NO. 45758-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

RODNEY F. BRYSON,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

GERALD R. FULLER
Interim Prosecuting Attorney
for Grays Harbor County

BY:____s/ Jason F. Walker_____
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STATE'S COUNTERSTATEMENT OF THE CASE:

The State is satisfied with the statement of the factual and procedural history in appellant's brief.

RESPONSE TO ASSIGNMENTS OF ERROR:

1. **Because Defendant's intent to assault transferred to a second target, who was offensively touched, substantial evidence supports the defendant's conviction for third degree assault.**

Defendant claims that Sgt. Keith Dale, Defendant's apparently unintended victim, was not *harmed*, so Defendant's *intent* could not have transferred. This argument is fallacious and based upon a misstatement of the law of transferred intent. Additionally, Defendant relies on an incomplete definition of "assault."

Standard of review.

"We review the evidence in a light most favorable to the State to determine 'whether ... any rational trier of fact could have found guilt beyond a reasonable doubt' where a criminal defendant challenges the sufficiency of the evidence." *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410, 413 (2004) (quoting *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992).) "When the sufficiency of the evidence is

challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas* at 201 (citing *State v. Partin*, 88 Wash.2d 899 (1977).)

Spitting on another is an assault.

"Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm." *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439, 442 (2009). "[A] touching is unlawful when the person touched did not give consent to it, and was either harmful or offensive." *State v. Shelley*, 85 Wn. App. 24, 28-29, 929 P.2d 489, 491 (1997) (citing *State v. Garcia*, 20 Wash.App. 401, 403–04, 579 P.2d 1034 (1978).) "Spitting may constitute a battery." *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130, 133 (1978) (citing R. Perkins, *Criminal Law*, 108 n.14 (2d ed. 1969).)

In the instant case it is undisputed that some of Defendant's spittle landed on Sgt. Dale. This was an offensive touching and constitutes the *mens rea* of the crime of assault.

In his brief Defendant refers to only one of three ways of committing assault, and it is the wrong way for this case. A victim need not be harmed to suffer an assault.

Under the "transferred intent" rule, *intent* transfers to an unintended victim, not harm.

"'[A]ssault' includes the element of intent." *State v. Davis*, 119 Wn.2d 657, 663, 835 P.2d 1039, 1042 (1992) (citing *State v. Hopper*, 118 Wash.2d at 159, 822 P.2d 775 (1992).) Under the transferred intent rule, "the *intent* to assault one victim transfers to all victims who are unintentionally harmed or put in apprehension of harm." *State v. Frasquillo*, 161 Wn. App. 907, 916, 255 P.3d 813, 817 (2011) (citing *State v. Elmi*, 166 Wash.2d 209, 207 P.3d 439 (2009) (emphasis added.)

The evidence suggests that Defendant intended to subject CCO Kiser to this offensive touching, not Sgt. Dale. Under the transferred intent rule, Defendant's intent to subject CCO Kiser to the offensive touching transfers to Sgt. Dale, the unintended target. Therefore both the *actus reus* and the *mes rea* of the crime are fulfilled and the crime is complete. Defendant's bad aim is no defense.

Defendant claims that, because Sgt. Dale was not "harmed" or "injured," transferred intent is not applicable. However, a) being spat upon is harm; and b) neither injury nor harm are predicates for transferred

intent. Defendant's assignment of error is without merit and this court should reject it.

2. Trial counsel was not ineffective for failing to object because the opinion evidence was not on the issue of guilt.

Defendant claims that trial counsel was ineffective for failing to object to testimony Defendant claims was on the ultimate issue. However, the testimony was not on the ultimate issue, and there was no cause to object.

An opinion regarding factual issues is not an opinion as to a defendant's guilt.

In *State v. Hayward* the defendant was charged with second degree assault after an incident where the defendant had broken the jaw of the victim. *Hayward*, 152 Wn. App. 632, 635, 217 P.3d 354, 356 (2009). At trial, the prosecutor called an emergency room physician who had treated the victim the day after the incident. *Id.* at 638. The prosecutor asked the doctor if, in his opinion, the injury was "…one that would be a temporary but substantial loss or impairment o[f] the function of a body part?" *Id.* at 639 (alteration in original). This is the definition of the "substantial bodily injury" required by Assault in the 2nd Degree. RCW 9A.04.110(4)(b) & 9A.36.021(1)(a). The defendant objected, claiming that the doctor was giving an opinion as to guilt. *Id.* The trial court overruled the objection,

saying that the doctor was merely rendering an opinion. *Id.* The Court of Appeals agreed, saying, "[t]he fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt." *Id.* at 649 (citing *City of Seattle v. Heatley*, 70 Wash.App. 573, 579, 854 P.2d 658 (1993).)

In the instant case the prosecutor asked the police officer witnesses whether, from their observations, Defendant act was an intentional act. Both witnesses gave their opinion that it was. Trial counsel did not object because this was proper opinion testimony on an issue other than that of guilt. Because this was proper testimony, trial counsel's performance was not deficient, and Defendant was not prejudiced. Defendant's second assignment of error should be rejected and his conviction affirmed.

CONCLUSION

Defendant's assignments of error are without merit. Defendant was afforded a fair trial and was convicted, and this court should affirm that conviction.

DATED this _27th_ day of August, 2014.

Respectfully Submitted,

By:___s/ Jason F. Walker___
JASON F. WALKER
Deputy Prosecuting Attorney
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JFW/ws

GRAYS HARBOR COUNTY PROSECUTOR

August 27, 2014 - 3:01 PM

Transmittal Letter

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