

NO. 64458-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CAREY J. HICKMAN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JEFFREY RAMSDELL

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. ISSUES PRESENTED	1
B. STATEMENT OF THE CASE	2
C. ARGUMENT.....	11
1. THE ADMISSION OF EXPERT TESTIMONY WAS NOT MANIFEST CONSTITUTIONAL ERROR BECAUSE IT WAS NOT IMPROPER AND BECAUSE THERE HAS BEEN NO SHOWING OF PREJUDICE	11
a. The expert testimony in this case was not improper because it was based on the witness's expertise and findings and in no way conveyed an opinion on the defendant's guilt.	14
b. There has been no showing of actual and identifiable prejudice in this case because the jurors were properly instructed that they were not bound by the expert's opinion.....	24
c. Any error in admitting the expert's testimony was harmless given the overwhelming evidence that the victim's injuries were the product of an assault rather than a fall.....	26
2. COUNSEL'S FAILURE TO OBJECT TO THE TESTIMONY WAS NOT INEFFECTIVE BECAUSE THE TESTIMONY WAS PROPERLY ADMITTED AND BECAUSE THERE WAS NO PREJUDICE ...	31

3. BASED ON THE RECORD BEFORE THE COURT,
THE TRIAL COURT EXCEEDED IT'S STATUTORY
AUTHORITY WHEN IT ORDERED A DRUG AND
ALCOHOL EVALUATION 33

D. CONCLUSION 34

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

City of Seattle v. Heatley, 70 Wn. App 573, 854 P.2d 658 (1993)
rev. denied 123 Wn.2d 1011 (1994)..... 13, 19, 22

In re Personal Restraint of Davis, 152 Wn.2d 647, 101 P.3d 1
(2004)33

State v. Baird, 83 Wn. App. 477, 922 P.2d 157 (1996) rev. denied
113 Wn.2d 1012 (1997) 12, 16, 17, 18

State v. Elmore, 154 Wn. App 885, 228 P.3d 760 (2010) 13, 24

State v. Hayward, 152 Wn. App 632, 217 P.3d 354 (2009) 23

State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009)
..... 19, 20, 21

State v. Jones, 59, Wn. App. 744, 801 P.2d 263 (1990) rev. denied,
116 Wn.2d 1021(1991) 17, 17, 18, 19, 21

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)
..... 12, 13, 15, 18, 24, 25, 27

State v. Mason, 160 Wn.2d 910, 162 P.3d 396 (2007)22

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995)32

State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995)31

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008)
..... 12, 13, 15, 18, 20, 24, 25

State v. Rainey, 107 Wn. App. 129, 28 P.3d 10 (2001)32

State v. Sanders, 66 Wn. App. 380, 832 P.2d 1326 (1992) 22

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)..... 32

State v. Toennis, 52 Wn. App 176, 758 P.2d 539 (1988).....15, 18

State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)..... 27

Federal:

Strickland v. Washington, 466 U. S. 668, 686, 104 S. Ct. 2052
(1984)31, 32

Additional Authority

ER 704 12

RAP 2.5 (a)(3)13

A. ISSUES PRESENTED

1. Whether expert testimony that an injury is more likely the result of an assault than an accidental fall is improper when the opinion offered was based entirely on the expert's physical findings and expertise and did not convey any opinion on the veracity of any witness or on the defendant's guilt.

2. Whether the admission of such testimony rises to the level of manifest constitutional error when the jury was properly instructed that they were not required to accept the expert's testimony and no actual prejudice is shown.

3. Whether any error in admitting such testimony was harmless given the overwhelming evidence that the defendant was threatening and beating the victim repeatedly just before the victim's injuries were discovered.

B. STATEMENT OF THE CASE

Thomas Vinson is 69 year old man who lives alone in an apartment at 1201 Boylston Avenue, in Seattle. 7RP 78¹. He suffers from several physical ailments, including high blood pressure and arthritis in his spine. 7RP 80. At some point during the spring of 2009, he allowed the 37 year old appellant, Carey Hickman, to stay with him². 8RP 126, 9RP 12.

Michael Imeson lived directly below Mr. Vinson. 8RP 79. On the night in question, he and his girlfriend, Alana Bellwood, were in his apartment when they heard yelling and crashing from the apartment above. 8RP 80, 97. When they went out on the balcony to hear better, they heard a single male voice yelling angrily. 8RP 80, 98-99.

While on the balcony, Mr. Imeson heard a man from the apartment above yell, "Get over here you mother fucker; I will kill you." 8RP 83. The yelling was "pretty continuous" and included profanity and threats such as "I'll beat the shit out of you. I'll kill

¹ The Verbatim Report of Proceedings will be referenced in the same manner is in the Appellant's Brief (App. Br.). See App. Br. at page 2, footnote 1.

you." 8RP 84-85, 90. The tone of the man's voice was "very, very angry" and "the kind of way that you would talk to a dog." 8RP 83, 85, 97-98. Ms. Bellwood described the voice as so angry it scared her. 8RP 100. They only heard the one man's voice; there was never any response. 8RP 80, 100.

In addition to repeated profanity and threats, Mr. Imeson and Ms. Bellwood heard the distinct sound of "flesh hitting flesh, like someone getting punched³." 8RP 80, 99. Obviously concerned, they yelled upstairs. There was a brief pause, the sound of the upstairs balcony closing, and then "the sounds of the hitting and yelling continued." 8RP 80-81.

Once they heard the noises of flesh on flesh in conjunction with the angry yelling, Mr. Imeson and Ms. Bellwood called 911. 8RP 84. According to Mr. Imeson, the sounds of someone getting hit did not stop until the police arrived. 8RP 86-87. It did stop when

² Although Mr. Vinson testified that he had never met Mr. Hickman prior to the night he was assaulted, this testimony was contradicted by numerous other witnesses. 7RP 95-96, 8RP 12-13, 19, 9RP 12-14.

³ On cross-examination, Mr. Imeson described the sounds he heard this way: "If you were to form one hand into a fist and form the other into a cup and slam one into the other, that's what it sounded most like for most of the time." 8RP 93-94. He testified that he heard that sound more than a dozen times. 8RP 94.

they heard the police actually enter the apartment above. 8RP 87, 103.

Several Seattle Police Officers responded to the apartments within minutes. 6RP 25. When the officers reached the hall outside of Mr. Vinson's apartment, they also heard a man swearing, yelling and screaming. 6RP 29, 114; 8RP 25. They all heard only one voice. 6RP 34, 114; 8RP 25-26. The voice of the man that was yelling was consistently described as "angry" or "very angry". 6RP 29, 116; 8RP 27. The voice never wavered from sounding angry. 6RP 105. The officers also heard the man specifically yell "This is fucking it; three fucking strikes and you're out." 6RP 30, 115-116; 8RP 27. Officers later testified that this voice belonged to Mr. Hickman. 6RP 140-141.

The officers knocked and announced themselves as the police. 6RP 32, 117; 8RP 28. Mr. Hickman opened the door, saw it was the police, slammed it shut, and locked it. 6RP 33, 118; 8RP 28, 30. Several officers noticed that when he opened the door, he had blood on his face and hands. 6RP 118-119; 8RP 28-30.

After being told they were going to kick the door in, Mr. Hickman opened the door again but still refused to let officers in. As

they tried to force their way in, he tried to push the door back until ultimately, they had to break it down. 6RP 35-38, 121; 8RP 31. He never allowed them to come in voluntarily. 6RP 121. He never asked them to help Mr. Vinson who was immediately found in the apartment suffering from extensive injuries. 6RP 38-39; 8RP 32. All of the officers testified at trial that Mr. Hickman was aware that they were the police when he was refusing to let them in. 6RP 33-34, 118; 8RP 30.

Mr. Vinson was in obvious distress when officers arrived. He was sitting on the couch, slumped over, gasping and gurgling for air, his face "very swollen, bloody, bruised." Although he was conscious, he was unable to talk to the officers. 6RP 39-41, 104, 124-125.

Paramedics from the Seattle Fire Department arrived shortly after summoned by the officers. 6RP 44, 125. When they arrived, they noted that in addition to his obvious injuries, Mr. Vinson had significant blood in his airway. 7RP 118. Based on his decreased level of consciousness, he was intubated and rushed to Harborview Medical Center. 6RP 193-197, 8RP 77.

Both responding officers and detectives took photographs of what appeared to be fresh blood throughout Mr. Vinson's apartment including on the couch, on the floor in front of the couch, on the other end of the couch, on a different spot on the carpet, on the carpet near the front door, on the closet door, on the kitchen counter, and on the wall. 6RP 60-66, 102-103; 8RP 121, 169-175. There was no blood found on the corners of any of the tables in the living room where Mr. Vinson was found. 6RP 66; 8RP 146, 162. Mr. Hickman himself had blood on his shirt, pants and socks. 6RP 68-69. He no longer had blood on his hands by the time photos were taken at the precinct. 6RP 69. No injuries to his hands were seen. 6RP 70.

When Mr. Vinson was taken to Harborview, he was seen in the Emergency Department by Dr. David Carlbom, an attending physician. 7RP 5-6, 8. Dr. Carlbom characterized Mr. Vinson as "critically ill" and tachycardic when he arrived. 7RP 8, 10. Dr. Carlbom described to the jury the various injuries Mr. Vinson had upon arrival at the emergency room: Left medial and inferior orbital

floor fracture, fractured lamina papyracea,⁴ collapsed left lung, abrasion on right shoulder and armpit, scrapes or scratches on right side of neck and face, abrasion on abdomen, laceration on right side of upper lip, and contusions and abrasions on his forehead. 7RP 12, 14, 19, 22-23. The laceration on the right side of the Mr. Vinson's mouth required sutures. 7 RP 23.

Shortly after he arrived, Mr. Vinson was transferred to the Intensive Care Unit, where his treatment was overseen by Dr. Heather Evans. Mr. Vinson remained intubated after he was transferred to the ICU. 7RP 49, 52. The doctors continued to be concerned about him given his initial level of responsiveness at the scene, the blood in his airway when he was intubated and his failure to improve during his first 24 hours in the hospital. 7RP 55. Both Dr. Carlbom and Dr. Evans testified that the blood in Mr. Vinson's airway was a result of his fractured orbital bones. 7RP 16-17, 65.

Dr. Evans also testified that, in her medical opinion, based on the blood in Mr. Vinson's airway and his unresponsiveness at

⁴ The lamina papyracea was described as a "very thin, small bone in the nose deep inside." 7RP 14.

the scene, there was no doubt that Mr. Vinson needed to be intubated and that had he not been, his likelihood of death was considerable. 7RP 56, 66. She further clarified that “there is no question that his intubation saved his airway and likely saved his life.” 7RP 67.

Mr. Vinson remained at the hospital for 17 days. Although he had “fairly minor injuries” in comparison to the extreme injuries they often see at Harborview, Mr. Vinson continued to be unable to take care of himself. 7RP 63, 75; 9RP 49. None of the doctors were able to specifically attribute his decreased level of functioning to his injuries, his long-standing alcohol use, or dementia, or a combination of all three. 9RP 50-51, 57, 60-61.

During testimony, Dr. Carlbom was asked about the victim's injuries. After describing his extensive experience treating patients presenting with broken bones in the emergency room, estimated at 1000 patients a year, Dr. Carlbom was asked to discuss common causes of orbital fractures like Mr. Vinson's. Dr. Carlbom testified that such fractures are usually a result of a direct injury to the eye, most commonly seen with motor vehicle accidents, the second most common cause being assault. 7RP 29-30. When asked

directly if it was a common injury from falling, the testimony went on as follows:

A. It is not a common injury. If you review the literature, it happens uncommonly maybe six percent of the time in several large case series. I've actually never seen it from a fall myself.

Q. In your opinion is it likely or unlikely or something else that Mr. Vinson's injuries were caused from a fall?

A. The fracture – the orbital blowout fracture, the multiple contusions around his body would be unusual to be seen with a fall.

7RP 30.

Dr. Carlbom was never asked if the injuries to Mr. Vinson were in fact the product of an assault. Rather, he was asked whether the injuries were consistent with an assault, to which he replied, "yes." 7RP 31.

During cross-examination, the defense attorney asked several questions about causation. Throughout this testimony, Dr. Carlbom never referred to an "assault" and only talked in neutral terms about causation. For example, when asked from what direction the injury was caused, the doctor testified that "[o]rbital floor fractures are commonly force directed from the front. They can be caused by direct impact on the inferior orbital rim, which is your

cheekbone. So maybe from the side. Certainly not from above.”
7RP 37. When asked about the source of the fracture to the lamina papyracea, Dr. Carlbom testified that he would assume “it’s the same energy delivered to his face that caused the orbital floor fracture.” 7RP 38. When the doctor was later asked about the cause of the contusions and scrapes to Mr. Vinson’s forehead, he refused to speculate on what caused them and simply answered that “some object struck his forehead with direct and shearing forces. Or his forehead stuck some object.” 7RP 42.

Although Dr. Carlbom pointed out that it would be unusual for a single fall or impact to result in the multiple injuries the victim suffered, he never “ruled out” the possibility that Mr. Vinson’s injuries could have come from falling. App. Br. at 18; 7RP 30-31, 43. In fact, Dr. Carlbom quite readily agreed that falling was one of the causes of orbital blowouts:

Q. [The prosecutor] asked you about sources of orbital blowout, and you apparently have done some reading and have percentages, plus experience?

A. Correct...

Qfalling, household injuries, you gave falling at six percent?

A. Correct. Falling in several large series of patients with this type of fracture was a minor cause, behind motor vehicle collisions, assault and sports injuries.

Q. But it is clearly a category?

A. Sure. It is possible.

7RP 45.

Dr. Carlbom was never asked by the State or the defense to comment on the plausibility of a particular factual scenario regarding the cause of the Mr. Vinson's injuries. There was no objection to any of Dr. Carlbom's testimony.

After the conclusion of the evidence, Mr. Hickman was found guilty of Assault in the First Degree. CP 60.

C. ARGUMENT

1. THE ADMISSION OF EXPERT TESTIMONY WAS NOT MANIFEST CONSTITUTIONAL ERROR BECAUSE IT WAS NOT IMPROPER AND BECAUSE THERE HAS BEEN NO SHOWING OF PREJUDICE

Dr. Carlbom, an expert medical witness in this case, testified that the victim's injuries were consistent with an assault and unlikely to have resulted from an accidental fall. As he expressed no opinion on the defendant's guilt, the veracity of any witness or even a specific version of events, his testimony was entirely proper.

Ultimately, it was still left to the jury to determine the weight to give Dr. Carlbom's testimony, whether in fact an assault occurred, if an assault did occur, who committed it, with what intent and with what effect. Therefore, there was no manifest constitutional error in the admission of his testimony.

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. ER 704; State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008); State v. Kirkman, 159 Wn.2d 918, 929, 155 P.3d 125 (2007)(citations omitted)("[I]t has long been recognized that a qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact.")

It is, however, improper for a witness to express an opinion or personal belief as to the guilt of the defendant, the intent of the accused or the veracity of witnesses. Montgomery, 163 Wn.2d at 591,(citations omitted). The goal is to avoid telling the jury what result to reach. State v. Baird, 83 Wn. App. 477, 485, 922 P.2d 157 (1996) rev. denied 113 Wn.2d 1012 (1997)(citation omitted).

However, opinions based solely on inferences from the physical evidence and the witness's expertise, and not based on a witness's credibility, may be properly admitted. Id. at 485, citing City of Seattle v. Heatley, 70 Wn. App 573, 854 P.2d 658 (1993) rev. denied 123 Wn.2d 1011 (1994).

A claim of improper opinion testimony may be raised for the first time on appeal only if it is manifest error affecting a constitutional right. State v. Elmore, 154 Wn. App 885, 897, 228 P.3d 760 (2010) citing RAP 2.5 (a)(3); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). Manifest error requires a showing of actual and identifiable prejudice. Id.; Montgomery, 163 Wn. 2d at 595. Not all improper opinion testimony rises to the level of manifest constitutional error. Kirkman, 159 Wn.2d at 936. "Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact." Id. at 938. Important to the question of actual prejudice is whether the jury was properly instructed. Montgomery, 163 Wn.2d at 595.

- a. The expert testimony in this case was not improper because it was based on the witness's expertise and findings and in no way conveyed an opinion on the defendant's guilt.

In this case, Dr. Carlbom was never given a history of how the injury allegedly occurred, either by the victim or the defendant. He was never asked what, in his opinion, was the likely cause of the injuries. He certainly never commented on the veracity of the defendant or any witness. He was simply asked, based on his extensive experience as an emergency room doctor, whether the injuries he observed on Mr. Vinson were consistent with either a fall or an assault.

Dr. Carlbom essentially testified that while it was possible that the orbital blowout suffered by Mr. Vinson could have come from a fall, it was unlikely especially given the number of injuries on different parts of Mr. Vinson's body. Although he did testify that the injuries were consistent with an assault, he was not asked whether they were in fact the result of an assault. As his limited opinion given was based only on his observations, his experience and his medical research, his testimony was proper.

In order to determine whether a witness's statement amounts to impermissible opinion testimony, the court must consider the circumstances of the individual case, including the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Kirkman, 159 Wn.2d at 131(citations omitted).

Courts have repeatedly approved asking a qualified witness whether their professional findings are consistent with a particular conclusion, even if that conclusion encompasses an ultimate fact to be decided by the jury. See e.g. State v. Montgomery, 163 Wn.2d 577, 592-593, 594 fn8, 183 P.3d 267 (2008)(Permissible to ask a detective whether he has an opinion, based on training and experience, as to whether certain chemicals and the manner in which they were obtained is consistent or inconsistent with intent to manufacture methamphetamine); State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)(Permissible to ask doctor whether physical examination was consistent with history of sexual abuse given by the victim); State v. Toennis, 52 Wn. App 176, 185, 758 P.2d 539 (1988)(Permissible for a qualified physician to testify that, within

reasonable probabilities, a particular injury or group of injuries to a child is not accidental or not consistent with the defendant's explanation, but is instead consistent with physical abuse by a person of mature strength).

In addition, medical experts may give opinions about cause of injuries so long as they do not testify that the defendant committed the crime. See e.g. State v. Jones, 59 Wn. App. 744, 801 P.2d 263 (1990) rev. denied, 116 Wn.2d 1021(1991); State v. Baird, 83 Wn. App 477, 922 P.2d 157 (1996)rev. denied 113 Wn.2d 1012 (1997). In Jones, a homicide case, one expert medical witness testified that the child died from "non-accidental blunt injury." 59 Wn. App. at 747. The witness told the jury that his conclusion was based not only on the injuries themselves but the history of the injury as given by the defendant. Id. He went on to explain the reasons he disbelieved the defendant's story that the injury was the result of an accident. Id. A second doctor testified that the "nature of the injury is such that this injury could only really be sustained by some sort of inflicted manner, whether it be an object, including a hand or a fist or some other object." Id. at 748. Despite the fact that the expert's testimony certainly touched on the

plausibility of the defendant's version of events, the court found the experts' testimony was permissible because it was based on inferences drawn from the physical evidence educed at the autopsy rather than based on their opinion of a witness's credibility. Id. at 749. The court also pointed out that the witnesses never opined that it was the defendant that inflicted the injury; rather, that was still left for the jury to decide. Id. at 751. It was also noted that the jury still had the responsibility to determine what weight to give to the experts' testimony. Id.

Similarly, in Baird, it was undisputed that the defendant assaulted his wife, cut off her nose and sliced her eyelids. Instead, the defendant asserted a claim of voluntary intoxication and diminished capacity. 83 Wn. App at 480-481. Despite the fact that their testimony implicated the defendant's state of mind – the crucial issue in the case, doctors were allowed to testify that the injuries to the victim's eyes were "deliberate." Id. The court found the testimony permissible because the doctors' opinions did not rely upon a judgment about the defendant's credibility, but rather on their expertise and examination of the injuries. Id. at 486.

Appellant claims that because Dr. Carlbom testified that assault was a common cause of orbital blowouts and that it was “undisputed”⁵ that Mr. Hickman was the only person in the room when the injuries occurred, Dr. Carlbom “directly, or at least by inference, testified that Hickman assaulted Vinson.” App. Br. at 14. Only by incorrectly claiming that Dr. Carlbom “statistically ruled out” falling (App Br. 18) as a cause of Mr. Vinson’s injuries can appellant make this assertion. Dr. Carlbom testified that assault was the second most common cause of *one* of the victim’s injuries. Although he said it would be unusual if the injuries were caused from a fall, he specifically testified that it was possible. The testimony in this case simply cannot be characterized as an explicit or even almost explicit statement on an ultimate fact.

On the contrary, it was entirely proper. Just like the testimony in Montgomery, Kirkman and Toennis, Dr. Carlbom was asked whether the injuries he saw were consistent with an assault. Just like the experts in Jones and Baird, his opinion was based solely on his physical observations and expertise. In fact, the

⁵ Mr. Vinson testified that Mr. Hickman was with several other men in the apartment when he was attacked. 7RP 85-92.

experts in Jones were provided with the defendant's history of the injuries and rejected it as part of their analysis and still their testimony was deemed proper. 59 Wn. App. at 747. Dr. Carlbom never had any version before him to consider at all.

Even if the doctor's testimony can be characterized as an implied belief that Mr. Vinson's injuries were the product of assault, there was no connection made to Mr. Hickman as the assailant. Although *the evidence* certainly implicated Mr. Hickman, that opinion was not reflected in Dr. Carlbom's testimony. "The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. City v. Heatley, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)(emphasis in original).

The appellant's analysis appears to rely almost entirely on State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236 (2009). In Hudson, a sexual assault case, the only disputed issue was whether the sexual encounter was consensual or not. After testifying extensively about the victim's description of the assault, a SANE nurse was asked whether physical injuries to the victim were consistent with the victim's report of "nonconsensual sex." 150 Wn.

App. at 650-651. The court noted that had the nurse's testimony been limited to this question, it would probably have been proper. Id., at 653, fn2, citing State v. Montgomery, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). However, both of the nurses in this case went on to testify that they found "extensive injury related to nonconsensual sex" and that "this was very traumatic nonconsensual...penetration." Id. The court concluded that these were "overt and unambiguous" opinions that the victim was raped. Id. Given that the defendant did not dispute that their encounter caused the victim's injuries, these amounted to statements that the defendant was guilty of rape. Id. at 653. The court went on to discredit the nurses' testimony further by stating that the sole reason they believed the sex was nonconsensual was because it must have been extremely painful. Id. at 654.

The opinions rendered in Hudson are significantly different from what Dr. Carlom testified to in this case, mainly because Dr. Carlom never testified that Mr. Vinson's injuries were in fact from an assault. His testimony was limited to whether or not such injuries were consistent with assault or commonly attributed to a fall. Even when describing causation during cross-examination, he

never referred again to the word “assault” but instead talked about “force” and “impact.” 7RP 37-38, 42.

Moreover, unlike Hudson, where there was only one issue for the jury i.e. the consensual or non-consensual nature of the sexual encounter, causation was not the sole issue at Mr. Hickman's trial. For example, during closing arguments, defense challenged not only whether an assault occurred but whether the extent of the injuries arose to great bodily harm. 9RP 109, 112-113. Even if Dr. Carlbom had “overtly and unambiguously” stated that Mr. Vinson’s injuries were from an assault, the jury would still have to decide who assaulted him, what that person’s intent was and what the extent of the injuries were.⁶

Appellant also seems to make a significant distinction between Dr. Carlbom’s use of the word “assault” and the doctor’s opinion in Jones that the injuries were “non-accidental.” He seems to ignore the fact that another doctor in Jones permissibly testified that the injuries were “inflicted.” App Br. at 13-14. The difference

⁶ To find Mr. Hickman guilty of Assault in the First Degree, the jury had to find beyond a reasonable doubt that Mr. Hickman assaulted Mr. Vinson, that he acted with intent to inflict great bodily harm and that the assault resulted in the infliction of great bodily harm. CP 51.

between “non-accidental, inflicted injuries” and “assault” simply cannot elevate otherwise proper opinion testimony to a manifest constitutional error.

Moreover, courts have routinely allowed expert opinion even when the testimony directly addresses an element of the crime as long as the opinion, again, is based on physical observations and expertise and there is no comment on the defendant’s guilt. See e.g. State v. Mason, 160 Wn.2d 910, 932, 162 P.3d 396 (2007)(In homicide case, medical examiner properly allowed to testify that amount of blood loss at scene warranted issuing a presumptive death certificate because the testimony was not that defendant committed murder but simply that the victim had sustained life-threatening injuries.); State v. Sanders, 66 Wn. App. 380, 388, 832 P.2d 1326 (1992)(In possession with intent to deliver case, officer properly allowed to testify that lack of certain items in home where drugs found indicates that the house was not used for purpose of consuming drugs because his opinion was based solely on physical evidence and his experience and he did not express any opinion as to the defendant’s guilt or credibility.); City v. Heatley, 70 Wn. App 573, 576, 579, 854 P.2d 658(1993)(In DUI case, permissible for

officer to testify that the defendant was “obviously intoxicated,” “affected by the alcoholic drink,” and “could not drive a motor vehicle in a safe manner” even though the language was similar to the legal standard because his opinion was based solely on his experience and physical observations and contained no direct opinion on the defendant’s guilt or the credibility of a witness.); State v. Hayward, 152 Wn. App 632, 650-651, 217 P.3d 354 (2009)(In assault case, doctor properly testified that injury sustained by the victim was “a temporary but substantial loss or impairment of the function of a body part” – the legal definition of substantial bodily harm - because the testimony did not include any discussion of the defendant or his participation in the injury.)

Dr. Carlbom did not testify that the victim’s injuries were caused by an assault nor did he opine, directly or indirectly, on the credibility of any witness or on the defendant’s guilt. He simply told the jury, based on his experience and observations, that the injuries were consistent with an assault and unlikely although not impossible caused by a fall. This testimony was proper.

- b. There has been no showing of actual and identifiable prejudice in this case because the jurors were properly instructed that they were not bound by the expert's opinion.

Even if the court determines that Dr. Carlbom's testimony was somehow improper, there is no actual and identifiable prejudice that warrants a finding of manifest constitutional error.

As indicated above, the instructions given to the jury are an important consideration of whether there was actual prejudice to the defendant's rights. State v. Elmore, 14 Wn. App 885, 898, 228 P.3d 760 (2010) citing State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008). In this case, the jurors were instructed that they were "the sole judges of the credibility of each witness" and "also the sole judges of the value or weight to be given to the testimony of each witness." CP 39. Appellant's trial counsel even highlighted these instructions during closing argument. 9RP 101. They were also instructed that they are not required to accept an expert witness's opinion. CP 46. Jurors are presumed to follow the instructions. Montgomery, 163 Wn.2d at 596, citing State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

Although appellant dismisses the instructions given in this case as being overridden by Dr. Carlbom's impressive resume (App. Br. at 18-19), these very same instructions have negated prejudice even in cases where the court has quite clearly found improper opinion testimony. See e.g. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008). In Montgomery, the court held that both the detectives and a chemist gave improper opinion testimony that "went to the core issue and the only disputed element." Id. at 594. Despite that, the court found there was no actual prejudice, and thus no manifest constitutional error, because of the instructions that were given:

In Kirkman, this court concluded that there was no prejudice in large part because, despite the allegedly improper opinion testimony on witness credibility, the jury was properly instructed that jurors "are the sole judges of the credibility of the witnesses" and that jurors "are not bound" by expert witness opinions. Virtually identical instructions were given in this case. There was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should presume the jury followed the court's instructions absent evidence to the contrary.

Id. at 595-586 (internal citations and references to the record omitted.)

The jurors in this case were instructed that it was their responsibility to determine the value or weight to be given each witness and they were specifically told they were not required to accept any expert's opinion. CP 39, 46. There is no showing that they disregarded these instructions. Moreover, as discussed below, there was significant evidence other than Dr. Carlbom's testimony that proved that Mr. Vinson was the victim of a brutal assault rather than an accidental fall. Therefore, there was no actual prejudice to the appellant.

- c. Any error in admitting the expert's testimony was harmless given the overwhelming evidence that the victim's injuries were the product of an assault rather than a fall.

Although Dr. Carlbom testified that the victim's injuries were consistent with an assault and unlikely to be caused by a fall, the jury would have undoubtedly reached that same conclusion even without the doctor's testimony given the evidence presented as to the appellant's threats against the victim, the obvious sounds of an assault coming from the apartment where the victim was found, and the presence of injuries on multiple locations on the victim's body. As the jury would have convicted the defendant as charged without

the disputed testimony, any error in admitting that testimony is harmless.

Even improper opinion testimony amounting to manifest constitutional error, is subject to harmless error analysis. State v. Kirkman, 159 Wn.2d 918, 926-927, 155 P.3d 125 (2007). A constitutional error is harmless if the State can show beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2009), citing State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007)(additional citations omitted). This test can be met if the untainted evidence presented at trial is so overwhelming that it leads necessarily to a finding of guilt. Id.

Numerous witnesses, including downstairs neighbors and several police officers, heard a man yelling, screaming and swearing inside an apartment. 6RP 29, 114; 8RP 25, 80, 87. His was the only voice that was heard and it continued until officers pushed in the door. 6RP 34, 114; 8RP 80, 100. Mr. Hickman and Mr. Vinson were the only people found inside of that apartment. Mr. Hickman was identified as the man who was yelling. 6RP 140-

141. Mr. Vinson, on the other hand, was nearly unconscious and a bloody mess. 6RP 39-41, 104, 124-125.

In this case, appellant's basic claim is that there was insufficient evidence that Mr. Vinson's injuries were the product of an assault rather than an accidental fall. It is notable that when appellant categorizes the evidence negating harmless error, he leaves out testimony of the neighbors, Mr. Imeson and Ms. Bellwood. App. Br. at 20. Their testimony was damning.

Mr. Imeson and Ms. Bellwood not only heard a very angry Mr. Hickman, they heard direct threats that included "I'll kill you" and "I'll beat the shit out of you." 8RP 83-85. Officer's standing outside the door also heard Mr. Hickman say, "This it fucking it. Three fucking strikes and you're out." 6RP 30, 115-116; 8RP 27. Given the evidence that Mr. Vinson was the only other person in the apartment, it is clear those threats were directed at him.

At the same time the neighbors could hear Mr. Hickman describing what he was going to do to Mr. Vinson, they could hear him doing it. They both specifically described hearing the sounds of "flesh on flesh" while Mr. Hickman was yelling. 8RP 80, 99. Repeatedly. 8RP 84. They clearly distinguished the sound of

someone being punched from other sounds they heard from the apartment above. 8RP 88, 94. What they heard, over and over, was "what sounded like someone getting punched" or slapped. 8RP 85, 86, 99.

That Mr. Hickman was screaming because Mr. Vinson fell is implausible. His actions after the police arrive make it laughable. He did not, as one might have expected if someone they were living with had fallen and injured themselves so severely, ask the police to help Mr. Vinson when they came knocking at the door. 6RP 38-39, 119. Instead, he did everything in his power to keep them from coming in. 6RP 33, 35-38, 118, 121; 8RP 31.

In addition, when the police were able to finally push their way in, they found Mr. Vinson severely injured and gasping for breath. 6RP 39-41, 104, 124-125. And yet, moments before, as they stood outside the door, they could hear Mr. Hickman still yelling, still angry, still threatening Mr. Vinson. This is tremendous evidence of guilt.

Moreover, not only did the witnesses hear multiple blows - an unlikely sound when someone falls, but the physical evidence confirmed what they heard. The victim had not one injury but

several, on different parts of his body including his left eye, his forehead, his right lip, his right cheek, his neck, his right shoulder and armpit and his abdomen. 7RP 12, 14, 19, 22-23. Blood was found not only where Mr. Vinson was sitting but on the wall, in the kitchen, on the other end of the couch, by the door, on the carpet and on the wall behind the couch. 6RP 60-66, 102-103; 8RP 121, 169-175. None of this evidence is remotely consistent with an accidental fall. It does, however, corroborate exactly what the witnesses heard.

The fact is that the angry threats and sounds of punching and slapping alone provide overwhelming evidence that this was an assault. The evidence that the victim suffered injuries on multiple parts of his body and that the injuries were likely sustained in multiple areas of the apartment proved it beyond any doubt. All of this testimony was untainted by Dr. Carlbom's limited use of the word "assault" and opinion that it would be uncommon for Mr. Vinson's injuries to be caused from a fall. Any error in this case was harmless.

2. COUNSEL'S FAILURE TO OBJECT TO THE TESTIMONY WAS NOT INEFFECTIVE BECAUSE THE TESTIMONY WAS PROPERLY ADMITTED AND BECAUSE THERE WAS NO PREJUDICE

The only claim of ineffective assistance in this case arises from trial counsel's failure to object to Dr. Carlbom's testimony. Given that the expert's testimony was in fact proper and that there was overwhelming evidence of guilt notwithstanding his testimony, trial counsel was not ineffective for failing to object.

"The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U. S. 668, 686, 104 S. Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). To establish a claim of ineffective assistance of counsel, a defendant must prove: 1) counsel's performance was deficient, and 2) the deficient performance prejudiced the defense. Strickland at 687. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Id. at 700.

To prove the first prong of the Strickland test, the defendant must show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. To satisfy the first prong, an appellant must show that counsel made errors so serious that he/she was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Strickland, 466 U. S. at 687. Thus, "scrutiny of counsel's performance is highly deferential and courts will indulge a strong presumption of reasonableness." Id. at 689. The defendant bears the burden of showing there were no "legitimate strategic or tactical reasons" behind defense counsel's decision. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001) (quoting State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

To satisfy the second prong of the Strickland test, prejudice to the defendant, the defendant must show that there is a reasonable probability that but for defense counsel's unprofessional

conduct, the result of the proceeding would be have been different. In re Personal Restraint of Davis, 152 Wn.2d 647, 672-673, 101 P.3d 1 (2004)(citations omitted). A "reasonable probability" is one that undermines confidence in the outcome or the trial. Id. at 673.

As discussed above, Dr. Carlbom's testimony was not improper in any way. Presumably this is why trial counsel did not object below. Even if the testimony was improper, there is simply no prejudice. Again, as discussed above, there was overwhelming evidence of guilt of the defendant, untainted by the doctor's limited testimony about the cause of the victim's injuries. Even without his testimony, the jury would have found him guilty.

As there was no deficient performance and no prejudice, this claim should be rejected.

3. **BASED ON THE RECORD BEFORE THE COURT,
THE TRIAL COURT EXCEEDED ITS STATUTORY
AUTHORITY WHEN IT ORDERED A DRUG AND
ALCOHOL EVALUATION**

The respondent concedes that there was no evidence before the sentencing court that either drugs or alcohol played a significant role in Mr. Hickman's crime. Therefore, the requirement that he

obtain a drug and alcohol evaluation and participate in follow-up treatment was not reasonably related to the circumstances of the offense and should be stricken from the Judgment and Sentence.

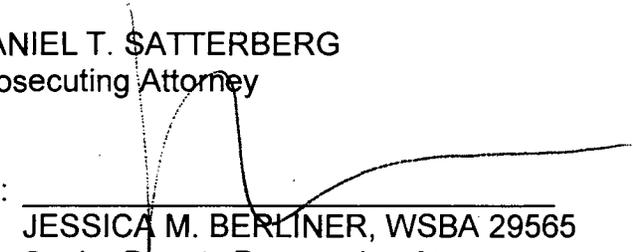
D. CONCLUSION

For the foregoing reasons, Hickman's assignments of error regarding the testimony should be rejected. The State respectfully asks this Court to affirm the verdict and remand for the trial court to strike the drug and alcohol evaluation and treatment condition of community custody.

DATED this 1st day of October, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew Peter Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. CAREY HICKMAN, Cause No. 64458-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Karen Grant
Name
Done in Seattle, Washington

10/1/10
Date

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