

## You Win Some You Lose Some

By: Wayne C. Fricke; May 2007

After a year-and-a-half wait, the Washington Supreme Court finally ruled on the case of State v. Smith, No. 76433-6, which addressed the definition of assault and, more specifically, whether the definition should be included in the “to convict” instruction as an element. The three Washington State appellate courts had reached different decisions, with Division II ruling in Smith that it was not required to be set forth in the “to convict” instruction.

In a five-to-four decision written by Justice Alexander, the Supreme Court agreed with the Court of Appeals and has henceforth resolved the conflict between the appellate courts. In doing so, the court essentially overruled State v. Coop, 50 Wn.App. 277 (1988), State v. Bland, 75 Wn.App. 345 (1993), State v. Rivas, 97 Wn.App. 349 (1999) and State v. Nicholson, 119 Wn.App. 855 (2003). Eventually, the court concluded that the definition of assault in the common law created a “means within means” situation, which is not required to be proven as an element to assault.

As the dissent properly noted, the majority totally disregarded the extensive law that existed in the Supreme Court and the Court of Appeals leading up to this case. As it noted, the purpose of a common law definition goes beyond providing the details of the elements of assault, but is instead a fundamental definition that identifies the very act itself. The four justices noted that the majority presented no authority that foreclosed the application of alternative means doctrine to common law alternatives.

Unfortunately, a woman who should have been released will spend a total of nine years and one day in prison because of her conviction of second degree assault with a firearm enhancement. The trial court had granted an exceptional sentence downward on the underlying charge and indicated it would depart further downward, but the statute prevented a departure on the firearm enhancements. The Supreme Court, in upholding the conviction, reversed many years of doctrine from Division I and Division III to achieve a result not supported by the law.

End

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