

 ORIGINAL

No. 37770-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA HAYWARD,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable George L. Wood, Judge
Cause No. 07-1-00175-1

BRIEF OF RESPONDENT

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A. APPELLANT’S ASSIGNMENTS OF ERROR

1. Defendant claims that the trial court provided an erroneous definition of recklessness.
2. Defendant claims that the trial court erred by giving Instruction No. 10, which reads as follows:
Recklessness also is established if a person acts intentionally.
Instruction No. 10, Supp. CP.
3. Defendant claims that the trial court’s instruction defining recklessness contained an improper mandatory presumption.
4. Defendant claims that the trial court’s instruction defining recklessness impermissibly relieved the state of its burden to establish each element by proof beyond a reasonable doubt.
5. Defendant claims that Dr. Wallace invaded the province of the jury by expressing an explicit opinion on Mr. Hayward’s guilt.
6. Defendant claims that Dr. Wallace’s opinion testimony on an ultimate issue violated his constitutional right to a jury trial.
7. Defendant claims that Dr. Wallace should not have been permitted to testify that Baar suffered substantial loss or impairment of the function of a bodily part.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court’s instruction on recklessness misstated the law and relieved the State of its burden of proof.
2. Whether the trial court’s instruction defining recklessness created an unconstitutional mandatory presumption.
3. Whether Dr. opinion invaded the province of the jury thereby violating defendant’s constitutional right to a jury trial.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the procedural and substantive facts set forth in his opening brief at pages 3 through 5 with the following caveats:

1. The defendant testified that he was pushed into Baar by the crowd and Baar pushed him back. RP (4-8-08) 84, 85.
2. The defendant testified that Baar swung at him but only achieved a glancing blow. RP (4-8-08) 85, 86, 107.
3. The defendant testified that he hit Baar in the side of the head. RP (4-8-05) 85, 86.
4. Mr. Muck testified that he saw the defendant hit Mr. Baar in the face/jaw, RP (4-7-08) 38-40, but that he never saw Mr. Baar hit the defendant. RP (4-7-08) 40.
5. Mr. Muck testified that Mr. Baar never attempted to hit the defendant after the defendant hit Mr. Baar. RP (4-7-08) 42.
6. Mr. Mellott testified that he did not see Mr. Baar push the defendant. RP (4-7-08) 113.

7. Mr. Mellot testified that he saw the defendant hit Mr. Baar on the left side of Mr. Baar's face with a closed fist. RP (4-7-08) 125, 126.¹

8. Ms. Potter testified that she saw the defendant hit Mr. Baar on the left side of his face but did not see Mr. Baar hit or push the defendant. RP (4-8-08) 55, 56, 64.

D. ARGUMENT

In an overabundance of caution and at the risk of being redundant, although defendant merged his first two assignments of error, (misstating the law and relieving the State of it's burden of proof with the creation of a mandatory presumption), the State addresses each assignment of error separately.

1. **THE COURT'S INSTRUCTION NEITHER MISSTATED THE LAW NOR RELIEVED THE STATE OF IT'S BURDEN OF PROOF.**

The defendant herein was charged with Assault in the Second Degree; i.e., that the defendant intentionally assaulted another, and thereby did recklessly inflict substantial bodily harm. The Court instructed the

¹ Interestingly enough, at the sentencing hearing on May 29, 2008, Ms. Smith, Mr. Baar's mother, read a statement to the court stating that the defendant had steel plates in his hand and defense counsel admitted same. However, this evidence was not presented to the jury during anyone's testimony. RP (5-29-08) 8, 9.

jury on the definitions of both “intentionally” and “recklessly”. See Instructions No.’s 9 and 10. The instruction on recklessly included the language, “recklessness also is established if a person acts intentionally or knowingly”.

The defendant argues that the instruction conflated the two mental states, and unconstitutionally relieved the prosecution of its burden to establish the recklessness element. For this proposition, the defendant relies on *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In *Goble*, an Assault in the Third Degree case, the Court held that combining the intentional instruction with the knowledge instruction relieved the State of its burden of proving that Goble knew of the victim’s status as a law enforcement officer, if it found the assault was intentional. *Goble*, 131 Wn.App. at 203. That is not true in this case; the facts are different.

In *Goble*, there were facts that were specific to the issue of differing mental states. There actually was a dispute over whether the defendant knew that the victim was a law enforcement officer – so in *Goble*, when the “knowingly” instruction also included language, “that when someone acts knowingly, that person also acts intentionally”, there could have been some confusion by the jury; i.e., that if the offensive touching was intentional, that the defendant must have known that the victim was a law enforcement officer. In fact, there was evidence that the jury was actually confused by the instruction. *Goble*, 131 Wn.App. at 200.

The defense asserted in *Goble* – that the defendant did not know that the victim was a law enforcement officer – was particularly prone to cause a conflagration of mental states.

In the case herein, there was no such confusion. The jury was instructed on both mental elements in two separate instructions, Instructions 9 and 10. In addition, the “to convict” instruction (Instruction No. 7), the elements are clearly set out: (1) the defendant intentionally assaulted Tyson Barr, and (2) the defendant thereby recklessly inflicted substantial bodily harm on Tyson Barr. There is no reason to think that the jury was confused by the instructions or conflated the two mental states. It is well established law that juries are presumed to follow the instructions provided. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Moreover, in contrast to what happened in *Goble*, the instruction at issue here, was not a misstatement of the law, as was held by the Court in *Goble*. *Goble*, 131 Wn.App. at 202. Here, the “reckless” instruction reflected the exact language of the statute (see RCW 9A.08.010(1)(c)). And, as also set forth in the statute, the instruction included language that when recklessness suffices to establish an element, such element is also established if a person acts intentionally or knowingly. RCW 9A.08.010(2).

In the instant case, there was no conflagration of mental states, and the State wasn’t unconstitutionally relieved of its burden to prove each

element beyond a reasonable doubt. The jury was provided with an instruction that exactly reflected the language in the statute. Under the law, juries are presumed to follow the law. Not only was the instruction proper and did not conflagrate the mental states on its face, there is no reason to believe that the jury was confused and did not follow the law as instructed.

Even if it was error to include the additional language on “intentionally” within the “reckless” instruction, the error was harmless. Here, the jury would have reached the same verdict even if the error had not occurred. *Goble*, 131 Wn.App at 203. , citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985) The evidence was overwhelming that the defendant intentionally assaulted Mr. Barr and that in doing so he recklessly inflicted substantial bodily harm. Defendant’s conviction must be affirmed.

2. THE COURT’S INSTRUCTION DEFINING RECKLESSNESS DID NOT CREATE AN UNCONSTITUTIONAL A MANDATORY PRESUMPTION.

Defendant claims that Instruction No. 10, Supp. CP. did not place any limitation on the intentional or knowing acts that could establish the recklessness required by RCW 9A.36.021 and cites *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) where similar language in an

instruction defining “knowledge” was found to require reversal. In *Goble*, the trial court’s “knowledge” instruction informed the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” *State v. Goble*, 131 Wn.App. at 202. That language was found to be ambiguous.

It is the State’s position that *Goble* was primarily decided because the jury expressed actual confusion over the knowledge instruction. This court should distinguish the instant case. Unlike *Goble*, the jury here evidenced no confusion over Instruction No. 10. Thus, there is no evidence that Instruction No. 10 impacted the deliberations in any way and if there was any error it was harmless.

Moreover, not every omission or misstatement in a jury instruction relieves the State of its burden. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). A jury instruction, that is claimed to be erroneous, which omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). “[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Neder*, 527 U.S. at 9. The *Neder* test for determining harmless error (where the claimed error is of constitutional magnitude) is “whether it appears beyond a reasonable doubt that the error complained

of did not contribute to the verdict obtained.'" *Id.* at 15. When applied to omissions or misstatements of elements in jury instructions, "the error is harmless if that element is supported by uncontroverted evidence." **State v. Brown**, 147 Wn.2d 330, 341, 58 P.3d. 889 (2002).

In the instant case, the assault charge at issue contains two mental states; intent and recklessness. Instruction 6 defines Assault in the Second Degree, Instruction 7 sets out the intent element in paragraph number 1, and the reckless element in paragraph number 2, Instruction 9 defines the mental state of intent, and instruction 10 defines the mental state of recklessness.

Read together, these instructions do not conflate the intentional and reckless elements, which are set out as separate elements in the to-convict instruction and separate mental states instructions. As instructed here, the jury could only have convicted the defendant if it found beyond a reasonable doubt that he intentionally assaulted Mr. Baar and in doing so recklessly inflicted substantial bodily harm. Instruction No. 10 did not relieve the State of its burden of proving every element of Assault in the Second Degree.

Moreover, this alleged error in the jury instructions is harmless beyond a reasonable doubt. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. **State v. Guloy**, 104 Wn.2d 412, 425, 705 P.2d 182 (1985), cert denied, 475 U.S. 1020, 106 S.Ct. 11208, 89 L.Ed.2d 321 (1986) [*citing State v. Stephens*,

93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)], *cert denied*, 475 U.S. 1020 (1986). Constitutional error is presumed prejudicial and the State must prove that the error was harmless. *Stephens*, 93 Wn. 26 at 190-91. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if uncontroverted evidence proves that element beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) [*citing Neder v. United States*, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)].

The uncontroverted evidence in the instant case clearly established that the defendant intentionally assaulted Mr. Baar and in doing so, inflicted substantial bodily harm; Mr. Baar was spitting blood from his mouth after the defendant hit him in the face/jaw, he went to the hospital several hours later, it was determined that Mr. Baar had a broken jaw and he was sent Harborview where he had surgery and his jaw was wired shut making it impossible for him to eat solid foods and very difficult to talk. Uncontroverted evidence supported the defendant's assault conviction beyond a reasonable doubt. Accordingly any error in instructing the jury was harmless beyond a reasonable doubt and the conviction must be affirmed.

3. **THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS NOT INFRINGED UPON WHEN DR. WALLACE STATED HIS OPINION THAT A BROKEN MANDIBLE A SUBSTANTIAL LOSS OR IMPAIRMENT OF THE FUNCTION OF A BODY PART.**

A trial court's decision to admit expert testimony is reviewed for an abuse of discretion. *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988).

The State does not dispute the fact that under both the United States Constitution and the Washington State Constitution, the defendant is entitled to a jury trial. U.S. Const. Amend VI, Wash. Const. Article I, § 21.

Defendant, citing *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007), claims that opinion testimony on an ultimate issue presents a manifest constitutional error if it is a "nearly explicit" or "almost explicit" statement by the witness that the witness believes the accused is guilty.

Testimony deemed to be an opinion as to a defendant's guilt must relate to the defendant. *State v. Wilber*, 55 Wn.App. 294, 298, 777 P.2d 36 (1989).

Dr. Wallace never mentioned the defendant in any of his testimony. RP (4-8-08) 25-46. However, Dr. Wallace did testify as to the effects a broken mandible would have on a person. RP (4-8-08) 41. In addition, Dr. Wallace testified that when he initially saw Mr. Baar he seemed to have an isolated injury to the face with some swelling. RP (4-8-08) 29. Based on Dr. Wallace's observations, a CAT scan, and consultation with other doctors, it was determined that Mr. Baar had a

broken mandible. RP (4-8-08) 33. Dr. Wallace could certainly testify to the fact that Mr. Baar suffered a substantial impairment of a bodily function RP (4-8-08) 40-41. Mr. Baar reported to Dr. Wallace that he had been hit in the face/jaw and complained of pain. RP (4-8-08) 30, 32, 29. Mr. Baar testified on direct examination that the defendant hit him on the left side of his jaw RP (4-7-08) 61, which made it hard for him to open and shut his jaw, and that his jaw was wired shut making it impossible for him to eat solid foods. RP (4-7-08) 66, 67. Losing the ability to communicate, to eat solid foods or to open his jaw is all clear evidence of a substantial impairment of a bodily function; the jury could certainly come to that conclusion on its own. At no point did Dr. Wallace testify that the defendant was guilty of fracturing Mr. Baar's jaw

Erroneous admission of expert testimony under ER 702 is not of constitutional magnitude. *State v. Huynh*, 49 Wn.App. 192, 198, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). Thus error is not prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial. *Huynh*, 49 Wn.App. at 198.

Had Dr. Wallace's testimony been an impermissible opinion on the defendant's guilt, the error would have been one of constitutional magnitude. *State v. Carlin* 70 Wn.App. 698, 703, 700 P.2d 323 (1985).

Because Dr. Wallace did not state an opinion on the defendant's guilt, there is no error of any magnitude.

However, if this court finds error, the State asked the court to find that any error was harmless.

When error is claimed, the court typically determines if there is a substantial likelihood that any error affected the verdict. *State v. Contreras*, 57 Wn.App. 471, 473. 788 P.2d 1114 (1990) [*quoting State v. Traweek*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied* 106 Wn.2d 1007 (1986)], *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) [*citing In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1970)]. When error affects a separate constitutional right, it is subject to the stricter standard of constitutional harmless error. *Id.* Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Jones*, 71 Wn.App. 798, 812 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994); *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).

The evidence in the instant case was overwhelming that the defendant struck Mr. Baar in the jaw breaking his mandible. Dr. Wallace saw the swelling on Mr. Baar's face, which was consistent with being

struck in the jaw. Error, if there was any, is harmless and the defendant's conviction must be affirmed.

Washington Evidence Rule 704, Opinion on Ultimate Issue states:

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.

“Whether testimony constitutes an impermissible opinion about the defendant's guilt depends upon the circumstances of each case.” *State v. Cruz*, 77 Wn.App. 811, 814-15, 894 P.2d 573 (1995). Factors to consider include the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence presented. *Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994). Opinions based solely upon inferences from the physical evidence and the expert's experience, and not based upon the defendant's credibility, may properly be admitted. *Seattle v. Heatly* 70 Wn.App. at 579. The decision to admit opinion testimony is within the discretion of the trial court. *Seattle v. Heatly*, 70 Wn.App. at 579, 585.

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. . . . *Gerberg v. Crosby*, 52 Wn.2d 793, 795, 329 P.2d 184 (1958).

Under the circumstances of the instant case, Dr. Wallace's statement that Mr. Baar suffered a substantial impairment of a bodily function was a permissible opinion. RP (4-08-08) 40-41. Dr. Wallace did not tell the jury what result to reach. Dr. Wallace's opinion did not rely on a judgment about the defendant's credibility, but rested upon his experience, training, information received from Mr. Baar and observations of Mr. Baar. The fact that Dr. Wallace's opinion supports the jury's conclusion that the defendant was guilty does not make it an improper opinion on guilt.

The trial court did not abuse its discretion in admitting Dr. Wallace's opinion. The Defendant's conviction must be affirmed.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the defendant's conviction for Assault in the Second Degree

DATED this 22 day of January, 2009, at Port Angeles,
Washington.

Respectfully submitted,



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Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,
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vs.

JOSHUA HAYWARD,
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NO. 37770-5-II

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STATE OF WASHINGTON)
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County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 23rd day of January, 2009, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 23rd day of January, 2009

[Signature: Linda J. Mayberry]
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Residing at Port Angeles, Washington
My commission expires: 10/30/2011