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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

No. 37440-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Tyshon Swain,

Appellant.

Clallam County Superior Court

Cause No. 07-1-00183-1

The Honorable Judges S. Brooke Taylor and Ken Williams

Appellant's Opening Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ASSIGNMENTS OF ERROR 1

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 3

ARGUMENT 6

I. The court's instruction defining recklessness created a mandatory presumption and relieved the state of its burden of proving an element of the offense. 6

II. Dr. Garlick's opinion that choking causes substantial bodily injury violated Mr. Swain's constitutional right to a jury trial 14

CONCLUSION 16

TABLE OF AUTHORITIES

FEDERAL CASES

Carella v. California, 491 U.S. 263, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) 13

Estelle v. McGuire, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991) 11

Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) 13

Morissette v. United States, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952) 7, 13

Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) 7, 12

Yates v. Evatt, 500 U.S. 391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991) 11, 12, 13, 14

WASHINGTON CASES

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000). 10, 14, 15

Seattle v. Gellein, 112 Wn.2d 58, 768 P.2d 470 (1989) 7

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987) 15

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) 6

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008) 11, 15

State v. Deal, 128 Wn.2d 693, 911 P.2d 996 (1996) 7, 12

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994) 15

State v. Gerdts, 136 Wn. App. 720, 150 P.3d 627 (2007) 9

State v. Goble, 131 Wn.App. 194, 126 P.3d 821 (2005) 8, 9, 10

State v. Harris, 122 Wn.App. 547, 90 P.3d 1133 (2004)..... 6

State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007)..... 10

State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007)..... 15

State v. Mertens, 148 Wn.2d 820, 64 P.3d 633 (2003)..... 7

State v. Randhawa, 133 Wn.2d 67, 941 P.2d 661 (1997)..... 6

State v. Savage, 94 Wn.2d 569, 618 P.2d 82 (1980)..... 7

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend VI 14

U.S. Const. Amend. XIV 14

Wash. Const. Article I, Section 21 14

Wash. Const. Article I, Section 22 14

WASHINGTON STATUTES

RCW 9A.08.010..... 7, 8

RCW 9A.36.021..... 8

OTHER AUTHORITIES

RAP 2.5..... 15

ASSIGNMENTS OF ERROR

1. The trial court erred by providing an erroneous definition of recklessness.

2. The trial court erred by giving Instruction No. 11, which reads as follows:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> Recklessness also is established if a person acts intentionally or knowingly.
>
> Instruction No. 11, Supp. CP.

3. The trial court's instruction defining recklessness contained an improper mandatory presumption.

4. The court's instruction defining recklessness impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.

5. Dr. Garlick invaded the province of the jury by expressing an explicit opinion on the defendant's guilt.

6. Dr. Garlick's opinion testimony on an ultimate issue violated Mr. Swain's constitutional right to a jury trial.

7. Dr. Garlick should not have been permitted to testify that choking causes a substantial impairment of a bodily function.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Proof that a result was achieved recklessly may be established by evidence that the person intentionally or knowingly caused the result. The trial court instructed the jury that Mr. Swain recklessly caused substantial bodily harm if he intentionally or knowingly took any action, without requiring proof that he intentionally or knowingly caused substantial bodily harm. Did the trial court's instruction misstate the law and relieve the state of its burden of proof?

2. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that "Recklessness…is established if a person acts intentionally or knowingly." Did the court's instruction defining recklessness create an unconstitutional mandatory presumption?

3. A "nearly explicit" or "almost explicit" opinion on an ultimate issue violates an accused person's constitutional right to a jury trial. Dr. Garlick expressed his opinion that Mr. Swain caused substantial impairment of a bodily function, which is one definition of substantial bodily harm. Did Dr. Garlick's opinion invade the province of the jury and violate Mr. Swain's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Tyshon Swain was charged with assaulting his girlfriend, Joylena Owen (and with breaking the window of her car).[1] RP (2/13/08) 5, CP 21. The state alleged that he intentionally assaulted Owen and recklessly inflicted substantial bodily harm. CP 20.

According to Owen, Mr. Swain called her on March 3, 2007, and said he needed her to pick him up because his truck was stuck. RP (2/13/08) 65-55. When she arrived, the back tires of the truck were in a ditch, and he seemed intoxicated. Since he "hadn't drank [sic] in a really long time," she asked him if he had been drinking. The two of them argued before he got in her car. RP (2/13/08) 68. Owen said that Mr. Swain broke one of her car windows, and she hit him because she was angry. RP (2/13/08) 70.

Owen testified that Mr. Swain started choking her, but stopped when one of the children (who were in the back of the car) asked him to. RP (2/13/08) 71-74. Mr. Swain told Owen to drive them home, and she did. The two continued to argue at home, and Owen said she scratched his face, and he tried to scratch hers in retaliation. RP (2/13/08) 75-78.

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[1] The charge of malicious mischief in the third degree is not at issue in this appeal.

A deputy interviewed Owen and photographed her injuries on March 12, 2007. RP (2/13/08) 26-28. Owen had three scratches on her face, marks near her mouth and on her cheek and lips, a puffy and swollen eyelid and redness in her right eye, blotchiness and marks on her neck, and bruising. The deputy said that it looked like her skin had been punched, and he described her voice as "scratchier, like I would say a hoarse person who has a cold." RP (2/13/08) 29-32.

Dr. Garlick saw Owen on March 12, 2007. RP (2/14/08) 23. He saw injuries around her neck (but not elsewhere), and said that she told him the injuries were from March 11, 2008 (the day before she saw him). RP (2/14/08) 30-34. He told the jury that choking usually results in neck injuries, and can stop the flow of blood and oxygen to the brain. He also told the jury that a choking victim might lose consciousness and experience darkening of vision, and characterized this as "a substantial impairment of bodily function." RP (2/14/08) 16-21. Later in his testimony, he repeated that choking would result in a substantial impairment of bodily function. RP (2/14/08) 28.

In its instructions to the jury, the trial court defined the phrase "substantial bodily harm" 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.
> Instruction No. 10, Supp. CP.

The court also defined "recklessness" for the jury:

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.
>
> Recklessness also is established if a person acts intentionally or knowingly.
> Instruction No. 11, Supp. CP.

During closing, the prosecuting attorney relied on Dr. Garlick's testimony to argue that Mr. Swain inflicted substantial bodily injury:

> Did Mr. Swain's choking, did the strangulation of Ms. Owen, did his cutting off of her blood supply, did his cutting off of her air supply amount to those magic words: "a temporary but substantial loss or impairment of the function of any bodily part or organ?"
>
> When you think about that, think about what Dr. Garlick said, "significant choking assault" and beyond that, his testimony of what happens when someone is choked or strangled or however you want to term it, what happens before the air supply is cut off and what happens, I guess in a more susbstantive fashion, is someone's blood supply to their brain.
>
> When that's cut off, they don't last very long.
> RP (2/14/08) 147-148.

During its deliberations, the jury asked to see Dr. Garlick's report. The Court responded by saying, "You have been provided all of the evidence admitted during the trial." RP (2/14/08) 173.

Mr. Swain was convicted of Assault in the Second Degree (and Malicious Mischief in the Third Degree), and sentenced within his standard range. He timely appealed from the Judgment and Sentence. CP 6, 8, 12-13.

ARGUMENT

I. THE COURT'S INSTRUCTION DEFINING RECKLESSNESS CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN OF PROVING AN ELEMENT OF THE OFFENSE.

An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of the crime charged is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997). A jury instruction that misstates an element of an offense is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the factfinding function of the jury.

State v. Savage, 94 Wn.2d 569, 573, 618 P.2d 82 (1980), *citing Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates a conclusive presumption whenever "a reasonable juror might interpret the presumption as mandatory." *State v. Deal,* 128 Wn.2d 693, 701, 911 P.2d 996 (1996). The Washington Supreme Court has "unequivocally rejected the [use of] any conclusive presumption to find an element of a crime," because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Mertens,* at 834.

RCW 9A.08.010 ("General requirements of culpability") defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus "[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly." RCW 9A.08.010(2). Assault in the Second Degree requires proof of an

intentional assault accompanied by the reckless infliction of substantial bodily harm. RCW 9A.36.021. Applying the substitution provisions of RCW 9A.08.010, a person an be convicted of Assault II if she or he "[i]ntentionally assaults another and thereby [intentionally, knowingly, or recklessly] inflicts substantial bodily harm." RCW 9A.36.021, *modified.*

In this case, the trial court's instruction defining recklessness included the following language: "Recklessness also is established if a person acts intentionally or knowingly."[2] Instruction No. 11, Supp. CP. The instruction did not place any limitation on the intentional or knowing acts that could establish the recklessness required by RCW 9A.36.021.

Similar language in an instruction defining "knowledge" has previously been found to require reversal. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble,* the accused was charged with assaulting a person whom he knew to be a law enforcement officer.[3] The trial court's "knowledge" instruction informed the jury that "[a]cting

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[2] This language was (presumably) intended to convey to jurors that they could convict Mr. Swain not only if he recklessly inflicted substantial bodily harm, but also if he intentionally or knowingly inflicted substantial bodily harm, in accordance with RCW 9A.08.010(2).

[3] Although not a statutory element of Assault in the Third Degree, knowledge that the victim was a law enforcement officer performing official duties was included in the "to convict" instruction and thus became an element under the law of the case in *Goble. Goble at* 201.

knowingly or with knowledge also is established if a person acts intentionally." *Goble*, at 202. This language was found to be ambiguous, in that the jury could believe an intentional assault established Mr. Goble's knowledge, regardless of whether or not he actually knew the victim's status as a police officer:

> We agree that the instruction is confusing and... allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.

Goble, at 203.

The rule set forth in *Goble* has been limited to crimes (such as the Assault II charged in this case) that include more than one *mens rea* as an element in the "to convict" instruction. *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007).[4] Furthermore, the problem created by the ambiguous language can be corrected by instructions that are "clear,

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[4] Interestingly, under *Gerdts,* Mr. Goble's conviction would not have been reversed, since he was charged with assaulting another whom he knew to be a police officer; he was not charged with "intentionally" assaulting another whom he knew to be a police officer. *See Goble,* at 200-201.

accurate, and separately listed [sic]." *State v. Keend*, 140 Wn. App. 858, 868, 166 P.3d 1268 (2007).[5]

In this case, Instruction No. 11 included the flawed language first identified in *Goble.* If interpreted correctly, the instruction allowed the jury to convict for intentional or knowing infliction of substantial bodily harm; however, if interpreted incorrectly, the instruction permitted jurors to vote guilty even in the absence of recklessness. Since juries lack the tools of statutory construction, the trial court's failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted

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[5] The instructions in *Keend,* which were upheld by this Court, did not differ significantly from those in *Goble,* which led this Court to reverse. *Compare Goble,* at 200-202 *with Keend,* at 863-864, 867. Thus *Keend* appears to have overruled *Goble sub silentio.*

evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke,* 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was "unimportant in relation to everything else the jury considered on the issue in question..." *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

> a court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

Yates, at 403-405 (footnotes and citations omitted). A court must examine the proof actually considered, and ask:

> [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.

Yates, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." *Yates*, at 405-406.[6]

Here, the conclusive presumption required the jury to find Mr. Swain *recklessly* inflicted substantial bodily harm upon proof that he acted *intentionally* or *knowingly*. Instruction No. 11, Supp. CP. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Swain acted recklessly). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume guilty knowledge from proof of *any* intentional act, including the intentional act of assault itself.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom,* at 512 ("the law presumes that a person intends the ordinary consequences of his voluntary acts");

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[6] In *Deal, supra,* this Court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Deal*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Deal,* at 703.

Morissette, *supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) ("[the] acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted," and "[a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted"); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) ("a person 'shall be presumed to have embezzled' a vehicle if it is not returned within 5 days of the expiration of the rental agreement," and "'intent to commit theft by fraud is presumed' from failure to return rented property within 20 days of demand"); *Yates,* at 401 ("'malice is implied or presumed' from the 'willful, deliberate, and intentional doing of an unlawful act' and from the 'use of a deadly weapon.'").

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Swain was reckless when he inflicted substantial bodily harm. Jurors could have focused on evidence of *any* intentional act (including the assault itself), and disregarded all other evidence bearing on Mr. Swain's mental state *vis-a-vis* the infliction of substantial bodily injury. Because it is impossible

to make the determination required by *Yates, supra,* it cannot be said that the error was harmless beyond a reasonable doubt.

Furthermore, even considering the entire record (contrary to the requirement under *Yates, supra*), reversal is required. A reasonable juror could have acquitted Mr. Swain of the charged crime by deciding that he was criminally negligent rather than reckless. Thus the error was not trivial, formal, or merely academic, and it cannot be said that the error was harmless beyond a reasonable doubt. *Lorang*, at 32. Because of this, Mr. Swain's conviction for Assault in the Second Degree must be reversed and the case remanded for a new trial.

II. DR. GARLICK'S OPINION THAT CHOKING CAUSES SUBSTANTIAL BODILY INJURY VIOLATED MR. SWAIN'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A criminal defendant has a constitutional right to a jury trial. Under Article I, Section 21 of the Washington Constitution, "The right of trial by jury shall remain inviolate..." Wash. Const. Article I, Section 21. Article I, Section 22 provides that "the accused shall have the right . . . to have a speedy public trial by an impartial jury." Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution, applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV.

Impermissible opinion testimony on the defendant's guilt violates an accused's constitutional right to a jury trial. *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007); *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987). Opinion testimony on an ultimate issue presents a manifest constitutional error (allowing review even absent objection below, *see* RAP 2.5) if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty. *Kirkman,* at 937.

In this case, Dr. Garlick testified that Ms. Owen suffered substantial bodily harm. RP (2/14/08) 16-21, 28. This testimony was more than "nearly explicit" or "almost explicit;" the doctor testified that an element had been satisfied. The testimony invaded the province of the jury and violated Mr. Swain's constitutional right to a jury trial.

The error is presumed prejudicial; accordingly, reversal is required unless the state can establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice Mr. Swain, and that it in no way affected the final outcome of the case. *Lorang*, at 32. This the state cannot do. A reasonable jury could decide that Ms. Owen's injuries did not amount to substantial bodily harm; thus, the evidence was not so overwhelming that it necessarily leads to a finding of guilt. *Burke, supra.* Accordingly, the conviction must be reversed and the case

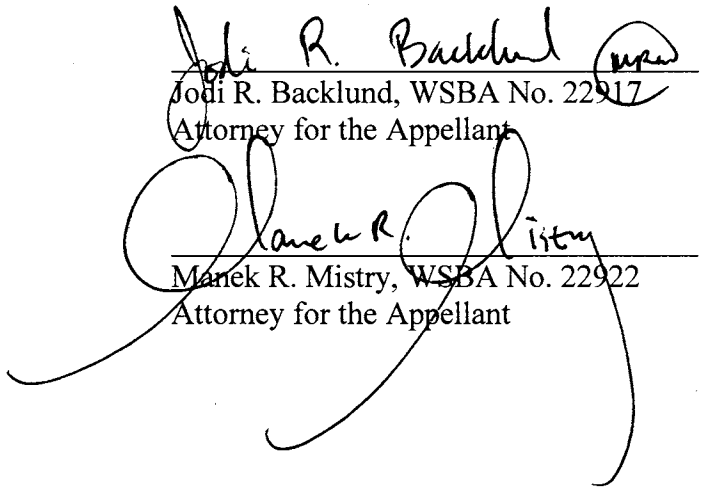
remanded to the superior court with instructions to exclude Dr. Garlick's opinion that Ms. Owen suffered substantial bodily harm.

CONCLUSION

Mr. Swain's conviction for Assault in the Second Degree must be reversed. The case must be remanded to the Superior Court for a new trial, with instructions to define recklessness properly and to exclude Dr. Garlick's improper opinion testimony.

Respectfully submitted on November 13, 2008.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 13, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 13, 2008.

Manek R. Mistry

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