Sixth Amendment of the United States Constitution.
3. The record contains insufficient evidence to support guilty findings on the charges.
4. The comments made by both the prosecutor and trial court judge on Mr. Ohlson's custody status prevented Mr. Ohlson from receiving a fair and impartial trial.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does a trial court abuse discretion by allowing hearsay testimony under the excited utterance exception when the declarant did not testify at trial and the circumstances at the time the statements were made do not support a finding that the declarant was under the effect of a startling event at the time the statements were made? (Assignment of Error No. 1)
2. Does a violation of the Confrontation Clause found in the Sixth Amendment of the United States Constitution occur when statements made by a declarant who did not testify at trial were admitted into evidence. (Assignment of Error No. 2)

3. Was insufficient evidence presented to support convictions of Assault in the Second Degree? (Assignment of Error No. 3)

4. Was Mr. Ohlson's right to a fair and impartial trial violated when the prosecutor questioned Mr. Ohlson about his time in jail and the trial court judge commented on Mr. Ohlson's custodial status? (Assignment of Error No. 4)

### **III. STATEMENT OF THE CASE**

Mr. Ohlson was charged by an Amended Information of one count of malicious harassment and two counts of assault in the second degree. (RP 2) Following jury trial, Mr. Ohlson was found not guilty of the charge of malicious harassment and guilty of the two counts of assault in the second degree. (RP 212) (CP 1)

The first witness presented at trial was L.F.. (RP 61) L.F. testified as follows. On the afternoon of April 16, 2004 L.F. was waiting outside of Lions Field with a friend for a ride home. (RP 62-63) L.F. waited with a friend named D.L. (RP 63.85) L.F. reported observing Mr. Ohlson driving towards her in his car. (RP 66) L.F. contacted law enforcement on her cellular phone to report the incident. (RP 69) The tape recording of the 911 call was played for the jury. (RP 70)

Officer Fatt was the second witness called by the prosecution. (RP 71-72) Officer Fatt accompanied Officer Davis to Mr. Ohlson's residence. (RP 74) Officer Fatt spoke with Mr. Ohlson to investigate the

reported malicious harassment. (RP 73, 76) Officer Fatt woke up Mr. Ohlson in order to speak with him. (RP 76) During that conversation Mr. Ohlson reported having problems with some individuals on Lebo Boulevard. (RP 76)

Officer Davis was next to testify. (RP 79) Officer Davis contacted Mr. Ohlson along with Officer Fatt. (RP 81) According to Officer Davis, Mr. Ohlson stated that he repeatedly drove past the two individuals multiple times. (RP 85) During that conversation, Mr. Ohlson estimated that at one point his vehicle was five feet from D.L.. (RP 85)

Officer Crystal Gray next testified for the prosecution. (RP 89) Officer Gray contacted L.F. and D.L.. (RP 90) Officer Gray reported that L.F. and D.L. appeared to be upset and shaken up. (RP 91) Officer Gray further testified that L.F. was shaking. (RP 91) She had a conversation with L.F. and D.L.. (RP 91) During that conversation, L.F. and D.L. reported what had occurred. (RP 91) The prosecution solicited testimony from Officer Gray regarding the statements made by both L.F. and D.L.. (RP 91-92) Defense counsel objected on hearsay grounds. (RP 91-92). The trial court allowed the admission of the statements under the excited utterance exception to the hearsay rule. (RP 92) The prosecution inquired of the Officer as to the statements of both individuals. (RP 91-92) Officer Gray reported comments attributed to both L.F. and D.L.. (RP 92)

Robert Klose was the final witness testifying for the prosecution. (RP 107-8) At the time of the incident Mr. Klose was on his front deck about one hundred feet away from where L.F. and D.L. were waiting. (RP 111-112) Mr. Klose estimated that L.F. and D.L. were in their early twenties. (RP 111) Mr. Klose testified as to watching a vehicle go on and then off the sidewalk near L.F. and D.L.. (RP 112) The swerve onto the sidewalk was quick. (RP 113)

Mr. Ohlson testified as well. (RP 119) Mr. Ohlson was struggling with a drug problem and seeking to get high prior to this event. (RP 120) As Mr. Ohlson was angry that day. (RP 122) Mr. Ohlson testified that he flipped off L.F. and D.L.. (RP 122) Mr. Ohlson saw L.F. and D.L. flip him off in return. (RP 122) Mr. Ohlson also drove by L.F. and D.L. multiple times. (RP 124) As he turned his car around, one of his tires bumped up on the curb. (RP 124) Mr. Ohlson testified that he did not have any intentions as he drove on the sidewalk. (RP 124) On further questioning, Mr. Ohlson stated that he had no intentions and was just angry and lost control of himself because he was mad and feeling guilty. (RP 128) Mr. Ohlson also described his struggle with drugs. (RP 127)

Q: Are you still struggling with stopping to use – trying to stop using drugs?

A: Well, not since I have been in jail, no, but...

Q: Thank you, Mr. Ohlson  
(RP 127)

The prosecution asked Mr. Ohlson about his time in jail.

Q: So when you have been, I guess, probably sitting around from that point of time on, what are the types of things that you think about? Has this been on your mind a lot?

A: It's been weighing pretty heavy, yeah.

Q: It's been kind of dominating your thoughts while you were in custody?

A: Yeah

(RP 133)

The trial court commented on Mr. Ohlson's custody status in front of the jury. (RP 210). As the time passed 4:30 in the afternoon, Judge Spearman spoke with the jury about either continuing their deliberations or returning in the morning. (RP 210-211) Judge Spearman informed the jury that Mr. Ohlson was being held in the jail.

There's one provisional problem – I'm going to allow you to keep deliberation – but here's the issue we're trying to resolve right now, as I deal with other people and other institutions, the jail. We're trying to make sure that if you reach a verdict, so you don't have to come back tomorrow, we can have the defendant, since you have heard in testimony he is in custody, whether or not he can be brought over after 4:30.

(RP 210-211)

#### **IV. ARGUMENT**

##### **A. DOES A TRIAL COURT ABUSE DISCRETION BY ALLOWING HEARSAY TESTIMONY UNDER THE EXCITED UTTERANCE EXCEPTION WHEN THE DECLARANT DID NOT TESTIFY AT TRIAL AND THE**

**CIRCUMSTANCES AT THE TIME THE STATEMENTS WERE MADE DO NOT SUPPORT A FINDING THAT THE DECLARANT WAS UNDER THE EFFECT OF A STARTLING EVENT AT THE TIME THE STATEMENTS WERE MADE?**

Hearsay is defined as an out of court statement offered into evidence to prove the truth of the matter asserted. *ER 801(c)*. Hearsay is generally inadmissible. *ER 802* A statement made out of court is admissible as an excited utterance under a three part test. First, a startling event must have occurred. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Secondly, the statement must relate to a startling event or condition, *ER 803(a)(2)*; *State v. Williamson*, 100 Wn.App. 248, 257-56, 996 P.2d 1097 (2000); *State v. Briscoeray*, 95 Wn.App. 167, 173, 974 P.2d 912 (1999). Thirdly, the statement must be made while the declarant was under the influence of the startling event. *Id.* The standard of review for challenging the court's admission of a statement as an excited utterance is abuse of discretion. *State v. Woods*, 143 Wash 2d 561, 594, 23 P.3d 1046 (2001); *State v. Young*, 99 P.3d 1244 (2004)

In the case at hand, the court allowed into evidence the conversation Officer Gray had with D.L. over the objection of the defendant. (RP 91-92) D.L. did not testify at trial. Officer Gray testified as what both L.F. and D.L. told her. (RP 92-93) Officer Gray used the word "they" to convey what both L.F. and D.L. told her. (RP 92-93) The court's decision to allow Officer Gray testify as to what L.F. and D.L. told her was an abuse of discretion. In

this case, there was insufficient evidence presented to support the admissibility of the statements as an excited utterance.

The first test for admissibility of a statement as an excited utterance was met in this case as to the statement of L.F.. According to L.F., she felt that Mr. Ohlson was driving toward her on the sidewalk. (RP 66-67). However, no testimony was provided directly from D.L. to indicate that a startling event occurred from his perspective.

The third test for admissibility of D.L.'s statements is not met in this case. There was no evidence presented indicating that D.L. was under the influence of the startling event at the time statements were made. Officer Gray testified as to the demeanor of L.F.. Officer Gray testified that L.F. was shaking. The only reference to D.L.'s demeanor was a reference to both individuals in general terms. "So they were pretty shaken up." (RP 91)

Furthermore, Officer Gray did not directly attribute any statements to D.L.. Officer Gray testified as to what both D.L. and L.F. told her in general terms. It is not possible to determine exactly what D.L. told Officer Gray from the testimony provided.

The evidence did not support a conclusion that D.L. was under the influence of the event at the time the statement was made. D.L. did not testify as to his condition at the time the statements were made. There was insufficient evidence of D.L.'s demeanor presented to support the admissibility of the statements as an excited utterance. The evidence does

not clearly indicate that D.L. was under the influence at the time the statements were made. Without such evidence, the decision to admit the statements attributed to D.L. was an abuse of discretion.

**B. DOES A VIOLATION OF THE CONFRONTATION CLAUSE FOUND IN THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION OCCUR WHEN STATEMENTS WERE ADMITTED INTO EVIDENCE AND THE DECLARANT DID NOT TESTIFY AT TRIAL?**

Even if the court determines that D.L.'s statements were admissible as excited utterances, the court must also determine if a violation of the confrontation clause occurred in this case. A violation of the confrontation clause may occur even if the statement is admissible under a hearsay exception. *California v. Green*, 399 U.S. 149, 155-156, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970) The Sixth Amendment of the Constitution provides in relevant part; "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." *U.S. Const. amend. VI* Under the case of *Washington v. Crawford*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.ed2d 177 (2004), admission of testimonial statements that are not subject to cross examination by the defense is a violation of the Sixth Amendment Confrontation Clause. An exception to this rule occurs in the event the witness was unavailable at trial and the defense had an opportunity to question the witness prior to trial. *State v. Powers*, 99 P.3d 1262 (2004) WL 2436373 (Wash.App. Div.2) quoting *Washington v. Crawford*, 541 U.S. at —, 124 S.Ct. at 136

Under the case of *Washington v. Crawford*, supra, testimonial statements include pretrial statements made by the declarant who had a reasonable expectation that the statements would be used in a prosecution. *Washington v. Crawford*, supra, See also *State v Powers*, 99 P.3d at 1263

The case of *Washington v. Crawford*, supra, changed the court's analysis in determining the appropriateness of admitting statements. The analysis has shifted from determining whether or not the statements fit within an exception to the hearsay rule to determining if the statements were testimonial in nature. Subsequent to the *Washington v. Crawford*, supra, case, if the court determines that the statements were testimonial in nature, the declarant does not testify, and no prior opportunity for cross examination of the declarant was provided, the statements should not be admitted. *Washington v. Crawford*, supra.

In the case of *State v. Powers*, 99 P.3d 1262 (2004), the court held that the admission of a 911 tape was a violation of the Sixth Amendment Confrontation Clause. In that case witness, T.P., made the call into 911 but did not testify at trial. The court found that 911 call made was not a call for help but rather made to report the defendant's behavior. *State v. Powers*, 99 P.3d at 1266. The 911 call was in a question and answer format. *Id.* The court held that the 911 call under these circumstances was testimonial in nature. *Id.* The court found the admission of the 911 tape created a

violation of the Confrontation Clause and reversed the conviction. *State v. Powers*, 99 P.3d at 2266-7.

The case of *State v. Orndoff*, 122 Wn.App. 781, 95 P.3d 406 (2004) also provide some insight into the application of *Washington v. Crawford*, supra. In the *Orndoff* case only one of the two victims testified at trial. The trial court allowed the victim, Mr. Norby, to testify as to statements made by the other victim, Ms. Coble. Ms. Coble made the statements in controversy directly to Mr. Norby during the event. These statements related to observations made by Ms. Coble, Ms. Coble's attempt to contact 911, and Ms. Coble's demeanor. Ms. Coble did not testify at trial. The court held that Ms. Coble's statements were not testimonial in nature. The court found that Ms. Coble had no reasonable expectation that the statements would be used prosecutorially. In furtherance of the position the statements were not testimonial in nature, the court noted that the statements were not made in response to police questioning. *State v. Orndoff*, 122 Wn. App. at 784

The admission of D.L.'s statements in this case created a violation of the Sixth Amendment's Confrontation Clause. The statements of D.L. were testimonial in nature. D.L. did not testify at trial nor was any record made indicating that D.L. was unavailable. Consequently, no exception to the Confrontation Clause exists.

The statements attributed to D.L. are clearly testimonial in nature. D.L. spoke to Officer Gray. (RP 90-93) Officer Gray was on duty when she

questioned D.L.. (RP 89-90) Officer Gray arrived at the scene in the patrol car using patrol lights and sirens. (RP 90) Officer Gray had a conversation with D.L. regarding what had transpired at the scene. (RP 91-92) D.L. must have had a reasonable expectation that the statements made to Officer Gray would be used in a prosecution. Mr. Ohlson did not have an opportunity to cross-exam D.L. Even if the court determines that the statements from D.L. were admissible as an excited utterance, the statements do not meet the requirements of the Confrontation Clause. Under the case of *Washington v. Crawford*, supra, the statements attributed to D.L. should not have been admitted. In the absence of D.L.'s testimony at trial, the admission of D.L.'s statements created a violation of Mr. Ohlson's Sixth Amendment right to confrontation.

This case is similar to the case of *State v. Powers*, supra. The conversation between Officer Gray and D.L. was similar to a 911 call. D.L. reported what had happened to law enforcement. (RP 91-93) Mr. Ohlson was not in the area at the time Officer Gray had the conversation with D.L. as Mr. Ohlson was home at that time. (RP 73-76) D.L.'s statements to Officer Gray could not be construed as a cry for help. As in the case of *State v. Powers*, supra, the statements made by D.L. were testimonial in nature and the admission of those statements violated Mr. Ohlson's Sixth Amendment rights.

This case is distinguishable from the facts in the case of *State v. Orndoff*, supra. In the *Orndoff* case the declarations of the nontestifying witness were found not to be testimonial in nature. The statements of controversy in the *Orndoff* case were not made to law enforcement. The statements were made to another victim of the incident at the time the incident was occurring. In contrast, the facts of the case at hand are vastly different. Here, the statements were made to a law enforcement officer. Additionally, the statements were made after the incident had occurred. D.L.'s declarations are unquestionably testimonial in nature. The admission of Mr. Litt's statements without his appearance at trial and without the opportunity to cross-exam D.L.. In violation of Mr. Ohlson's Sixth Amendment right.

**C. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT CONVICTIONS OF ASSAULT IN THE SECOND DEGREE.**

Evidence is sufficient to support a conviction if when the evidence is viewed in the light most favorable to the prosecution, any rational trial of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992) For an assault conviction, the State must prove that the defendant intended to create a reasonable apprehension of harm. *State v. Krup*, 36 Wash.App. 454, 458, 676 P.2d 507 (1984) A defendant must actually intend to cause apprehension, negligently, recklessly, or illegally using a vehicle causing

another to be in fear of being struck is not enough. **Wayne R. LaFave & Austin Scott, Jr.**, Criminal Law, section 82, at 611 (1972) See also *State v. Byrd*, 125 Wash.2d 707, 887 P.2d 396 (1995)

Assault in Second Degree is defined in **RCW 9A.36.021**. That statute reads as follows:

- (1) A person is guilty of Assault in the Second Degree if he under circumstances not admitting to Assault in the First Degree.
- (c) Assaults another with a deadly weapon.

The Amended Information charges Assault in that manner. Assault in the first degree occurs when a person acts with intent to inflict great bodily harm, assaults another with a deadly weapon or by force or means that is likely to produce great bodily harm. **RCW 9A.36.011(1)** A deadly weapon is defined as a device which is capable of causing death or substantial bodily harm. **RCW 9A.04.110(6)** The common law definition of assault includes three alternative means including battery, attempted battery or creating apprehension of bodily harm. *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320, 323 (1994)

In the event an assault is committed by putting someone in apprehension of bodily harm, the act must be done with the intent to create the apprehension of harm. *State v. Fraser*, 81 Wn.2d 628, 631, 503 P.2d 1073, 1076 (1972) The conduct of the defendant must include some physical action which creates a reasonable apprehension that physical injury

is imminent. *State v. Maurer*, 34 Wash.App. 573, 580, 663 P.2d 152, 156 (1983) The victim must be in actual fear of bodily harm. *State v. Eastmond*, 129 Wn.2d 497, 503-04, 919 P.2d 577, 579-80 (1996)

Even when examining the evidence in the light most favorable to the State, insufficient evidence exists for finding that an Assault in the Second Degree was committed against D.L.. Specifically, no testimony was provided by D.L. himself. Consequently, the record does not contain any statements from D.L. directly suggesting he was in fear of bodily harm. The testimony presented by L.F. does not suggest that D.L. must have been in fear of bodily harm. L.F. testified that she moved out of the way of Mr. Ohlson's car. (RP 66-67) Mr. Klose testified that Mr. Ohlson swerved onto the sidewalk quickly. (RP 112-113) Mr. Ohlson testified that one of his tires bumped onto the curb. (RP 124) Mr. Ohlson further testified that he did not have any intentions as he drove on the sidewalk. (RP 124) Mr. Ohlson had no intention to harm either D.L. or L.F.. Furthermore, the record is devoid of any indication that D.L. was in actual apprehension of bodily harm. Consequently, the record lacks any evidence sufficient to conclude that an assault occurred against D.L.. When examining the evidence in the light most favorable to the prosecution, the evidence fails to be sufficient to base a conviction for the charge of Assault in the Second Degree against D.L.

Additionally the record is lacking sufficient evidence suggesting that Mr. Ohlson acted with intent to commit what amounts to assault in the second degree. Mr. Ohlson may have acted negligently. However, negligence is not sufficient for establishing the intent element required. See *State v. Byrd*, 125 Wash.2d 707, 887 P.2d 396 (1995)

In this case, insufficient evidence was presented to find that Mr. Ohlson committed the crimes of assault in the second degree.

**D. THE COMMENTS ON MR. OHLSON'S CUSTODY STATUS PREVENTED MR. OHLSON FROM RECEIVING A FAIR TRIAL.**

A defendant is entitled to appear at trial to be free of all bonds. *State v. Finch*, 137 Wash 2d 792. 842 P.2d 967 (1999) Restraints are disfavored because they may abridge constitutional rights, including the presumption of innocence. *State v. Hartzog*, 96 Wash.2d 383, 398, 635 P.2d 694 (1981)

The right to a fair and impartial trial is guaranteed by the United States Constitution in the Fourth and Fourteenth Amendments and the Washington State Constitution in article 1, sections 3 and 22. The defendant's right to a fair and impartial trial may be violated by a reference to the custody status of the defendant. *State v. Mullin-Coston*, 115 Wn.App. 679. 64 P.3d 40 (2003). Other jurisdictions have also held that such a reference may violate the right to a fair and impartial trial. See *Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991). Additionally, the comments made by the prosecutor rise to the level of prosecutorial

misconduct. Prosecutorial misconduct occurs when the action of the prosecutor is improper and prejudicial. *State v. Davis*, 141 Wash.2d 798, 840, 10 P.3d 977 (2000); *State v. Stenson*, 132 Wash.2d 668, 718, 940 P.2d 1239 (1997).

In the case of *State v. Finch*, supra, the defendant was shackled throughout the trial. No evidence suggested that he posed a significant risk or was an escape risk. The appellate court found that shackling the defendant was improper.

Of note is the case of *State v. Mullin-Coston*, supra. The court in that case mentioned in footnote eight of the opinion the need for the State to give the trial court the opportunity to weigh the probative versus prejudicial nature of information regarding the defendant's custody status before such the defendant's custody status is mentioned before the jury. *State v. Mullin-Costin*, 115 Wn.App. at 694

In the case at hand, the prosecutor did not provide the court with the opportunity to weigh the prejudicial versus probative value of the Mr. Ohlson's custodial status before that information was presented to a jury. The procedure suggested in the case of *State v. Mullin-Coston*, supra, was not followed.

Furthermore, Mr. Ohlson's custodial status had no probative value in this case. The prosecutor essentially asked Mr. Ohlson if he had been thinking about the event while he had been in jail. (RP 133) That line of

questioning had no relevance on the determination of Mr. Ohlson's guilt to the charge. Presumably, the only purpose to that line of questioning was to emphasize to the jury Mr. Ohlson's custodial status. These actions arise to the level of prosecutorial misconduct.

In this case, the prosecutor's conduct was both improper and prejudicial. The remarks were improper as discussed above and also prejudicial. The reference to Mr. Ohlson's in-custody status interfered with Mr. Ohlson's right to a fair and impartial trial. With those remarks, the jury were repeatedly reminded that Mr. Ohlson was in custody at the time of trial. This understanding may have interfered with the jury's ability to presume Mr. Ohlson's innocent during the trial.

Furthermore, the trial court judge discussed Mr. Ohlson's custodial status with the jury. (RP 210-211) These comments further interfered with Mr. Ohlson's right to a fair and impartial trial. The comment was made while the jury was in the deliberation phase of the trial. (RP 210-211) By reminding the jury that Mr. Ohlson was in custody, Mr. Ohlson's right to a fair and impartial trial was prejudiced. The jury was reminded once again that Mr. Ohlson was in custody. This reminder interfered with the presumption of innocence.

V. CONCLUSION

For the reasons cited above, Mr. Ohlson respectfully requests the court to reverse the convictions for Assault in the Second Degree entered in this matter.

Respectfully submitted this 3 day of February, 2004.

A handwritten signature in black ink, appearing to read "Michelle Bacon Adams", written over a horizontal line.

MICHELLE BACON ADAMS

WSBA #25200

Attorney for Appellant

**DECLARATION OF MAILING**

I, Michelle Bacon Adams, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered to:

Clerk of the Court  
COURT OF APPEALS, DIVISION II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

DATED this 3rd day of February, 2005, at Port Orchard, WA.

  
MICHELLE BACON ADAMS

**DECLARATION OF MAILING**

I, Jeanne L. Hoskinson, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Brief of Appellant in the above-captioned case hand-delivered or mailed as follows:

**Copy of Brief of Appellant Hand-Delivered to:**

Mr. Randall Sutton  
Kitsap County Prosecuting Attorney's Office  
614 Division Street, MS-35  
Port Orchard, WA 98366

**Copy of Brief of Appellant Hand-Delivered to:**

James D. Ohlson  
c/o Kitsap County Jail  
614 Division Street, MS-33  
Port Orchard, WA 98366

FILED  
COUNTY CLERK  
FEB 03 2005  
PORT ORCHARD, WA  
98366

DATED this 3rd day of February, 2005, at Port Orchard, WA.

*Jeanne L. Hoskinson*  
JEANNE L. HOSKINSON  
Legal Assistant

West's RCWA 9A.04.110

**C**

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.04. PRELIMINARY Article (Refs & Annos)

**→ 9A.04.110. Definitions**

In this title unless a different meaning plainly is required:

- (1) "Acted" includes, where relevant, omitted to act;
- (2) "Actor" includes, where relevant, a person failing to act;
- (3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;
- (4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;  
  
(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;
- (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;
- (5) "Building", in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;
- (6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;
- (7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;
- (8) "Government" includes any branch, subdivision, or agency of the government of this state and any county, city, district, or other local governmental unit;
- (9) "Governmental function" includes any activity which a public servant is legally authorized or permitted to undertake on behalf of a government;
- (10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";
- (11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;

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(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty;

(13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

(14) "Omission" means a failure to act;

(15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

(16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

(18) "Place of work" includes but is not limited to all the lands and other real property of a farm or ranch in the case of an actor who owns, operates, or is employed to work on such a farm or ranch;

(19) "Prison" means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest, including but not limited to any state correctional institution or any county or city jail;

(20) "Prisoner" includes any person held in custody under process of law, or under lawful arrest;

(21) "Property" means anything of value, whether tangible or intangible, real or personal;

(22) "Public servant" means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function;

(23) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto;

(24) "Statute" means the Constitution or an act of the legislature or initiative or referendum of this state;

(25) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or

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defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;

(26) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(27) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

CREDIT(S)

[1988 c 158 § 1; 1987 c 324 § 1; 1986 c 257 § 3; 1975 1st ex.s. c 260 § 9A.04.110.]

#### HISTORICAL AND STATUTORY NOTES

**Effective date--1988 c 158:** "This act shall take effect July 1, 1988." [1988 c 158 § 4.]

**Effective date--1987 c 324:** "Section 3 of this act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately. The remainder of this act shall take effect July 1, 1988." [1987 c 324 § 4.]

**Effective date--1986 c 257 § § 3-10:** "Sections 3 through 10 of this act shall take effect on July 1, 1988." [1987 c 324 § 3; 1986 c 257 § 12.]

**Severability--1986 c 257:** See note following RCW 9A.56.010.

#### Source:

Laws 1909, ch. 249, § 51.

RRS § 2303.

Former § 9.01.010.

#### CROSS REFERENCES

Animal cruelty laws, substantial bodily harm as defined in this section, see § 16.52.011.

Bodily harm, admissibility of testimony by child under the age of ten describing act of physical abuse, see § 9A.44.120.

Computation of time, see § 1.12.040.

Criminally insane persons, definitions, "nonfatal injuries" construed consistently with "bodily injury" under this section, see § 10.77.010.

Deadly weapons,

Landlords, threats against tenants, termination of rental agreement, see § 59.18.354.

Tenants, use by on rental premises, see § § 59.18.130, 59.18.352.

West's RCWA 9A.36.011

**C**West's Revised Code of Washington Annotated CurrentnessTitle 9A. Washington Criminal Code (Refs & Annos)Chapter 9A.36. ASSAULT--Physical Harm**→9A.36.011. Assault in the first degree**

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or

(b) Administers, exposes, or transmits to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or

(c) Assaults another and inflicts great bodily harm.

(2) Assault in the first degree is a class A felony.

CREDIT(S)

[1997 c 196 § 1; 1986 c 257 § 4.]

## HISTORICAL AND STATUTORY NOTES

**Severability--1986 c 257:** See note following RCW 9A.56.010.**Effective date--1986 c 257 § § 3-10:** See note following RCW 9A.04.110.

Laws 1997, ch. 196, § 1, in subd. (1)(b), inserted ", exposes, or transmits"; and inserted ", the human immunodeficiency virus as defined in chapter 70.24.RCW,".

**Source:**

Laws 1854, pp. 79, 80, § § 24, 26, 28.

Laws 1869, p. 202, § § 24 to 30.

Laws 1873, p. 185, § § 28 to 34.

Code 1881, § § 103, 801 to 809.

Laws 1909, ch. 249, § § 155 to 157, 161.

RRS § § 2407 to 2409, 2413.

Former § § 9.11.010, 9.65.010 to 9.65.030.

Laws 1975, 1st Ex.Sess., ch. 260, § 9A.36.010.

Former § 9A.36.010.

## CROSS REFERENCES

Aiming firearm at human being, see § 9.41.230."Crime of violence" defined as including first degree assault, see § 9.41.010.Foreign protection orders, assault not constituting a violation under this section, penalties, see § 26.52.070.

West's RCWA 9A.36.021

**C**

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

Chapter 9A.36. ASSAULT--Physical Harm

**→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.

(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.

CREDIT(S)

[2003 c 53 § 64, eff. July 1, 2004; 2001 2nd sp.s. c 12 § 355; 1997 c 196 § 2. Prior: 1988 c 266 § 2; 1988 c 206 § 916; 1988 c 158 § 2; 1987 c 324 § 2; 1986 c 257 § 5.]

**HISTORICAL AND STATUTORY NOTES**

**Intent--Effective date--2003 c 53:** See notes following RCW 2.48.180.

**Intent--Severability--Effective dates--2001 2nd sp.s. c 12:** See notes following RCW 71.09.250.

**Application--2001 2nd sp.s. c 12 § § 301-363:** See note following RCW 9.94A.030.

**Effective date--1988 c 266:** "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect July 1, 1988." [1988 c 266 § 3.]

**Effective date--1988 c 206 § § 916, 917:** "Sections 916 and 917 of this act shall take effect July 1, 1988." [1988 c 206 § 922.]

**Severability--1988 c 206:** See RCW 70.24.900.

