

62146-7

62146-7

NO. 62146-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALLEN LEWIS BRADFORD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JEFFREY RAMSDELL

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Could a rational trier of fact have found the defendant guilty of assault in the second degree for punching Allen Foulstone in the face, causing a non-displaced fracture of his nose?

2. Did the trial court violate the defendant's right to confront a witness--a constitutional violation--simply by sustaining a relevancy objection to one of defense counsel's questions during cross-examination of Advanced Registered Nurse Practitioner Heidi Bray?

3. Did the trial court violate the defendant's Sixth Amendment right to counsel when the court sustained an objection during closing argument, when defense counsel attempted to recite the Latin derivation of the term "fracture," the Latin derivation of which was neither included in the instructions to the jury, nor presented as evidence during trial?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with second-degree assault and bail jumping. CP 7-9. The charges were severed for trial. The defendant's separate conviction for bail jumping is not a part of this

appeal. The defendant proceeded to trial on the assault charge, the Honorable Jeffrey Ramsdell presiding. A jury convicted the defendant as charged. CP 94-97. With an offender score of six, the defendant received a standard range sentence of 33 months. CP 101-11.

## **2. SUBSTANTIVE FACTS**

Allen Foulstone is a slight of build 21-year-old aerospace engineering student at the University of Washington. 7RP<sup>1</sup> 19-20, 27. The 40-year-old defendant is not a student at the university, but he routinely plays pickup basketball games at the UW's Intramural Athletic facility (IMA). 10RP 48, 59.

On April 28, 2007, Foulstone and his friend, Ryan Purugganan, went down to the IMA to play in a game. 7RP 25-26; 8RP 21. They ended up on a team opposed to a team containing the defendant, a man they had never met. 7RP 29. During the course of the game, Foulstone and the defendant were guarding each other. 7RP 29. The game was competitive and physical,

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<sup>1</sup> The verbatim report of proceedings is cited as follows: 1RP--4/17/08 & 4/21/08; 2RP--4/21/08; 3RP--4/22/08 & 4/23/08; 4RP--6/12/08, 6/16/08 & 6/17/08; 5RP--6/18/08; 6RP--6/23/08; 7RP--6/24/08; 8RP--6/25/08; 9RP--6/26/08; 10RP--6/30/08; 11RP--7/1/08; 12RP--8/1/08.

although the defendant described the intensity of the game as "mediocre." 7RP 28; 10RP 52.

At one point, relatively early in the game, while running along the baseline, the defendant gave Foulstone a shove to get position, a shove that knocked Foulstone down. 7RP 31. Foulstone did not consider the shove as anything out of the ordinary. 7RP 36.

Foulstone got back up and used his body to physically block the defendant from grabbing a rebound as another player put up a shot. 7RP 31. The player made the shot and Foulstone grabbed the ball to inbound it. 7RP 31. At this point, the defendant approached Foulstone and punched him in the face with a closed fist, knocking him to the ground, unconscious.<sup>2</sup> 7RP 31; 8RP 27.

As Foulstone lay on the ground, the defendant got on top of him and prepared to hit him again. 8RP 34-35. Before he could strike a second blow, he was pushed off by Purugganan. 8RP 35. After then confronting Purugganan, the defendant attempted to flee,

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<sup>2</sup> As Foulstone lay on the ground, the defendant got on top of Foulstone and raised his arm to hit Foulstone again. 8RP 34-35. Before he could strike a second blow, he was pushed off by Purugganan. 8RP 35. After confronting Purugganan, the defendant then attempted to flee but university officers stopped the defendant before he could exit the parking lot. 8RP 35-36, 92-93, 95; 9RP 59-60.

but he was apprehended by police officers as he tried to drive away. 8RP 35-36, 92-93, 95; 9RP 59-60.

When Foulstone came to, he found that he was bleeding from the nose and lip and had a cut to his nose near his eye (the scar was still present at the time of trial). 7RP 42-43, 47. Two days later, Foulstone went to the University of Washington Hospital because he was suffering significant pain and his nose was "so swollen." 7RP 44-46.

Heidi Bray is an Advanced Registered Nurse Practitioner for the University of Washington Medical Center emergency department. 8RP 124. Bray is licensed and board certified to provide care independently, see patients independently, diagnose injuries and write prescriptions. 8RP 125. She has a bachelor's degree from Johns Hopkins University and a masters' degree from the University of Washington. Bray has received formal training in reviewing x-rays and informal training in reading CT scans. 8RP 128.

Bray examined Foulstone on April 30, 2007. 8RP 130. Bray observed bruising under Foulstone's left eye, a laceration to the left side of the bridge of his nose, and "swelling on the left lateral aspect of his nose." 8RP 130-31. After examining Foulstone,

taking a complete medical history, and manipulating the injury, Bray ordered a CT scan. 8RP 133; 10RP 7, 10.

After reviewing all available information, Bray stated that "[m]y diagnosis in the case of Mr. Foulstone was nasal fracture." 10RP 9. Bray provided more specifics, "I observed soft tissue injuries that were consistent with a non-displaced fracture of his left lateral--the suture line that divides the left lateral nasal bone with the maxillary process." 10RP 8. Bray explained that suture, in this context, refers to the seam formed where the facial bones come together. 10RP 8-9. Bray indicated that the radiology results comported with her examination and diagnosis. 10RP 8.

The defendant did not call any doctor or expert witness, but through cross-examination, tried to take issue with Bray's diagnosis. Specifically, defense counsel cross-examined Bray about the phraseology used by the radiologist in his report.

In the radiology report, counsel noted that the radiologist did not use the term "fracture."<sup>3</sup> 10RP 33. Instead, the radiologist expressed his interpretation of the CT scan results in the following

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<sup>3</sup> Counsel did not have the report admitted into evidence.

terms: "a mild bending of the suture between the nasal bone proper and the frontal process of the maxilla." 10RP 37.

Bray explained that the term "fracture" is a broad term and that there are many types of fractures. 10RP 33. There are linear fractures, compound fractures and multiple other types of fractures, including, Bray stated, a "mild bending of the suture line," or as she described Foulstone's injury, a "non-displaced fracture." 10RP 33-34.

Additional facts are included in the sections they pertain.

**C. ARGUMENT**

**1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF ASSAULT IN THE SECOND DEGREE.**

A person commits assault in the second degree by intentionally assaulting another and recklessly inflicting substantial bodily harm. The defendant argues that the evidence presented at trial was insufficient for any rational trier of fact to have found that he committed assault in the second degree. Specifically, he argues there is no evidence the injury to the victim's nose was a fracture of a bodily part. This argument--akin to a closing argument at trial--should be rejected.

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. While the defendant may argue over the language used by the witness and the radiologist, the evidence shows the victim suffered a non-displaced fracture of his nose.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A factual sufficiency review "does not require the reviewing court to determine whether it believes the evidence at trial established guilt beyond a reasonable doubt but rather only whether any rational trier of fact could be so convinced." State v. Smith, 31 Wn. App. 226, 640 P.2d 25 (1982). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992)).

Here, the parties must first agree on what the State had to prove at trial. While the defendant raises a vagueness challenge, the State agrees with the defendant as to what the State was required to prove.

The defendant was charged with assault in the second degree under RCW 9A.36.021(1)(a). Thus, the State was required to prove that the defendant intentionally assaulted Allen Foulstone and thereby recklessly inflicted substantial bodily harm upon Allen Foulstone. CP 7, 79, 89. Substantial bodily harm is defined by statute, and was defined for the jury here as follows:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, **or that causes a fracture of any bodily part.**

CP 86 (emphasis added); RCW 9A.36.021.

The phrase "fracture of any bodily part," and/or the term "fracture," is not defined by statute. The State agrees with the defendant that where a statutory term is undefined, the term is given its usual and ordinary meaning. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998), rev denied, 137 Wn.2d 1039 (1999). The State also agrees that the court may look to a dictionary to help determine a term's ordinary meaning. Id.

The dictionary definition of fracture includes the following:

The act or process of breaking or the state of being broken...rupture by a break through the entire thickness of a material...the breaking of hard tissue (as a bone, tooth, or cartilage)...the rupture (as by tearing) of soft tissue...the product or result of fracturing.

Webster's Third New International Dictionary, Unabridged, 901 (1993). Thus, under a common definition, the State had to prove the defendant caused a break of any bodily part.

Bray's diagnosis was a "non-displaced fracture." 10RP 33-34. In different terms, she described it as "a non-displaced fracture of his left lateral--the suture line that divides the left lateral nasal bone with the maxillary process." 10RP 8. Bray's diagnosis alone satisfies the State's burden. See State v. R.H.S., 94 Wn. App. 844, 974 P.2d 1253 (1999) ("punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm."); also State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (an assault victim's bruises were a temporary but substantial disfigurement sufficient to constitute the substantial bodily harm element of second-degree assault).

The issue as to whether Foulstone suffered a fracture of a bodily part was a question of fact for the jury. Bray stated

Foulstone had a fracture of a bodily part, and the jury found against the defendant here. Viewed in the light most favorable to the State, the defendant cannot prevail.

What the defendant's argument at trial--and on appeal--really boils down to is a question of semantics, not evidence, a trial tactic that failed. The defendant presented no medical evidence or expert testimony at trial. Instead, trial counsel tried to persuade the jury that because the radiology report used certain specific language, without using the actual term fracture, that there was no break of any bodily part. But other than pure argument, trial counsel provided no evidence to support his claim.

Bray testified Foulstone had a non-displaced nasal fracture, and that the phraseology contained in the radiology report was just another way of describing the same thing. There is no evidence that the medical terminology describing "a mild bending of the suture between the nasal bone proper and the frontal process of the maxilla" is not describing a break of a bodily part. It is simply a conclusion trial counsel wanted the jury to find based on his interpretation of the medical phraseology.

On appeal, the evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Tilton, 149 Wn.2d at 786. All reasonable inferences from the evidence are drawn in favor of the State and interpret the evidence most strongly against the defendant. Salinas, 119 Wn.2d at 201. The defendant's argument is one of persuasion, not evidence, and when the evidence is viewed in the light most favorable to the State, the evidence supports the conclusion that a reasonable jury could have found the defendant caused a break of a bodily part to Allen Foulstone's nose, i.e., a non-displaced fracture.<sup>4</sup>

**2. THE SCOPE OF CROSS-EXAMINATION RESTS WITHIN THE SOUND DISCRETION OF THE TRIAL COURT.**

The defendant claims that the trial court's sustaining of a relevance objection to a question posed by defense counsel during his cross-examination of Advance Nurse Practitioner Heidi Bray

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<sup>4</sup> The defendant makes vagueness challenges to the statute and as applied. The State will not address these issues directly. The challenges are based on the defendant's assertion that he was convicted for an injury that was not a fracture or break of a bodily part. The State agrees that the statute requires proof of a break of a bodily part. In any event, any claim that the instructions were vague is precluded here. A claim that an undefined term is unconstitutionally vague is precluded if a defendant fails to propose an appropriate definition. State v. Whitaker, 133 Wn. App. 199, 233, 135 P.3d 923 (2006), rev. denied, 159 Wn.2d 1017 (2007). The defendant did not propose any definitional instructions here.

amounted to a constitutional confrontation clause violation that requires the reversal of his conviction. This argument should be rejected. The trial court has the obligation to rule on objections, and the discretion to decide whether evidence or testimony is admissible. The trial court here properly sustained the State's relevance objection.

**a. The Law.**

Both the United States Constitution and the Washington State Constitution guarantee criminal defendants the right to confront and cross-examine adverse witnesses. U.S. CONST. amend. VI; Wash. Const. art. 1, § 22; State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). Although the right to confrontation should be zealously guarded, that right is not without limitation. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. O'Connor, 155 Wn.2d 335, 348-49, 119 P.3d 806 (2005).

While the Confrontation Clause of the Sixth Amendment provides for "the opportunity of cross examination" it does not follow that the Confrontation Clause prevents a trial judge from imposing any limits on defense counsel's inquiry of a prosecution witness. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct.

1431, 89 L. Ed. 2d 674 (1986). "On the contrary, trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Van Arsdall, 475 U.S. at 678-79. As the Supreme Court has observed, "the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Van Arsdall, at 678-79.

In O'Connor, the Washington State Supreme Court held that a Confrontation Clause challenge to the trial court's decision to limit cross-examination is reviewed under an abuse of discretion standard. O'Connor, 155 Wn.2d at 350-51; see also Alford v. United States, 282 U.S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624 (1931). To hold otherwise, the Court observed, would result in a system under which a trial court is constitutionally "required to admit" any evidence proffered by a defendant.<sup>5</sup> Id. at 350.

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<sup>5</sup> In O'Connor, a malicious mischief case, the trial court prohibited the defendant from cross-examining the victim on her recovery of insurance proceeds despite the fact that the defendant had already paid the victim for the damages. The Supreme Court upheld the trial court's discretionary decision to prohibit cross-examination on this subject. O'Connor, 155 Wn.2d at 348-51.

Discretion is abused when a decision is manifestly unreasonable or based upon untenable grounds. O'Connor, 155 Wn.2d at 351. The trial court should be reversed only if no reasonable person would have decided the matter as the trial court did. O'Connor, at 351.

**b. The Alleged Constitutional Error.**

In cross-examining Advanced Nurse Practitioner Heidi Bray about the radiologist report, the following exchange occurred:

Defense Counsel: An[d] where does the doctor, either the attending or the resident, express that there is a fracture? Or did they not use the word fracture in their report?

Bray: In their dictated report they do not use the word fracture.

Defense Counsel: Certainly a fracture, again, is one of those things that is a legal term, not a medical term of art?

Bray: It's a medical term, sort of an umbrella term underneath which a number of other descriptors are employed. The words mild bending of the suture line don't exclude fracture, in fact they are a type of fracture. They imply a type of fracture.

Defense Counsel: So there's an implication that you, not as a radiologist, are making from a description of mild bending of the suture line?

Bray: It's not an implication, it's what I know to be true about this description. I'm not--I mean, the radiologist has made this description in his report.

Defense Counsel: Well, in the radiologist's report--

Bray: And I'm interpreting it, certainly.

Defense Counsel: It says referral for possible nasal fracture?

Bray: Yes.

Defense Counsel: And FX is the way medical people abbreviate for the word fracture, correct?

Bray: Yes.

Defense Counsel: And they use that in reference to simply--how it's coming from you to them, correct?

Bray: Exactly. We fill out a quick request when we send the patient down so they know what we are concerned about.

Defense Counsel: So they know how to express the term fracture either by dictating it or abbreviating it, FX.

Bray: I'm certain that the radiologist knows how to dictate the word fracture.

Defense Counsel: Certainly they can refer in their report and report back to you that there's any number of different types of fractures that exist, complete fracture, incomplete fracture are terms you've heard expressed, correct?

Bray: Should they elect to describe an anomaly they see with the word fracture they certainly do so in many cases and often times they don't, oftentimes

they use language that they--of their choosing, they may use more specific.

Defense Counsel: Linear fracture, transfer fracture, all different types of fractures of these--

Bray: Not so much in the case of facial bones though. And we're talking about facial bones here.

Defense Counsel: We're talking about bone here, right:

Bray: Well, in this case we're talking about facial bone, suture line, right.

Defense Counsel: And certainly you're not an orthopedist, that's another type of MD that specializes in bones, correct?

Bray: That is correct.

Defense Counsel: Oblique fractures, compression fractures, spinal fractures--

Prosecutor: Objection to the relevance--

Defense Counsel: All different types--

Prosecutor: Objection.

The Court: Relevance?

Prosecutor: Yes, Your Honor.

The Court: I'll sustain the objection. I think you made your point. There are many different types of fractures. But we're talking about facial fractures in this specific circumstance.

10RP 33-35.

**c. The Trial Court Acted Within Its Discretion.**

The defendant's confrontation clause claim is nothing more than an evidentiary issue wherein the trial court appropriately exercised its discretion in sustaining on objection to defense counsel's irrelevant question. Bray had previously testified that she diagnosed Foulstone as having a certain type non-displaced fracture to his nose. Counsel's cross-examination at the point in question consisted of having Bray confirm that the fracture to Foulstone's nose was not some other kind of fracture, such as--as counsel asked--a spinal fracture. This line of questioning, having Bray agree to negatives--that Foulstone did not have types of fractures that no witness was claiming he did, was irrelevant.

If defense counsel sought to present evidence that Bray's diagnosis was incorrect, or that the language that the radiologist used did not translate or mean that Foulstone had a fracture, counsel was free to do that. But counsel, in cross-examining Bray, was not introducing evidence. He was merely asking Bray about types of fractures that Foulstone did not have. It is no different than asking Bray, "so, Foulstone did not have a broken leg." While the

answer is obvious, it is also irrelevant. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. ER 401.

On appeal, the defendant asserts that the trial court limited defense counsel's examination on the expert's definition of "fracture." This is incorrect. Counsel was perfectly free to ask Bray what her definition of fracture was, but he did not do so. Counsel was only prevented from continuing to ask Bray about types of fractures that Foulstone did not suffer. As the trial court stated, counsel had already "made your point. There are many different types of fractures. But we're talking about facial fractures in this specific circumstance." 10RP 35. The court's ruling was based on the question asked and the objection made. Defense counsel was free to ask any other question or cover any other subject matter. To argue that defense counsel was barred from cross-examining on

an entire subject, or that the defendant's right to confront the witness was abridged, is simply not supported by the record.<sup>6</sup>

**3. THE TRIAL COURT DID NOT PREVENT DEFENSE COUNSEL FROM ARGUING THE COMMON MEANING OF THE WORD FRACTURE.**

The defendant claims that the trial court unconstitutionally prevented defense counsel from arguing the common meaning of the term "fracture." This claim is not supported by the record and should be rejected. The trial court prevented but one thing, defense counsel's interjection into closing argument the Latin derivation of the term "fracture," something that was not in the record and was an improper comment on the law. The trial court had full discretion to make such a ruling.

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<sup>6</sup> After trial was over, defense counsel put on the record that he had intended to ask Bray about as many as 20 different kinds of fractures. He also said that he intended to ask Bray about the definition of each of these fractures. 10RP 172-76. Even if this is considered an "offer of proof," it provides nothing to the defendant's argument here. First, this "offer" was not before the trial court at the time of the court's ruling, trial was in fact over. See ER 103. Second, the definition or description of injuries Foulstone did not suffer was irrelevant. Third, the "offer" did not indicate that counsel was prevented from going into some other particular area of inquiry.

**a. The Law.**

The Sixth Amendment right to counsel includes the right to deliver closing argument. State v. Frost, 160 Wn.2d 765, 772, 161 P.3d 361 (2007). Where a trial court unduly limits the scope of defense counsel's closing argument, it may infringe upon this right. Frost, 160 Wn.2d at 771-72.

At the same time, the right to deliver a closing argument is not unfettered. It is well established that trial courts possess broad discretionary powers over the scope of counsel's closing arguments. Frost, at 771-72 (citing Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975), and State v. Perez-Cervantes, 141 Wn.2d 468, 474-75, 6 P.3d 1160 (2000)). The Supreme Court has "emphasized that the trial court should in all cases ... restrict the argument of counsel to the facts in evidence." Frost, at 773 (internal citations and quotations omitted). In fact, the Supreme Court has stated that a "trial court has the discretion, indeed the duty, to restrict the argument of counsel to the facts in evidence." Frost, at 777 (internal quotations omitted).

Equally important, counsel's statements "must be confined to the law as set forth in the instructions to the jury." Frost, at 772; State v. Woolfolk, 95 Wn. App. 541, 548, 977 P.2d 1 (1999).

The practice of arguing questions of law to the jury, other than to read instructions which have been given by the court, is not favored, and the trial court may refuse to permit such argument.

State v. Shelton, 71 Wn.2d 838, 844, 431 P.2d 201 (1967).<sup>7</sup>

Rulings by a trial court restricting the scope of argument are reviewed to determine if the trial court abused its discretion.

Perez-Cervantes, 141 Wn.2d at 475. A trial court abuses its discretion only if no reasonable person would have taken the view adopted by the trial court. Perez-Cervantes, at 475.

**b. The Alleged Error.**

In closing argument, defense counsel made the following argument:

Defense Counsel: Fracto is from the Latin word: fractus, to separate --

Prosecutor: . Objection, Your Honor.

Defense Counsel: -- from the --

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<sup>7</sup> "It is the rule in this state that statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions of the court." State v. Fateley, 18 Wn. App. 99, 109, 566 P.2d 959 (1977) (citing State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972)); see also State v. Brown, 35 Wn.2d 379, 213 P.2d 305 (1949) (A judge may refuse to permit the practice of arguing questions of law to the jury); State v. Rholeder, 82 Wash. 618, 621-22, 144 P. 914 (1914) (The court provides the law to the jury, and "[i]f the court has improperly instructed the jury, the remedy is by exception. If all the law applicable to the facts has not been given, the remedy is to request additional instructions.").

Prosecutor: Objection, objection, Your Honor.

The Court: And, grounds?

Prosecutor: Can we have a side bar, Your Honor?

The Court: Sure. (Side bar held)

Defense Counsel: From the fracture --

Prosecutor: Objection.

The Court: Mr. Gruenhagen [defense counsel] go ahead, sir.

Defense Counsel: The verb transitive. To burst asunder. Mild bending. Inconsistent.

10RP 144.

**c. Other Parts Of Closing Argument.**

Later during closing argument, defense counsel again returned to the topic of the definition of the term fracture.

Fracture. Common meaning? A break. As it relates to that, can you come to that conclusion? ... Is there proof of that beyond a reasonable doubt? Not based on a radiology report that says mild bending. Simply doesn't exist.

10RP 155. Counsel also told the jury that "there are words in these instructions that are not defined in this case and you're left to come to your own understanding of what those terms mean." 10RP 159.

At the conclusion of closing argument, the court put the side bar on the record.

The Court: We did have a side bar during closing argument. Mr. Gruenhagen began to discuss the derivations of the word fracture in argument before the jury. There was an objection. We discussed the issue in chambers. I sustained the objection on the grounds that there is an abundance of case law including State vs. Anderson, 58 Wn. App. 107, a 1990 case that says quite simply an undefined term in the statute will be given its usual and ordinary meaning, and the court may use dictionary definitions to determine the usual and ordinary meaning of a term.

In this particular case the jury is left to its own devices to make a determination as to what the ordinary meaning of the term fracture is. There is no more specific definition provided by statute. And my concern was there wasn't any testimony with regard to the term fracture. There wasn't any testimony with regard to the derivation of the term. So quite frankly there was no way for me or anybody else to validate what I assume Mr. Gruenhagen would present to the jury in good faith. But nonetheless, that was my rationale.

10RP 172-73.

**d. The Trial Court Acted Within Its Discretion.**

The record does not support the defendant's claim that he was prevented from arguing his theory of the case under the common definition of the term "fracture." This is quite evident from

the fact that defense counsel returned to the issue multiple times and specifically told the jury that the common meaning of a fracture was "[a] break." 10RP 155. The only argument that counsel was "allegedly" prevented from making was providing the jury with the Latin derivation of the term "fracture."<sup>8</sup> No evidence was presented to the jury on the Latin derivation of the term "fracture," and thus it was inappropriate to be providing such "evidence" in closing. Further, if counsel was intending to provide his Latin derivation of the term as the law of the case, it was also inappropriate as it is the court that provides the law to the jury, not counsel. Rholeder, 82 Wash. at 621-22. If counsel wanted a further legal definition provided to the jury, it was incumbent upon counsel to ask the court to provide one. Id.; see also Perez-Cervantes, at 476 (unchallenged jury instructions become the law of the case).

It was perfectly appropriate--as the remainder of closing argument shows--for counsel to argue to the jury the common meaning of the term "fracture." However, during the single portion

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<sup>8</sup> The term "allegedly" is used because it appears defense counsel did not stop despite the court's admonishment. While the trial court later stated that at side bar the court had sustained the State's objection, defense counsel at trial continued and provided the jury with what he purported was the Latin derivation of the term fracture. 10RP 144.

of closing argument objected to, counsel was not doing so. As the trial court stated, there was no way for the court to even know if what counsel was stating was true. It is highly unlikely that the jurors had a common understanding of Latin. The defendant cannot show that no reasonable judge would have ruled otherwise. The defendant's claim of constitutional error is not supported here.

**D. CONCLUSION**

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 1 day of February, 2010.

Respectfully submitted,

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By: 

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