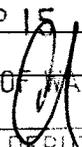


NO. 37168-5

FILED
COURT OF APPEALS
DIVISION II

08 SEP 15 PM 1:29

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

DWAYNE STAPHON SANDERS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 07-1-01845-1

BRIEF OF RESPONDENT

GERALD A. HORNE
Prosecuting Attorney

By
KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Did the trial court properly exercised it's discretion in overruling defendant's objection to a police officer's testimony indicating that an assault had occurred and in denying defendant's motion for mistrial based upon such testimony?.....	1
2.	Did the trial court properly exercised its discretion in not instructing the jury on third and fourth degree assault when there was insufficient evidence presented at trial to support such instructions?	1
B.	<u>STATEMENT OF THE CASE</u>	1
1.	Procedure	1
2.	Facts.....	2
C.	<u>ARGUMENT</u>	4
1.	THE TRIAL COURT DID NOT ERR WHEN IT OVERRULED DEFENDANT'S OBJECTION TO A STATEMENT BY A POLICE OFFICER INDICATING THAT AN ASSAULT HAD OCCURRED OR WHEN IT LATER DENIED DEFENDANT'S MOTION FOR MISTRIAL	4
2.	THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY ON THIRD AND FOURTH DEGREE ASSAULT	9
D.	<u>CONCLUSION</u>	15

Table of Authorities

State Cases

<i>City of Seattle v. Heatley</i> , 70 Wn. App. 573, 579, 854 P.2d 658 (1993)	6, 7, 8, 9
<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 77, 684 P.2d 692 (1984)	4
<i>Herring v. Department of Social and Health Servs.</i> , 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996)	11
<i>State v. Carlin</i> , 40 Wn. App. 698, 700, 700 P.2d 323 (1985)	8
<i>State v. Colwash</i> , 88 Wn.2d 468, 470, 564 P.2d 781 (1977)	11
<i>State v. Copeland</i> , 130 Wn.2d 244, 294, 922 P.2d 1304 (1996)	4
<i>State v. Cruz</i> , 77 Wn. App. 811, 814-815, 894 P.2d 573 (1995)	6
<i>State v. Demery</i> , 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)	6
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)	10, 13
<i>State v. Fernandez-Medina</i> , 94 Wn. App. 263, 266, 971 P.2d 521, <i>review granted</i> , 137 Wn.2d 1032, 980 P.2d 1285 (1999)	10
<i>State v. Fowler</i> , 114 Wn.2d 59, 67, 785 P.2d 808 (1990), <i>overruled on other grounds by State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991)	13
<i>State v. Garrison</i> , 71 Wn. 2d 312, 427 P.2d 1012 (1967)	8
<i>State v. Harris</i> , 62 Wn.2d 858, 385 P.2d 18 (1963)	11
<i>State v. Hopson</i> , 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)	5
<i>State v. Jackson</i> , 70 Wn.2d 498, 424 P.2d 313 (1967)	5

<i>State v. Johnson</i> , 124 Wn.2d 57, 873 P.2d 514 (1994)	5
<i>State v. Lucky</i> , 128 Wn.2d 727, 731, 912 P.2d 483 (1996), <i>overruled on other grounds by State v. Berlin</i> , 133 Wn.2d 541, 544, 947 P.2d 700 (1997)	10
<i>State v. Mak</i> , 105 Wn.2d 692, 701, 718 P.2d 407, <i>cert. den.</i> , 497 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986).....	5
<i>State v. Olmedo</i> 112 Wn. App. 525, 531, 49 P.3d 960(2002).....	6, 8
<i>State v. Ortiz</i> , 119 Wn.2d 294, 308, 831 P.2d 1060 (1992)	6
<i>State v. Rahier</i> , 37 Wn. App. 571, 575, 681 P.2d 1299 (1984)	11
<i>State v. Staley</i> , 123 Wn.2d 794, 803, 872 P.2d 502 (1994).....	11
<i>State v. Walker</i> , 136 Wn.2d 767, 771, 966 P.2d 883 (1998).....	10
<i>State v. Warden</i> , 133 Wn.2d 559, 563 947 P.2d 708(1997)	10
<i>State v. Workman</i> , 90 Wn.2d 443, 447-448, 584 P.2d 382, (1978)	9, 11, 12

Federal and Other Jurisdictions

<i>Beck v. Alabama</i> , 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L.Ed.2d 392 (1980).....	10
---	----

Statutes

RCW § 9A.36.021(1)(a)	1
-----------------------------	---

Rules and Regulations

CrR 6.15.....	11
ER 704	6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in overruling defendant's objection to a police officer's testimony indicating that an assault had occurred and in denying defendant's motion for mistrial based upon such testimony?
2. Did the trial court properly exercise its discretion in not instructing the jury on third and fourth degree assault when there was insufficient evidence presented at trial to support such instructions?

B. STATEMENT OF THE CASE.

1. Procedure

On April 5, 2007, the Pierce County Prosecutor's Office charged DWAYNE STAPHON SANDERS, hereinafter "defendant," with one count of assault in the second degree ("intentionally assaults another and thereby recklessly inflicts substantial bodily harm"). CP 1; *see* RCW § 9A.36.021(1)(a). The case proceeded to trial on October 9, 2007, in front of the Honorable Sergio Armijo. RP 15. Defendant proposed jury instructions on lesser offenses of third and fourth degree assault. RP 301. The court sustained the State's objection to the inclusion of those

instructions and the jury was not instructed on third and fourth degree assault. RP 313.

On October 16, 2007, the jury found defendant guilty of one count of assault in the second degree. RP 374; CP 133. The jury also found by special verdict that defendant and Ms. Goebel were members of the same family or household. CP 134. A sentencing hearing was held on December 14, 2007. RP 385. The court found defendant to be a persistent offender and sentenced him to life in prison without the possibility of parole. RP 394-395; CP 185-198. Defendant filed a timely notice of appeal. CP 291-305, 329-330.

2. Facts

On March 29, 2007, defendant was at the home of his girlfriend, Angelic Goebel. RP 61. The two of them “played dress up, listened to music, ... ate, [and] went through a bunch of clothes.” Also present was a transient, known only as Stephanie, whom Ms. Goebel occasionally let sleep over. RP 61. Ms. Goebel testified that during this time Stephanie and defendant were flirting which upset her. RP 62-64. Defendant and Stephanie left the house around 1 am to go to a 7-11 store to buy beer. RP 67. Ms. Goebel testified that she laid down in her bedroom. RP 68. Half an hour later, defendant and Stephanie returned. RP 69. Ms. Goebel testified she got into an argument with defendant about the events of the

night. RP 71. She testified that while she yelled at defendant, he hit her in the face with his hand more than once. RP 73-78. When defendant turned and walked away, Ms. Goebel jumped on his back. RP 77. Ms. Goebel testified that she ripped off defendant's necklace and grabbed his genital area. RP 111. Defendant threw Ms. Goebel off and chased Stephanie as she ran out the door. RP 78-79.

Defendant returned a minute later and Ms. Goebel asked him to leave. RP 79. When he would not leave, Stephanie and Ms. Goebel left with another friend. RP 80-81. When Ms. Goebel returned home several hours later, defendant was cleaning up the patio. RP 86. Ms. Goebel testified that they talked, ate, and had sex. RP 87. Defendant suggested that they sleep for a while, then afterwards he would take Ms. Goebel to the hospital before turning himself into the police. RP 87. Around nine at night, Stephanie returned to the house and woke up defendant and Ms. Goebel. RP 89. Ms. Goebel testified that Stephanie brought drugs, and defendant and Ms. Goebel got into an argument about Ms. Goebel using them. RP 90. Ms. Goebel called her friend Brian Hausner, and he came and took her to St. Clare's Hospital. RP 92-93. At the hospital, Mr. Hausner called the police. RP 94.

Officer Brian Weekes arrived at the hospital, took pictures of Ms. Goebel's injuries, and wrote up a report of what had happened. RP 96-98. He testified that Ms. Goebel appeared to have swelling and bruising around her eyes and bruising on her back, arm and ankle. RP 188. Dr.

Stephen Friedrich examined Ms. Goebel and diagnosed her as having a new fracture around her eye caused by a punch or blow to her face. RP 259. Ms. Goebel gave Officer Weekes the key to her apartment so he could go in to search for defendant. RP 96. Upon entering the apartment, Officer Weekes found defendant and arrested him. RP 193-194.

A few days after the incident, Detective Ryan Larson from the domestic violence unit of Lakewood interviewed Ms. Goebel. RP 103. He noticed she had two black eyes and trouble walking. RP 157. The defendant did not testify during the trial.

C. ARGUMENT.

1. THE TRIAL COURT DID NOT ERR WHEN IT OVERRULED DEFENDANT'S OBJECTION TO A STATEMENT BY A POLICE OFFICER INDICATING THAT AN ASSAULT HAD OCCURRED OR WHEN IT LATER DENIED DEFENDANT'S MOTION FOR MISTRIAL.

The grant or denial of a motion for a new trial is within the sound discretion of the trial court and will be reversed only for abuse of that discretion. *State v. Copeland*, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based upon untenable grounds. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984).

The trial court should grant a mistrial only when the defendant has been so prejudiced that only a new trial can insure that the defendant will be tried fairly. *State v. Johnson*, 124 Wn.2d 57, 873 P.2d 514 (1994)(citing *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989)(quoting *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, cert. den., 497 U.S. 995, 93 L.Ed.2d 599, 107 S. Ct. 599 (1986))). That is, a trial court’s denial of a motion for mistrial will be overturned only “when no reasonable judge would have reached the same conclusion.” *Johnson*, 124 Wn.2d at 76.

In the present case, during trial, Detective Ryan Larson testified that the reason he contacted Brian Hausner was “because [Hausner] gave [Ms. Goebel] a ride to the hospital after she was assaulted.” RP 160. Defense counsel immediately objected to the use of the term “assaulted” and moved to strike the response for being a legal conclusion. RP 160. Once the jury exited the courtroom, defense counsel moved for a mistrial. RP 160-161. After some discussion, the court overruled the objection to the statement and denied defendant’s motion for mistrial. RP 163. Defendant contends that the trial court erred in overruling defendant’s objection to Detective Larson’s testimony and further erred in denying the motion for mistrial.

To determine “whether testimony constitutes an impermissible opinion on the defendant’s guilt” the court looks to the circumstances of each case. *State v. Olmedo* 112 Wn. App. 525, 531, 49 P.3d

960(2002)(citing *State v. Cruz*, 77 Wn. App. 811, 814-815, 894 P.2d 573 (1995)). In doing this, courts should consider factors that “include the type of witness, the nature of the charges, the type of defense and the other evidence.” *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

Generally, testimony given by lay and expert witness may not directly or by inference refer to defendant’s guilt. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). But, “an opinion is not improper merely because it involves ultimate factual issues.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993)(citing *ER 704*)).

In deciding whether to admit evidence, including testimony, “trial courts are afforded broad discretion.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). “A trial court’s decision to admit or deny evidence will be upheld unless the appellant can show an abuse of discretion.” *State v. Olmedo*, 112 Wn. App. 525, 530, 49 P.3d 960 (2002)(citing *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001)).

Looking to the factors presented in *City of Seattle v. Heatley*, it is clear that the statement at issue in this case was not a legal conclusion, but rather an explanation by the detective as to why he took certain steps in his investigation. As such, the testimony was properly admitted by the trial court and the court's denial of defendant's motion for mistrial was proper.

During trial, the following exchange took place:

PROSECUTOR: What is the general nature of that report?

LARSON: It's in reference to a witness I contacted about this case.

PROSECUTOR: And what was that witness's name?

LARSON: Brian Hausner

PROSECUTOR: How is he related to the case?

DEFENSE COUNSEL: Objection, beyond the scope, no personal knowledge.

COURT: Well, preliminary, kept it at preliminary. Go ahead and ask the question.

PROSECUTOR: Why did you seek out Brian Hausner?

LARSON: **Because he gave [Ms. Goebel] a ride to the hospital after she was assaulted.**

RP 159-160 (emphasis added).

Detective Larson never testified that it was the defendant who assaulted Ms. Goebel. Rather, he was explaining the steps he took in his investigation with Ms. Goebel, and how he came into contact with Mr.

Hausner. The focus of the answer is on what caused Detective Larson to contact Mr. Hausner. The jury will hear this as an explanation of why he sought out and talked to Mr. Hausner. Detective Larson never states that it was defendant who was guilty of assaulting Ms. Goebel and “evidence is not improper when the testimony is not a direct comment on the defendant’s guilt... and based on inferences from the evidence.” *State v. Olmedo*, 112 Wn. App. 525, 531, 49 P.3d 960 (2002)(citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)). Typically, “improper opinions on guilt usually involve an assertion pertaining directly to the defendant.” *State v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993)(see, e.g., *State v. Garrison*, 71 Wn. 2d 312, 427 P.2d 1012 (1967); cf. *State v. Carlin*, 40 Wn. App. 698, 700, 700 P.2d 323 (1985)(police officer testified that tracking dog followed defendant’s “fresh guilt scent”)). Because Detective Larson never says it was defendant who assaulted Ms. Goebel, and is relaying to the jury the steps in his investigation which led him to Mr. Hausner, his statement was not improper.

Furthermore, Detective Larson’s experience in law enforcement since 1991, and knowledge as the domestic violence detective for the city of Lakewood, lends credibility to his opinion that Ms. Goebel had been assaulted. RP 152-153. When Detective Larson spoke with Ms. Goebel a few days after the incident at her home, she had a nervous and fearful demeanor. RP 156-157. He also noticed she had two black eyes and

difficulty walking with bruising on one of her legs. RP 157-158. It was a reasonable conclusion that these injuries were caused by an assault by someone. “The fact that an opinion encompassing ultimate factual issues *supports* the conclusion that defendant is guilty does not make the testimony an improper opinion of guilt.” *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)(emphasis in original). Therefore, the trial court did not abuse its discretion in denying defendant’s objection to Detective Larson’s statement. Because the trial court did not err by admitting Detective Larson’s testimony, defendant was not prejudiced by such testimony. With no such prejudice, the trial court did not abuse its discretion in denying defendant’s motion for a mistrial.

2. THE TRIAL COURT DID NOT ERR BY REFUSING TO INSTRUCT THE JURY ON THIRD AND FOURTH DEGREE ASSAULT.

An instruction on a lesser included offense is proper when, “each of the elements of the lesser offense [are] a necessary element of the offense charged [and] second, the evidence in the case support[s] an inference that the lesser crime was committed.” *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382, (1978). The first requirement of the *Workman* test, the legal prong, is met if the offense is a lesser included offense or an inferior degree offense. The second requirement, the factual prong, is met “if the evidence would permit a jury to rationally find a

defendant guilty of the lesser offense and acquit him of the greater.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)(citing *State v. Warden*, 133 Wn.2d 559, 563 947 P.2d 708(1997)(citing *Beck v. Alabama*, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L.Ed.2d 392 (1980))).

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. *State v. Walker*, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. *Id.*

The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, *review granted*, 137 Wn.2d 1032, 980 P.2d 1285 (1999), *citing Herring v. Department of Social and Health Servs.*, 81 Wn. App. 1, 22-23, 914 P.2d

67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

In the present case, defendant was charged with second degree assault. CP 1. He asked that the jury be presented with instructions on third and fourth degree assault. RP 301. After some discussion, the trial court sustained the State's objection to the inclusion of instructions on third and fourth degree assault, and the instructions were not given to the jury. RP 313. Defendant contends the trial court erred by not instructing the jury on third and fourth degree assault. During the discussion, the State conceded that the legal prong of the *Workman* test was met, but

argued the factual prong was not. RP 301. As such, the issue raised in this appeal is really whether the factual prong of the *Workman* test was met.

To prove second degree assault, the State had to prove beyond a reasonable doubt that “the defendant intentionally assaulted Angelic Goebel... [and] that the defendant thereby recklessly inflicted substantial bodily harm on Angelic Goebel.” CP 104- 123, Instruction No. 9. Defendant proposed an instruction that third degree assault is met when it is proven beyond a reasonable doubt that “the defendant caused bodily harm to Angelic Goebel,... the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering,...[and] that the defendant acted with criminal negligence.” CP 39-70, Instruction No. 16.

The evidence presented at trial did not support that an assault in the third degree was committed. Third degree assault differs from second degree assault in two factors: intent and the amount of harm. The only evidence regarding the intent of the assault was Ms. Goebel’s testimony at trial. In her testimony, she described the order of events saying “[defendant] hit [her] in [her] face” more than once and after she jumped on him, he threw her off his back onto a wall. RP 76-78. Defense counsel suggested that it would be possible for the jury to believe that if defendant “assaulted [Ms. Goebel], that that was an assault with criminal negligence

when he flung her off his back, because he may have done that with a great deal of force...[and] she doesn't say what she hit." RP 312. But, in her testimony, Ms. Goebel stated that she received a scrape on her back and said nothing of her face hitting the wall. RP 78. Dr. Freidrick's testimony during trial further supported Ms. Goebel's injuries came from defendant hitting her in the face when Dr. Freidrick testified that the orbital fracture to her eye came from a blow or punch to the face. RP 259.

In these situations, the evidence presented "must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000)(citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)). If the jury believes Ms. Goebel's testimony about the events, they will believe that defendant intentionally punched her in the face and that this caused the fracture. There is no evidence that the lesser and only the lesser degree of assault occurred. There is no evidence which affirmatively establishes that Ms. Goebel being thrown against the wall caused the broken eye socket necessary to establish an assault in the third degree. The judge agreed that defense's theory lacked evidence and stated "so far from what I can tell, he hit her on the face. That's it. He flung her, got her off his back.

There's no testimony that she hit her face." RP 313. Thus, the decision not to instruct the jury on third degree assault was proper when there was no evidence in support of defendant's theory.

Similarly, defense counsel made arguments for the inclusion of an instruction on fourth degree assault which was unsupported by the evidence. Defense counsel's proposed jury instructions stated that a fourth degree assault occurred if, among other things, it was proven that "defendant assaulted Angelic Marie Goebel." CP 39-70, Instruction No. 16. Defense counsel's theory was that the jury might reasonably infer that Ms. Goebel's injuries, specifically the orbital fracture, did not come from defendant hitting her, but instead from a previous surgery.

During trial, ambiguous evidence was presented about whether Ms. Goebel ever had sinus surgery and strong evidence was presented to indicate that the fracture was from a recent trauma to the region. When asked whether she had ever had sinus surgery, Ms. Goebel stated "No. When they did my jaw surgery, they messed around with all kinds of stuff in my head. But as far as sinus surgeries, I'm not aware of." RP 102. Dr. Oliphant, the radiologist who examined Ms. Goebel's CT scan, was also unsure of whether she had had prior surgery to her sinus'. RP 291.

In addition, although the radiologist and emergency doctor who examined Ms. Goebel's x-rays acknowledged that a sinus surgery could cause a fracture, they testified that they believed Ms. Goebel's fracture to be from a recent trauma to the region. RP 270, 272, 283-4, 291. Dr.

Oliphant stated, “the associated findings, with some fluid in the sinuses and soft tissue gas, suggests to me that it’s more likely acute” and “I would assume [the] fracture was new.” RP 283-84, 288. Without knowing whether Ms. Goebel even ever had sinus surgery and looking to the testimony that suggests her fracture was from a recent trauma, defendant’s theory that an assault may have occurred where she was not injured by defendant is unsupported by the evidence. As such, the decision of the trial court not to include the jury instruction on fourth degree assault was proper.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant’s convictions.

DATED: September 12, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811


Chelsey Mclean, Legal Intern

FILED
COURT OF APPEALS
DIVISION II

08 SEP 15 PM 1:29

STATE OF WASHINGTON

BY _____
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9.12.08 [Signature]
Date Signature