

A05-459

STATE OF MINNESOTA

IN SUPREME COURT

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State of Minnesota,

Respondent,

vs.

Michael Neal Vance,

Appellant.

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**APPELLANT'S BRIEF**

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STATE OF MINNESOTA

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State of Minnesota,

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**PROCEDURAL HISTORY**

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|-------------------------|---|
| 1. June 19, 2004:       | Date of the offense.  |
| 2. June 23, 2004:       | Complaint filed charging appellant with third-degree assault and third-degree burglary. |
| 3. October 20-25, 2004: | Jury trial before the honorable Judge Edward Lynch.                                     |
| 4. December 6, 2004:    | Sentencing before Judge Lynch.  |
| 5. March 4, 2005:       | Notice of appeal filed.   |
| 6. April 26, 2006:      | The Court of Appeals affirmed Vance's conviction,                                       |
| 7. July 19, 2006        | This Court granted Vance's petition for review  |

## LEGAL ISSUE

- I. **The appellant's assault conviction cannot stand because the district court failed to instruct the jury on the requisite intent element of the offense.**

*Apposite Authority*

Apprendi v. New Jersey, 530 U.S. 466 (2000).

Sullivan v. Louisiana, 508 U.S. 275 (1993).

Screws v. United States, 325 U.S. 91 (1945).

State v. Osborne, 715 N.W.2d 436 (Minn. 2006).

## STATEMENT OF THE CASE

Appellant Michael Vance was charged in Dakota County District Court with one count of third-degree assault in violation of Minn. Stat. § 609.223, and one count of terroristic threats in violation of Minn. Stat. § 609.713.

Mr. Vance was tried before the honorable Judge Edward Lynch. The jury returned a guilty verdict on both counts on October 25, 2004. (10/25 T. 2-4).<sup>1</sup> On December 6, Judge Lynch sentenced Mr. Vance to a term of 24 months. (12/6 T. 13). That sentence represented the presumptive sentence for a third-degree assault, a level four offense, with a criminal history score of four.

Mr. Vance timely appealed. In his appeal he argued: (1) that the district court erred by omitting CRIMJIG 13.01, and thus by failing to define the intent element of assault, (2) that the district court erred by failing to give a reasonable use of force instruction, (3) that Mr. Vance's trial counsel rendered ineffective assistance by failing to object to the instructions on the assault count, and (4) that the evidence supporting the terroristic threats charge was insufficient.

On April 26, 2006, the Court of Appeals affirmed Mr. Vance's conviction in an unpublished opinion. State v. Vance, 2006 Minn. App. Unpub. LEXIS 409 (Minn. Ct. App. April 26, 2006).<sup>2</sup> With respect to the assault count, the Court of Appeals rejected Mr. Vance's instructional claims, but declined to reach the merits of his ineffective

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<sup>1</sup> The trial transcripts for October 19-22 are consecutively paginated; Mr. Vance will refer to those transcripts as "T." The remaining transcripts are separately paginated; Mr. Vance will refer to those transcripts by their date.

<sup>2</sup> A copy of the Court of Appeals opinion is attached as an appendix to this brief.

assistance claim, citing an insufficient record. With respect to the threats count, the Court of Appeals rejected Mr. Vance's insufficiency claim.

Mr. Vance filed a petition for review on the intent element instructional claim and the alternative ineffective assistance of counsel claim. On July 19, 2006, this Court granted Mr. Vance's petition on the jury instruction issue, but denied the petition on the ineffective assistance issue.

## STATEMENT OF THE FACTS

The charges in this case arose out of an altercation between defendant-appellant Michael Vance and C [REDACTED] S [REDACTED] on June 19, 2004. Both Mr. Vance and Ms. S [REDACTED] testified at trial; each gave a different account of the incident.

At the time of the offense, Mr. Vance was living in Ms. S [REDACTED]'s house. (T. 159). Mr. Vance testified that Ms. S [REDACTED] was his girlfriend, but Ms. S [REDACTED] testified that while they had been romantically involved in the past, they were no longer dating. (T. 31, 159, 163-64).

Mr. Vance testified that he came home from work on June 18th to find Ms. S [REDACTED] locked in her bedroom. (T. 139-40). When she finally came out, he realized that she had been smoking meth. (T. 142). Mr. Vance testified that Ms. S [REDACTED] was a habitual and heavy meth user. (T. 162). According to Mr. Vance, when he got home, he and Ms. S [REDACTED] began to argue (as they frequently did) about her drug use. (T. 143-44).

Early on the morning of the 19th, Ms. S [REDACTED] decided that she wanted to go to a friend's house, but Mr. Vance told her that she was not safe to drive. (T. 146-47). They argued, and Ms. S [REDACTED] left out the front door. (T. 148). Mr. Vance testified that he ran after her, and when he got to the front step, he jumped at her. (T. 149-51). She started to stumble at the same time, and he fell on top of her in the front yard. (T. 151-52). Mr. Vance emphasized that he did not intend to hurt Ms. S [REDACTED]: "I didn't mean to hurt my girlfriend." (T. 152).

According to Mr. Vance, he took Ms. S [REDACTED] back inside, but he could tell that she was badly hurt. (T. 153-54). Their friend Bonita Gisch came over, and she took Ms. S [REDACTED] to the hospital. (T. 157-58).

Ms. S [REDACTED] testified that she and Mr. Vance had argued frequently in the past, and that he had previously threatened her and assaulted her. (T. 30-31, 43). She said that she had called the police several times, but she had always let Mr. Vance back in the house because she was afraid of him. (T. 44-45).

Ms. S [REDACTED] testified that she and Mr. Vance were arguing on the morning of the 19th, but she could not remember why they were arguing. (T. 27). According to Ms. S [REDACTED], Mr. Vance backhanded her in the mouth. (T. 28-29). When he went to get some ice for her, she grabbed her purse and went out the front door. (T. 29). She was scared because he had hit her, and so she was running to the neighbors' house to get help. (T. 30).

As she was running away from her house, she turned around to see him lunging off the front steps at her. (T. 29). She testified that she did not remember what happened next. (T. 31-32). The next thing she remembered was standing in the bathroom holding her shoulder; she was in unbearable pain. (T. 32). Mr. Vance grabbed her shoulder and threw her on the bed. (T. 33).

Ms. Gisch arrived and asked what happened. (T. 35, 67-69). Both Ms. S [REDACTED] and Ms. Gisch testified that Mr. Vance initially attempted to prevent Ms. Gisch from seeing Ms. S [REDACTED], but he eventually moved out of the way. (T. 35, 70-72). Ms. Gisch took Ms. S [REDACTED] to the hospital. (T. 36, 73).

At the hospital, Ms. S [REDACTED] was diagnosed with a broken collarbone. (T. 36, 82). She also had lacerations on her back. (T. 37, 82). Ms. S [REDACTED] called the police from the hospital, and they came to her home later and took a statement. (T. 38, 96, 105).

Ms. S [REDACTED] was unable to recount many details of the events surrounding the incident. She could not remember why the argument had started in the first place. (T. 27). She testified that she did not remember that morning, and that she did not “remember much of that day at all.” (T. 28.) She said that that day was “pretty much a blur.” (T. 27-28). Ms. S [REDACTED] admitted that she had previously convicted of possessing meth, but she denied that she was on meth the day of the incident. (T. 28, 49).<sup>3</sup>

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<sup>3</sup> Ms. Gisch testified that there were sheets covering the windows of Ms. S [REDACTED]'s house. (T. 78). Officer Kressley testified that in her experience on the drug task force, she had encountered homes with windows covered by sheets. (T. 112).

## ARGUMENT

### MR. VANCE'S ASSAULT CONVICTION MUST BE REVERSED BECAUSE THE DISTRICT COURT FAILED TO INSTRUCT THE JURY ON THE INTENT ELEMENT OF THE CRIME

This case presents a straightforward legal issue. The district court failed to instruct the jury on an essential element of the charged crime—namely, the intent to injure. The constitutional rights to due process and a trial by jury require that each element of a criminal offense be submitted to the jury and proved beyond a reasonable doubt. Even in the absence of a request, a trial court has a duty to instruct on each element of the charged offense. The failure to instruct on each element is reversible error.

#### A. The Substantive Law of Assault

##### *1. The requisite mental state*

Minnesota law defines assault as:

- (1) An act done with intent to cause fear in another of immediate bodily harm or death; or
- (2) The intentional infliction of or attempt to inflict bodily harm upon another.

Minn. Stat. § 609.02, subd. 10. The statutory definition thus combines two types of assault.<sup>4</sup> The type of assault involved in this case is the second type: the intentional

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<sup>4</sup> Traditionally, the criminal law distinguished between “battery,” an unlawful touching or use of force, and “assault,” an attempted battery or threat of force. See 2 Wayne R. LaFare, Substantive Criminal Law § 16.2 (2d ed. 2003); Black’s Law Dictionary 109, 146 (7th ed. 1999). Minnesota, like many jurisdictions, now uses the term “assault” generically to refer to both assault and battery.

infliction of bodily injury. Compare State v. Hough, 585 N.W.2d 393, 395 (Minn. 1998) (“The type of assault here involved is [the first type].”).

The intent requirement is critical. Assault is not a strict liability offense. Not all uses of force—indeed, not all uses of force producing injury—constitute criminal assault. Justifiable uses of force and accidental injuries do not come within the purview of the criminal prohibition. See 2 Wayne R. LaFare, Substantive Criminal Law § 16.2 (2d ed. 2003). The crime, in other words, has three basic elements: (1) the defendant’s conduct, (2) his mental state, and (3) the harmful result to the victim. Id. The second element, which captures the intent requirement, is the element at issue in this case.

This Court has made clear that criminal intent is an essential element of the crime of assault. In fact, this Court has held that “[a]ssault is a specific intent crime.” State v. Edrozo, 578 N.W.2d 719, 723 (Minn. 1998) (citing State v. Cole, 542 N.W.2d 43, 51 (Minn. 1996)). Specific intent crimes “require[] that the defendant acted with the intention to produce a specific result.” State v. Orsello, 554 N.W.2d 70, 72 (Minn. 1996); see also Minn. Stat. § 609.02, subd. 9(3) (“‘Intentionally’ means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result.”). Thus, to be guilty of the second type of assault—to satisfy the mens rea element of the crime—a defendant must specifically intend to inflict injury.

The intent to inflict bodily harm is an element of the crime.

## 2. *Degrees of assault*

Minnesota law authorizes varying punishments for varying degrees of assault. See Minn. Stat. §§ 609-221 to 609-224. The degrees are defined to a large extent by the degree of injury caused. See Minn. Stat. § 609.02 (defining “bodily harm,” “substantial bodily harm,” and “great bodily harm”).

The varying degrees of assault all require criminal intent. This Court has held that the provisions defining the aggravated forms of assault must be “read together” with the basic definition of assault, which sets forth the requisite intent. State v. Spencer, 216 N.W.2d 131, 136 (1974). Thus, the “intent of the defendant [is] an essential ingredient” for all degrees of assault. Id.

The Court of Appeals has held, however, that the intent element does not vary between the different degrees of assault. “[T]he specific intent to inflict a *degree of harm* is not essential for” the aggravated forms of assault. Johnson v. State, 421 N.W.2d 327, 331 (Minn. Ct. App. 1988) (emphasis added). Under Johnson, a defendant who commits an assault is liable for causing greater injuries even if he does not intend to cause those greater injuries. Cf. Blatz v. Allina Health Sys., 622 N.W.2d 376, 391 (Minn. 2001) (discussing an analogous principle in tort law). But at bottom, to be guilty of assault at all, a defendant must have the foundational requisite intent to injure.<sup>5</sup>

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<sup>5</sup> Of course, in a different type of case, a defendant could also be liable for possessing the alternate culpable mental state—namely the “intent to cause fear in another of immediate bodily harm or death.” Minn. Stat. § 609.02, subd. 10(1); see also Hough, 585 N.W.2d at 395 (discussing the two types of assault). That type of assault, however, was not argued or presented to the jury in this case.

In short, to show that Mr. Vance committed the crime of third-degree assault under Minn. Stat. § 609.223, the state had to prove (1) that he committed an act, (2) with the intent to inflict injury, (3) that resulted in substantial bodily injury.

### *3. Pattern jury instructions*

The substantive principles described above are written into Minnesota's pattern jury instructions. CRIMJIG 13.01 gives the basic definition of assault. Mirroring Minn. Stat. § 609.02, it states: "The statutes of Minnesota provide that whoever does an act with intent to cause fear in another person of immediate bodily harm or death, or intentionally inflicts or attempts to inflict bodily harm upon another, is guilty of a crime." 10 Minnesota Practice, CRIMJIG 13.01 (4th ed. 2005).

Other instructions provide the principles governing the aggravated forms of assault. Mirroring Minn. Stat. § 609.223, CRIMJIG 13.15 and 13.16 define the additional elements needed for third-degree assault.

Just as the statutory provisions of § 609.02 and § 609.223 must be read together in defining the substantive principles of assault, see Spencer, 216 N.W.2d at 136, the pattern instructions must be read together to define the crime properly. The instructions give district judges some flexibility in the manner of instruction. The comment to CRIMJIG 13.01 states: "In cases in which a defendant is charged with a degree of an assault, the court may wish to incorporate this instruction directly into the first element of the appropriate elements instruction as a further definition of that element." 10 Minnesota Practice, CRIMJIG 13.01 cmt. (4th ed. 2005). Thus, for third-degree assault, the

definition of assault found in 13.01 may either be given separately or may be incorporated into 13.16.

## **B. The Trial Court's Omission**

The trial court below failed to give CRIMJIG 13.01 either as a separate instruction or as an instruction incorporated into 13.16. The jury thus received no instruction defining assault. The only relevant instructions given to the jury were the 13.15 and 13.16 instructions.

The statutes of Minnesota provide that whoever assaults another and inflicts substantial bodily harm is guilty of a crime. The elements of assault in the third degree are: First, the defendant assaulted another person; second, the defendant inflicted substantial bodily harm on another person. Substantial bodily harm means bodily harm that involves a temporary but substantial disfigurement, causes a temporary but substantial loss or impairment of any bodily member or organ, or causes a fracture of any bodily member. It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm but only that the defendant intended to commit the assault. Third, the defendant's took place [sic] on or about June 19, 2004, in Dakota County.

(T. 175). Those instructions thus set forth the principles for the *aggravated form* of assault, but the jury never heard the underlying definition of assault.

As a result, the jury received no instruction on the requisite mental state of the crime. CRIMJIG 13.01 is the only instruction that includes the mens rea element of assault.<sup>6</sup> An essential element of the crime—namely, the intent to inflict bodily harm—was omitted from the jury instructions.

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<sup>6</sup> The State may well marshal boilerplate arguments that trial courts have discretion to formulate jury instructions and that instructions must be read as a whole. But a trial court's discretion to formulate instructions does not include the discretion to omit essential elements of the offense. And the instructions, even taken as a whole, simply fail to define the essential mens rea element of assault.

The only mention of intent came in the “Johnson instruction,” which was added to CRIMJIG 13.16 after the Court of Appeals’ decision in Johnson, 421 N.W.2d 327, described above. See State v. Lindsey, 654 N.W.2d 718, 723 (Minn. Ct. App. 2002) (“The language in the pattern jury instruction that provides that the state does not have to prove intentional infliction of great bodily harm is based on Johnson . . .”). The Johnson instruction states:

It is not necessary for the State to prove that the defendant intended to inflict substantial bodily harm but only that the defendant intended to commit the assault.

The Johnson instruction reflects the substantive principle that a defendant need not intend the *degree* of harm caused. But the Johnson instruction is no substitute for the definition of assault itself. Indeed, its language describing the “inten[t] to commit the assault” is only sensible when read in conjunction with the definition given in 13.01. Without that underlying definition, the Johnson instruction is both circular<sup>7</sup> and hopelessly confusing.<sup>8</sup>

In order to prove the crime charged against Mr. Vance, that state had to prove that he intended to inflict bodily injury. It was not enough to prove that he intended to contact

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<sup>7</sup> Because of the circularity, “intent to commit assault” cannot substitute as a replacement for a definition of the mental state element any more than “intent to commit first-degree murder” could substitute for a definition of premeditation. Cf. State v. Kuhna, 622 N.W.2d 552, 557-59 (Minn. 2001) (finding error where the trial court failed to instruct on the elements of the substantive crime underlying a conspiracy count).

<sup>8</sup> Even when properly combined with 13.01, the Johnson instruction is less than pellucid. See Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C.L. Rev. 77 (1988) (describing how overly technical jury instructions are often indecipherable to lay jurors). The Johnson instruction would be better if worded more simply and directly, along the lines of: “Although the state must prove that the defendant intended to inflict bodily injury, it need not prove that the defendant intended to inflict the degree of injury that actually resulted.”

or strike or tackle Ms. S [REDACTED]—the intent to inflict bodily injury is what makes the conduct culpable. That culpable mental state is what separates criminal assault from accidental, justifiable, and otherwise non-criminal contact. That culpable mental state is an essential element of the offense. That culpable mental state was omitted from the trial court’s instructions to the jury.

The omission of the intent element violated Mr. Vance’s state and federal constitutional rights to trial by jury and due process of law. “Taken together, these rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’” Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)).

**C. Waiver Under Osborne**

Neither the district court nor the parties noticed the omission at trial; Mr. Vance’s trial counsel did not object to the court’s instructions. Before the Court of Appeals, Mr. Vance argued that he was entitled to relief even under the plain error standard.

This Court’s recent decision in State v. Osborne, 715 N.W.2d 436 (Minn. June 8, 2006), however, suggests that the forfeiture doctrine (and thus plain error review) may not apply to this case. Osborne involved a claim under Apprendi and Blakely v. Washington, 542 U.S. 296 (2004). At trial, the defendant failed to raise an Apprendi-Blakely objection to the imposition of upward departures. 715 N.W.2d at 442. Nonetheless, this Court held that the defendant had not forfeited the claim.

This Court noted that the defendant could not, in fairness, be expected to predict a new rule of law. *Id.* at 444-45. But at its core, the decision in *Osborne* was based on a recognition that certain fundamental jury trial rights may not be waived by silence. *Id.* at 442-43 (citing Minn. R. Crim. P. 26.01, subd. 1(2)(a)).

The State will argue that Mr. Vance is only entitled to plain error review—it will argue, in other words, that by failing to object, Mr. Vance forfeited his right to have a jury determine the mental state element of the crime. But under *Osborne*, such a waiver is only valid if it is “expressly made and supported by a demonstration that it is knowing, voluntary, and intelligent.” *Id.* at 443. In short, the *Osborne* rule for sentencing factors should apply with equal force to elements of the offense.<sup>9</sup>

Under *Osborne*, Mr. Vance is entitled to relief if the district court’s omission of the intent element was error and the error was not harmless. Those points are subsumed in the next section.

#### **D. Plain Error**

##### *1. A trial court’s duty to instruct*

Even if Mr. Vance is only entitled to plain error review because he failed to object to the district court’s error, he is still entitled to relief.

American law has long recognized that a trial court has a duty to instruct on the elements of the offense even in the absence of a request by counsel. Early American

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<sup>9</sup> At its core, the rule of *Apprendi* and *Blakely* is based on the recognition that there is no substantive difference between “elements” and “sentencing factors.” The Supreme Court had long recognized that elements of the offense must be submitted to the jury and proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). In *Apprendi*, the Supreme Court held that States could not circumvent that rule simply by redefining elements as “sentencing factors.” 530 U.S. at 485-87.

cases held that “the right of the judge to instruct the jury as to the law of the case, is not confined to the giving of such instruction as he may be asked to give.” Stettinius v. United States, 22 F. Cas. 1322, 1331 (C.C.D.C. 1839) (Cranch, C.J.).

And while the common law’s firm contemporaneous objection rule barred appellate consideration of claims not raised at trial, the rule gave way for certain fundamental errors, including the failure to instruct on the elements of the offense. The Supreme Court faced just such a situation in Screws.

It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. But there are exceptions to that rule. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilt which Congress has prescribed.

Screws v. United States, 325 U.S. 91, 107 (1945) (plurality) (citations omitted).

Following Screws, the trial judge’s duty to instruct on the elements of the offense became a matter of hornbook law.

Although, in general, the failure to give an instruction is not error unless a request therefore was made, the pertinent principles of substantive law must always be charged, even if the trial judge must do so on his own initiative. In defining an offense, the trial judge should include every material element  
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4 Wharton, Criminal Procedure § 467 at 19-20 (13th ed. 1989) (citing cases).

The same rule has been incorporated into analyses of jury instructions under modern plain error doctrine.<sup>10</sup> A corollary of a judge’s duty to instruct on each element is

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<sup>10</sup> In order to show error, an appellant must show (1) that there was error, (2) that the error was plain (meaning “clear” or “obvious”), and (3) that the error affected substantial

that “any omission of an element of a crime in the instructions is plain error.” United States v. Gaither, 440 F.2d 262, 264 (D.C. Cir. 1971). Both federal courts<sup>11</sup> and state courts<sup>12</sup> follow the same rule. The failure to instruct on an element of the offense necessarily satisfies (at least) the first two prongs of the Olano test.

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rights. Olano v. United States, 507 U.S. 725 (1993); see also Johnson v. United States, 520 U.S. 461, 467 (1997); State v. Griller, 583 N.W.2d 736, 740 (Minn. 1998).

<sup>11</sup> See, e.g., United States v. Alferahin, 433 F.3d 1148, 1157 (9th Cir. 2006) (finding plain error where the district court failed to instruct on an element of the offense); United States v. Plitman, 194 F.3d 59, 65 (2d Cir. 1999) (“The failure to instruct on an essential element of the offense generally constitutes plain error. . . .”) (internal quotation marks omitted); United States v. Bordeaux, 121 F.3d 1187, 1189-90 (8th Cir. 1997) (“[G]iving the instruction without including the element of force was plain error that warrants reversal of the conviction.”); United States v. Miller, 111 F.3d 747, 750 (10th Cir. 1997) (“[F]ailure to instruct on other essential elements of the crime, even when not requested by the defendant, is structural error and per se reversible.”); United States v. Garza, 42 F.3d 251, 253 (5th Cir. 1994) (holding that failure to instruct on an essential element is plain error); United States v. McLamb, 985 F.2d 1284, 1293 (4th Cir. 1993) (“Failure to instruct on an element of the offense would typically constitute plain error . . . .”); Government of Virgin Islands v. Brown, 685 F.2d 834, 839 (3d Cir. 1982) (“The omission of an essential element of an offense in the charge to the jury ordinarily constitutes plain error, even in the absence of objection.”); United States v. Krosky, 418 F.2d 65, 67-68 (6th Cir. 1969) (holding that the trial judge’s failure to define the intent element constituted plain error); United States v. Hutchison, 338 F.2d 991, 991 (4th Cir. 1964) (“This court cannot and will not affirm a conviction by a jury unless the District Court instructs as to the elements of the offense charged in the information or indictment, whether requested or not.”); United States v. Noble, 155 F.2d 315 (3d Cir. 1946) (finding the failure to instruct on the essential elements of the crime “so fundamental” that the court reversed the conviction “even though the defendant had not requested the instructions”).

<sup>12</sup> See, e.g., People v. Fichtner, 869 P.2d 539, 543 (Colo. 1994) (“A trial court’s failure to instruct a jury on the essential elements of a crime constitutes plain error.”); State v. Harman, 502 A.2d 381, 386 (Conn. 1985) (“A trial court’s failure to instruct on any of [the essential] elements warrants reversal regardless of whether the defendant objected at trial.”); State v. Myers, 510 N.W.2d 58, 63 (Neb. 1994) (“[I]t is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous.”); State v. Houck, 727 P.2d 460, 467 (Kan. 1986) (“In charging the jury in a criminal case, it is

This Court should follow the same path. The failure to instruct on an element of the offense is error, and it is the sort of error that is “clear” and “obvious.” Olano, 507 U.S. at 725. A trial court, in other words, has a duty to instruct on the elements of the offense even in the absence of a specific request.

## 2. Prejudice

Under the third prong of the Olano plain error test, a defendant must show that the error affected his substantial rights. Olano, 507 U.S. at 734. The defendant must show, in other words, that the error was prejudicial, not harmless. State v. Strommen, 648 N.W.2d 681, 688 (Minn. 2002).<sup>13</sup> Application of that prong in this context has produced substantial disagreement and confusion in the case law. Some courts have treated the failure to instruct on an element as prejudicial per se, while others have held that the failure to instruct can be harmless in certain narrow circumstances. Mr. Vance prevails under either standard.

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the duty of the trial court to define the offense charged, stating the essential elements of the crime either in the language of the statute or in appropriate language of the court.”); Kolberg v. State, 829 So. 2d 29, 47 (Miss. 2002) (“Failure to submit to the jury the essential elements of the crime is ‘fundamental’ error.”); State v. James, 1995 Tenn. Crim. App. LEXIS 760 at \*10 (“[T]he trial court’s failure to instruct the jury as to an essential element of robbery constitutes plain error that requires a new trial.”); State v. Miller, 400 S.E.2d 611, 612 (W. Va. 1990) (“[F]ailure to afford a criminal defendant the fundamental right to have the jury instructed on all essential elements of the offense charged has been recognized as plain error.”).

<sup>13</sup> Both the normal harmless error standard for properly preserved claims and the third prong of the plain error test ask whether the error affected the defendant’s substantial rights. The difference between the two is that for plain error, the defendant bears the burden of showing prejudice, while for harmless error, the government bears the burden of showing harmlessness. Olano, 507 U.S. at 734; United States v. Robinson, 2006 U.S. App. LEXIS 20392 at \*15 (4th Cir. Aug. 9, 2006); United States v. Reynoso, 254 F.3d 467, 475 (3d Cir. 2001).

The view that failure to instruct is prejudicial per se is based on Supreme Court's opinion in Sullivan v. Louisiana, 508 U.S. 275 (1993). Writing for a unanimous court, Justice Scalia explained that why an improper reasonable doubt instruction cannot be held harmless.

Once the proper role of an appellate court engaged in the [Chapman v. California, 386 U.S. 18 (1967)] inquiry is understood, the illogic of harmless-error review in the present case becomes evident. Since . . . there has been no jury verdict within the meaning of the Sixth Amendment, the entire premise of Chapman review is simply absent. There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no *object*, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt -- not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent the constitutional error. That is not enough.

Id. at 280.

Following Sullivan, federal courts held that the failure to instruct on an element of the offense was prejudicial per se. "When proof of an element has been completely removed from the jury's determination, there can be no inquiry into what evidence the jury considered to establish that element because the jury was precluded from considering whether the element existed at all." United States v. Gaudin, 28 F.3d 943, 951 (9th Cir. 1994) (en banc), aff'd, 515 U.S. 506 (1995). The same principle applied on plain error review—failure to instruct on an element necessarily satisfied the third Olano prong.<sup>14</sup>

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<sup>14</sup> In Olano itself, the Supreme Court recognized that there may be a "special category" of errors that always satisfy the third prong of the plain error test. 507 U.S. at 735. Lower courts held that "the failure to instruct on an element of the crime, where the jury never made the constitutionally required findings, is within that 'special category' of forfeited errors, and satisfies Olano's third prong." United States v. David, 83 F.3d 638, 647 (4th Cir. 1996); see also, United States v. Haywood, 363 F.3d 200, 207 (3d Cir. 2004);

In Neder v. United States, 527 U.S. 1 (1999), however, a sharply divided Supreme Court retreated from Sullivan and held that the omission of an element of the offense may be reviewed for harmless error. But Neder was in turn quickly undermined by the Court's subsequent rulings in Apprendi and Blakely. Some courts have concluded that "Neder might be short-lived, in light of the seismic shift in the Supreme Court's Sixth Amendment jurisprudence since 1999." Freeze v. State, 827 N.E.2d 600, 605 (Ind. Ct. App. 2005); see also People v. Nitz, 820 N.E.2d 536, 554-55 (Ill. Ct. App. 2004), rev'd in part, 848 N.E.2d 982 (2006) (arguing that subsequent cases have implicitly overruled Neder). Several federal circuits have held, moreover, that Blakely errors always satisfy the third Olano prong. See, e.g., United States v. Davis, 407 F.3d 162, 165 (3d Cir. 2005); United States v. Oliver, 397 F.3d 369, 379 (6th Cir. 2005);<sup>15</sup> see also State v. Dettman, 2006 Minn. LEXIS 523 at \*31 (Minn. Aug. 10, 2006) (Anderson, Paul H., J., concurring) (concluding that a Blakely error satisfied the Olano test).

The federal law remains in flux. This Court may seek a more stable and coherent solution as a matter of state law. The rights to jury trial and due process are protected by the Minnesota Constitution as well as the Federal Constitution. See Minn. Const. Art. I, §§ 6-7. This Court may interpret the Minnesota Constitution "to offer greater protection

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United States v. Wiles, 102 F.3d 1043, 1060-61 (10th Cir. 1996); United States v. Baumgardner, 85 F.3d 1305, 1309-10 (8th Cir. 1996); United States v. Garza, 42 F.3d 251, 253 (5th Cir. 1994); Gaudin, 28 F.3d at 952.

<sup>15</sup> The Supreme Court's recent ruling in Washington v. Recuenco, 126 S. Ct. 2546 (2006), casts doubt on those holdings. Recuenco applied Neder to Blakely errors. The defendant in Recuenco did not question the continued vitality of Neder.

of individual rights than does the federal constitution.” State v. Fuller, 374 N.W.2d 722, 726 (1985).

And in fact, this Court has continued to rely on the Sullivan rationale for Minnesota cases, Neder notwithstanding. In State v. Moore, 699 N.W.2d 733 (Minn. 2005), the trial court instructed the jury that loss of a tooth constituted “great bodily harm” for the purpose of the first-degree assault statute, thus partially removing the “great bodily harm” element from the jury’s consideration. “Because a jury instruction that the loss of a tooth constitutes the permanent loss of the function of a bodily member deprives the defendant of the right to have the jury determine that every element of the charged offense has been established, harmless error analysis is not applicable.” Id. at 738; see also State v. Peterson, 673 N.W.2d 482, 487 (Minn. 2005) (citing Sullivan and thus finding harmless error analysis inapplicable where a trial court improperly instructed on the presumption of innocence).

In Osborne, moreover, this Court held that Blakely errors are “necessarily prejudicial.” 715 N.W.2d at 447.

We conclude that because the factors on which the upward departures were based were neither found by the jury nor admitted to by Osborne, Osborne’s sentence was imposed in violation of Blakely. Because the upward departures increased the length of Osborne’s governing sentence by 67 months, the Blakely error was necessarily prejudicial, not harmless.

Id. The same rationale applies to elements of the offense. In this case, the mens rea element of the crime was neither found by the jury nor admitted by Mr. Vance. That element formed the basis of the conviction and sentence. Under Osborne, the error is “necessarily prejudicial, not harmless.”

But even if this Court adopts the rationale of the Neder majority, Mr. Vance easily satisfies the third Olano prong. Even Neder contemplated only a very limited application of harmless error review. Neder held that the omitted element could only be held harmless if that element was *uncontested* at trial.

[S]afeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless.

527 U.S. at 19. Put differently, the omission cannot be held harmless if “the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.” Id.

There is no doubt in this case that Mr. Vance contested the omitted element. The entire basis of his testimony and his theory of the case was that he did not intend to injure Ms. S [REDACTED].<sup>16</sup> He specifically and repeatedly denied that he possessed that criminal intent: “I didn’t mean to hurt my girlfriend.” (T. 152). His testimony provided an evidentiary basis for a rational conclusion that the intent element of the crime was not

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<sup>16</sup> This Court has recognized that a missing element has “added significance” when it goes to the defendant’s theory of the case. State v. Kuhnau, 622 N.W.2d 552, 557 (Minn. 2001). Moreover, this Court has held that even a determination that Mr. Vance “probably would have been convicted in any event” cannot render the error harmless unless it can “be said beyond a reasonable doubt that the [instructional] error had no significant impact on the verdict.” State v. Olson, 482 N.W.2d 212, 216 (Minn. 1992).

satisfied.<sup>17</sup> Thus, even under Neder, the omission in this case cannot be held harmless. The omission was prejudicial, and the third Olano prong is satisfied.

### 3. *Discretionary authority*

Once the three prongs of the plain error test are satisfied, reversal is discretionary. This Court “has authority to order correction, but is not required to do so.” Olano, 507 U.S. at 735; see also Griller, 583 N.W.2d at 742 (“[B]efore granting a new trial on the basis of an unobjected-to error, we will consider whether a new trial is necessary to ensure fairness and the integrity of judicial proceedings.”).

The failure to instruct on an essential element of the offense undermines the fairness and integrity of the judicial proceedings because it deprives the defendant his right to a jury trial, which “has been understood to require that ‘the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .’” Apprendi, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). At the same time, it deprives the jury of its right to rule on each element and thus to control the outcome of the proceedings. See Blakely, 542 U.S. at 306 (“Just as suffrage ensures the people’s

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<sup>17</sup> Moreover, part of the problem with the omission here is that even if the jury believed Mr. Vance, it might still have found him guilty as a result of the erroneous instruction. See Kuh nau, 622 N.W.2d at 559 (finding prejudicial error where the jury could have convicted even if it accepted defendant’s theory); State v. Pendleton, 567 N.W.2d 265, 270 (Minn. 1997) (same). The jury might have found that Mr. Vance intentionally struck or used force on Ms. S [REDACTED], and that his action resulted in substantial bodily injury. Based on those findings alone—and without a finding of intent to injure—the jury could have reached a guilty verdict under the trial court’s instructions. Such a verdict would have been legally invalid.

ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.”).

Those values have led courts to exercise their discretionary authority in cases where an element of the crime is omitted from the jury instructions. “When a defendant has not been accorded his . . . rights to a jury determination of the existence of an essential element of the crime, we conclude that the error meets [Olano’s discretionary] standard.” Gaudin, 28 F.3d at 952.

The only way to uphold the verdict in this case is to speculate about what the jury would have done if it had been properly instructed. When a conviction rests on mere speculation, the fairness and integrity of the proceedings have been undermined. See State v. Jones, 678 N.W.2d 1, 21 (Minn. 2005). This Court should exercise its discretionary authority and grant relief.

**CONCLUSION**

For the foregoing reasons, Mr. Vance's assault conviction should be reversed.

Date: August 16, 2006

Respectfully submitted,

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