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STATE OF WASHINGTON
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DEPUTY

NO. 38101-0-II
Cowlitz County No. 07-1-01015-4

STATE OF WASHINGTON,

Respondent,

vs.

MISTY VIOLET ALVAREZ

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 17 OVER MS. ALVAREZ' OBJECTION.

II. INSUFFICIENT EVIDENCE EXISTS TO SUSTAIN THE CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 17 BECAUSE IT ALLOWED THE JURY TO CONVICT MS. ALVAREZ OF ASSAULT IN THE SECOND DEGREE USING AN OVERLY BROAD DEFINITION OF SUBSTANTIAL BODILY INJURY AND IN SO DOING RELIEVED THE STATE OF ITS BURDEN OF PROOF AND DENIED MS. ALVAREZ A FAIR TRIAL AS TO COUNT II.

II. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT MS. ALVAREZ' CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

C. STATEMENT OF THE CASE

The State charged Misty Violet Alvarez by amended Information with Burglary in the First Degree; Assault in the Second Degree; and two counts of Bail Jumping (Class A felony court appearance)¹. CP 4-5. Ms. Alvarez was convicted of all charges after a jury trial. CP 43-47.

On July 13th, 2007 Brandi Savage and Misty Alvarez had a fight. RP I, p. 75. Misty was married to Jesus Alvarez, also known as Chewy, and they had a son. RP II, p. 160-61. Misty also has another child who Mr. Alvarez treated as his own. RP II, p. 161, 172. Misty and Chewy

¹ Deadly weapon enhancements for counts I and II were dismissed on the morning of trial.

were separated at this time. RP II, p. 161. On July 13th, Misty had planned to celebrate her sister's birthday with her and some friends, while Chewy would tend to the children. RP II, p. 163-64. However, Chewy decided he didn't want to keep the children overnight. RP II, p. 164, 174-75. Misty had been drinking at the birthday party and became intoxicated. RP II, p. 174-75. She didn't plan on having to go and pick up her children and was very angry at Chewy for forcing her to drive over to his apartment to pick the boys up. RP II, p. 164, 174-75.

Misty had learned a few days before this that Chewy was involved with a new woman, Brandi Savage. RP II, p. 162. Chewy and Brandi lived in the same apartment complex. RP I, p. 81. This was upsetting to Misty. RP II, p. 162, 176.

Misty and Brandi had different versions of the fight. According to Brandi's first version, she was outside of her apartment door having a cigarette when Misty began to approach her apartment. RP I, p. 79. When she saw Misty coming she went inside her apartment and locked her door. RP I, p. 80. She went to her phone to call Chewy and tell him Misty was there. RP I, p. 81. As she did so, Misty broke down her door and came into apartment and began hitting her. RP I, p. 81. In her second version that she gave on cross examination, she admitted that Chewy had called her about ten minutes before Misty arrived and told her to stay in her

apartment. RP I, p. 95. Instead, she went outside to have a cigarette. RP I, p. 95. She admitted that she and Misty had a physical fight outside of the apartment. RP I, p. 95. Chewy was the one who broke up the fight. RP I, p. 83.

When she arrived at the apartment complex to get her boys she found Chewy talking to Misty on the stairs which lead to Misty's apartment. RP II, p. 165. The boys were at the bottom of the stairs and Misty felt that Brandi was rude to one of her boys. RP II, p. 165. Misty and Brandi began yelling at each other as Chewy took the boys to the car. RP II, p. 165-66. The fight moved to the area outside of Brandi's apartment door and escalated. RP II, p. 176, RP I, p. 95. Misty pushed Brandi, and Brandi pushed back. RP II, p. 167. Through the course of the fight Misty punched Brandi and there was hitting and swinging back and forth. RP II, p. 168, 177. They went through the apartment door, which had been broken before, and fell into the doorway. RP II, 168, RP I, 95. During the struggle Misty injured her head on the patio railing got a black eye. RP II, p. 169.

Brandi testified that she received a "couple of punches to the head and that was it." RP I, p. 82. She received abrasions and scrapes. RP I, p. 85. She went to the hospital after the police arrived. RP I, p. 85. The paramedics placed a neck brace on her but it was removed when she got to

the hospital and was not needed any further. RP I, p. 96-97. She testified her head was swollen, her ear was bruised and she had black eyes as a result of the fight. RP I, p. 87. She claimed it took three weeks for her bruising to heal. RP I, p. 87. She was discharged from the hospital after about two hours with instructions to take Aspirin or Ibuprofen. RP I, p. 86, 97. No medical testimony or evidence was offered. Clerk's Papers, Report of Proceedings.

Over the objection of defense counsel, the Court gave the following instruction (instruction no. 17) in relation to the charge of assault in the second degree:

“Disfigurement” means that which impairs or injures the beauty, symmetry, or appearance of a person; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

CP 33, RP II, p. 197. The on-the-record discussion of the instruction is quite cursory, because the attorneys and the judge followed the imprudent and frustrating Cowlitz County practice of discussing jury instructions off the record in an ante room, coming back to the record only to note objections and exceptions. RP II, p. 194, 196. The Court acknowledged that the instruction was is not WPIC and was borne out of only one published case from Division III, but said it was going to give it. RP II, p. 197.

The jury returned a verdict of guilty on all counts. CP 43-47. Ms. Alvarez was given a standard range sentence. CP 55. This timely appeal followed. CP 63.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN GIVING INSTRUCTION NO. 17 BECAUSE IT ALLOWED THE JURY TO CONVICT MS. ALVAREZ OF ASSAULT IN THE SECOND DEGREE USING AN OVERLY BROAD DEFINITION OF SUBSTANTIAL BODILY INJURY AND IN SO DOING RELIEVED THE STATE OF ITS BURDEN OF PROOF AND DENIED MS. ALVAREZ A FAIR TRIAL AS TO COUNT II.

Under RCW 9A.36.021 (1) (a) a person is guilty of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. Under RCW 9A.04.110 (4) (b) substantial bodily harm is defined as bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

In *State v. Atkinson*, 113 Wn.App. 661, 54 P.3d 702 (2002), *review denied* 149 Wn.2d 1013 (2003), Division III affirmed the decision of the trial court to give the following instruction: “[D]isfigurement means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.” *Atkinson* at 667. This is the same instruction

given in the case at bar. This instruction has not been codified in the Washington Pattern Jury Instructions, has not been endorsed by either Division I or Division II, and has not been endorsed by the Washington Supreme Court. In *Atkinson*, the appellant argued that this instruction is overly broad and eliminated the distinction between assault in the second degree and assault in the fourth degree. *Atkinson* at 667. Thus, it misstated the law and misled the jury. *Id.* *Atkinson* also argued that by improperly broadening the type of harm that supports assault in the second degree this instruction served to relieve the State of its burden of proving every element of the crime. *Atkinson* at 664.

Division III rejected this argument, holding that because the State was still required to prove the loss of beauty, symmetry or perfection was still substantial the defendant was still able to argue his theory of the case and the State was not relieved of its burden of proof. *Atkinson* at 668. However, this Court is not bound by Division III's approval of this instruction.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and properly inform the jury of the applicable law. *State v. Schaler*, 145 Wn.App. 628, 186 P.3d 1170 (2008); *State v. Slaughter*, 143 Wn.App. 936, 186 P.3d 1084 (2008); *State v. Irons*, 101 Wn.App. 544, 549, 4 P.3d 174 (2000).

Trial court's have considerable discretion in wording jury instructions. *State v. Castle*, 86 Wn.App. 48, 62, 935 P.2d 656 (1997). An instruction which passes constitutional muster is not necessarily a good or advisable instruction. *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). A reviewing court will review claimed errors of law in jury instructions de novo. *Atkinson* at 667, *State v. Kennard*, 101 Wn.App. 533, 537, 6 P.3d 38, *review denied*, 142 Wn.2d 1011 (2000).

The instruction at issue here required the jury to convict Ms. Alvarez if it found that Ms. Savage suffered a temporary but substantial loss of her beauty or symmetry or perfection, or that Ms. Savage was rendered temporarily but substantially unsightly. In other words, this instruction suggests that substantial bodily harm can be met by establishing a loss of beauty or attractiveness. It is highly unlikely the legislature intended to sweep within this strike offense people who cause bruising or scratches to others.

The legislature previously defined the harm required for second degree assault as:

“[G]reat bodily harm” and “grievous bodily harm,” which meant “any serious hurt or injury or a hurt or injury that is seriously Painful or hard to bear...” The 1986 Legislature was the first to use “substantial bodily harm” in connection with second degree assault with a deadly weapon. These definitions took effect on July 1, 1988, and superseded the definitions found in prior case law.

State v. Huddleston, 80 Wn.App. 916, 922-23, 912 P.2d 1068 (1996).

Pain alone is noticeable missing from the new definition of injury. The historical notes indicate the Legislature did not believe that substantial pain, standing alone, was enough to convict a person for assault in the second degree.² It belies common sense to conclude that the legislature was more concerned with beauty and perfection than it was with raw pain. Notably, the other means of inflicting substantial bodily harm involve serious injury, such as the fracture of a body part or the interference with a bodily part or organ (i.e. preventing another from breathing).

The State would not have sought this instruction if it didn't serve to unreasonably broaden the definition of substantial bodily harm and lessen the State's burden of proof; the evidence in this case clearly did not meet the WPIC definition of substantial bodily harm. The evidence in this case demonstrated an injury that is considerably less than substantial bodily harm and this instruction blurred the distinction between assault in the second degree and assault in the fourth degree. It is difficult to imagine what kind of injury would not meet a definition that encompasses a loss of beauty, perfection, or symmetry or which renders one unsightly.

² The legislative notes accompanying the 1988 legislation for RCW 9A.04.110 (4) (b) describe the alteration as "rewrote the definition of 'substantial bodily harm;' deleted the definition of 'substantial pain;' and redesignated the subsequent definitions accordingly." Additionally, serious injury was not a necessary element of the prior assault in the second degree statute. *State v. Brown*, 74 Wn.2d 799, 802, 447 P.2d 82 (1968).

This instruction misstates the law and misled the jury and the trial court erred in giving it. Ms. Alvarez' conviction for assault in the second degree should be reversed.

II. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT MS. ALVAREZ' CONVICTION FOR ASSAULT IN THE SECOND DEGREE.

The evidence is insufficient to prove that Ms. Savage suffered great bodily harm. Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Here, Ms. Savage received facial bruises and some abrasions. She did not require any real medical treatment and was sent home from the hospital with instructions to take Aspirin or Ibuprofen. In *State v. Dolan*, 118 Wn.App. 323, 332, 73 P.3d 1011 (2002) Division II held that bruises and swelling are not necessarily sufficient to establish substantial bodily harm as a matter of law. The trial court in *Dolan* had instructed the jury that bruising and swelling could be enough to establish substantial bodily harm in a case of second degree assault. *Dolan* at 332. Division II found this instruction incorrectly stated the law, in addition to being a comment on the evidence, and reversed. *Id.*

The State frequently relies on *State v. Ashcraft*, 71 Wn.App. 444, 859 P.2d 60 (1993) for the proposition that bruises alone suffice to establish substantial bodily harm. Yet *Ashcraft* made this summary pronouncement without any analysis or citation to authority. *Ashcraft* at 455. The opinion in *Ashcraft* gave little information about the actual injuries in that case that were found to constitute substantial bodily harm. The victim in *Ashcraft* was a five year-old child, who was discovered with numerous bruises of different ages and bite marks. *Ashcraft* at 449. Absent discussion of the kind of injuries the child sustained, or of the severity of the bruises, it is impossible to use *Ashcraft* to discern what

level of bruising would constitute sufficient evidence of substantial bodily harm.

Here, Ms. Savage said she had black eyes, a swollen head, and a bruised ear. This is simply insufficient to sustain a conviction for assault in the second degree. It certainly amounts to assault in the fourth degree, but not assault in the second degree. Ms. Alvarez respectfully asks this Court to reverse her conviction for assault in the second degree and enter a judgment of guilty of assault in the fourth degree.

E. CONCLUSION

Ms. Alvarez asks this Court to reverse her conviction for assault in the second degree due to insufficient evidence and enter a judgment of guilty on assault in the fourth degree. Alternatively, Ms. Alvarez asks this Court to reverse her conviction for assault in the second degree and grant her a new trial due to the trial court's error in giving instruction number 17.

RESPECTFULLY SUBMITTED this 6th day of April, 2009.



ANNE M. CRUSER, WSBA# 27944
Attorney for Ms. Alvarez

APPENDIX

1. RCW 9A.04.110

In this title unless a different meaning plainly is required:

- (1) "Acted" includes, where relevant, omitted to act;
- (2) "Actor" includes, where relevant, a person failing to act;
- (3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;
- (4) (a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;
- (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;
- (5) "Building", in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;
- (6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;

(7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;

(8) "Government" includes any branch, subdivision, or agency of the government of this state and any county, city, district, or other local governmental unit;

(9) "Governmental function" includes any activity which a public servant is legally authorized or permitted to undertake on behalf of a government;

(10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";

(11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;

(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty;

(13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;

(14) "Omission" means a failure to act;

(15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;

(16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;

(17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

(18) "Place of work" includes but is not limited to all the lands and other real property of a farm or ranch in the case of an actor who owns,

operates, or is employed to work on such a farm or ranch;

(19) "Prison" means any place designated by law for the keeping of persons held in custody under process of law, or under lawful arrest, including but not limited to any state correctional institution or any county or city jail;

(20) "Prisoner" includes any person held in custody under process of law, or under lawful arrest;

(21) "Projectile stun gun" means an electronic device that projects wired probes attached to the device that emit an electrical charge and that is designed and primarily employed to incapacitate a person or animal;

(22) "Property" means anything of value, whether tangible or intangible, real or personal;

(23) "Public servant" means any person other than a witness who presently occupies the position of or has been elected, appointed, or designated to become any officer or employee of government, including a legislator, judge, judicial officer, juror, and any person participating as an advisor, consultant, or otherwise in performing a governmental function;

(24) "Signature" includes any memorandum, mark, or sign made with intent to authenticate any instrument or writing, or the subscription of any person thereto;

(25) "Statute" means the Constitution or an act of the legislature or initiative or referendum of this state;

(26) "Strangulation" means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe;

(27) "Threat" means to communicate, directly or indirectly the intent:

(a) To cause bodily injury in the future to the person threatened or to any other person; or

(b) To cause physical damage to the property of a person other than the actor; or

(c) To subject the person threatened or any other person to physical confinement or restraint; or

(d) To accuse any person of a crime or cause criminal charges to be instituted against any person; or

(e) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(f) To reveal any information sought to be concealed by the person threatened; or

(g) To testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

(h) To take wrongful action as an official against anyone or anything, or wrongfully withhold official action, or cause such action or withholding; or

(i) To bring about or continue a strike, boycott, or other similar collective action to obtain property which is not demanded or received for the benefit of the group which the actor purports to represent; or

(j) To do any other act which is intended to harm substantially the person threatened or another with respect to his health, safety, business, financial condition, or personal relationships;

(28) "Vehicle" means a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail;

(29) Words in the present tense shall include the future tense; and in the masculine shall include the feminine and neuter genders; and in the singular shall include the plural; and in the plural shall include the singular.

2. RCW 9A.36.021

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be

taken by another, poison or any other destructive or noxious substance;
or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain
or
agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation.

(2)(a) Except as provided in (b) of this subsection, assault in the
second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation
under RCW 9.94A.835 or 13.40.135 is a class A felony.

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY C. Cruser
DEPUTY

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

STATE OF WASHINGTON,)	Court of Appeals No. 38101-0-II
)	Cowlitz County No. 07-1-01015-4
Respondent,)	
)	
vs.)	AFFIDAVIT OF MAILING
)	
MISTY VIOLET ALVAREZ,)	
)	
Appellant.)	
_____)	

ANNE M. CRUSER, being sworn on oath, states that on the 6th day of April 2009
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenue
Kelso, WA 98626

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

AND

Ms. Misty Alvarez