

NO. 39623-8-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY C. CLEMONS,

Appellant,

FILED  
COURT OF APPEALS  
DIVISION II  
10 FEB -4 AM 11:35  
STATE OF WASHINGTON  
BY   
DEPUTY

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Anne Hirsch, Judge  
Cause No. 08-1-02160-6

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in giving jury instruction 11 that created a mandatory presumption that relieved the State of its burden to prove recklessness.
02. The trial court erred in permitting Clemons to be represented by counsel who provided ineffective assistance by failing to object to jury instruction 11 that created a mandatory presumption that relieved the State of its burden to prove recklessness.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in giving jury instruction 11 that created a mandatory presumption that relieved the State of its burden to prove recklessness? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Clemons to be represented by counsel who provided ineffective assistance by failing to object to jury instruction 11 that created a mandatory presumption that relieved the State of its burden to prove recklessness? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Anthony C. Clemons (Clemons) was charged by information filed in Thurston County Superior Court on December 2, 2008, with assault in the second degree, contrary to RCW 9A.36.021(1)(a). [CP 2].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 6-7]. Trial to a jury commenced on July 22, 2009, the Honorable Anne Hirsch presiding. Neither exceptions nor objections were taken to the jury instructions. [RP 41, 47-48].<sup>1</sup>

The jury returned a verdict of guilty as charged, Clemons was sentenced within his standard range and timely notice of this appeal followed. [CP 33, 53-64].

02. Substantive Facts

On October 26, 2008, at approximately 3:00 in the afternoon, Jesse Cohen reported to the police that he had been assaulted by Clemons and another person later identified as Patrick Lamp while returning his child to its mother, Amanda Cross, who had been dating Clemons. [RP 7, 17-18, 20-21, 26, 33]. As a result of the incident, Cohen sustained a facial fracture and some bruising around his eyes. [RP 23, 45].

Clemons rested without presenting evidence. [RP 45-46].

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<sup>1</sup> All references to the Report of Proceedings are to the transcript entitled Jury Trial.

D. ARGUMENT

01. JURY INSTRUCTION 11 CREATED A MANDATORY PRESUMPTION THAT RELIEVED THE STATE OF ITS BURDEN TO PROVE RECKLESSNESS AND THEREBY VIOLATED CLEMONS'S RIGHT TO DUE PROCESS.

01.1 Instructions

The trial court's instructions to the jury included the "to convict" instruction, jury instruction 14, for second degree assault:

To convict the defendant of the crime of assault in the second degree, as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about October 26, 2008, the defendant intentionally assaulted JESSE EATON COHEN;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on JESSE EATON COHEN; and

(3) That this act occurred in the State of Washington.

[CP 31].

Jury instruction 8 stated, "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." [CP 25].

Jury instruction 12 defined “substantial bodily harm” as “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.” [CP 29].

Jury instruction 9 defined “intent.” “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” [CP 26].

Jury instruction 10 defined “knowingly” in the following manner:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of the fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if the person acts intentionally as to that fact.

[CP 27].

Jury instruction 11 defined “recklessness” as:

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 this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When reckless is required to establish an element of a crime, the element is also established if the person acts intentionally or knowingly.

[CP 28].

Neither party objected to the instructions, which were submitted by the State. [RP 41, 47-48].

#### 01.2 Standard of Review

This court reviews alleged errors of law in jury instructions *de novo*. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518, U.S. 1026 (1996). Jury instructions are to be read as a whole, and each one is read in the context of all others given. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). Jury instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). “It is reversible error to instruct the jury in a manner that would relieve the State (of its) burden” to prove “every essential element of a criminal offense beyond a reasonable doubt.” State v. Pirtle, 127 Wn.2d at 656.

### 01.3 Mandatory Presumption

A mandatory presumption requires the jury to infer the presumed fact if the State proves certain predicate facts. Francis v. Franklin, 471 U.S. 307, 314, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985). In determining whether an instruction creates a mandatory presumption, this court examines whether a reasonable juror would interpret the presumption as mandatory. State v. Deal, 128 Wn.2d 693, 701, 911 P.2d 996 (1996). Mandatory presumptions violate a defendant's right to due process where they relieve the State of its obligation to prove all of the elements of the charged offense. State v. Thomas, 150 Wn.2d 821, 844, 83 P. 3d 970 (2004).

Issues of constitutional magnitude, including, as here, a due process challenge to the propriety of an instruction that relieves the State of its burden to prove all of the essential elements of the offense, may be raised for the first time on appeal. State v. Deal, 128 Wn.2d at 698 (citing State v. Peterson, 73 Wn.2d 303, 306, 438 P.2d 183 (1968)); State v. Hayward, 152 Wn. App. 632, 643 n.4, 217 P.3d 354 (2009); State v. Goble, 131 Wn. App. 194, 202-03, 126 P.3d 821 (2005); RAP 2.5(a)(3).

### 01.4 Argument

As previously illustrated, jury instruction 8 stated, "A person commits the crime of assault in the second

degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” [CP 25]. Jury instruction 11 set forth the definition of “recklessness” and stated that it “is also established if the person acts intentionally or knowingly.”

Jury instruction 11 is erroneous in that it places no limitation on intentional or knowing acts that could be relied upon under the scheme of this instruction to establish the essential element of “recklessness.” Given that the instruction does not indicate that “recklessness” is also established if a person acts intentionally or knowingly to cause substantial bodily harm, it impermissibly allowed the jury to find that Clemons or his accomplice recklessly inflicted such harm if it found that either Clemons or Lamp intentionally or knowingly assaulted Cohen. As in Hayward, this instruction similarly conflated the intent the jury had to find regarding Clemons’s or his accomplice’s assault against Cohen with an “intent to cause substantial bodily harm required by the recklessness mental state into a single element,” thus relieving “the State of its burden of proving (Clemons or his accomplice) recklessly inflicted substantial bodily harm.” 152 Wn. App. at 645 (citing State v. Goble, 131 Wn. App. at 203).

Given that Jury instruction 11 did not limit the substituted mental states (here, intentionally and knowingly) to the specific essential element at issue (here, infliction of substantial bodily harm), “as required by RCW

9A.08.010(2) and revised WPIC 10.03 (2008),” State v. Hayward, 152 Wn. App. at 646, it violated Clemons’s constitutional right to due process by creating a mandatory presumption, which relieved the State of its burden to prove that Clemons or his accomplice recklessly (or intentionally or knowingly) inflicted substantial bodily harm.

01.5 No Harmless Error

An instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977). An instruction that omits an element of the charged offense does not necessarily render the trial fundamentally unfair. Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). To determine whether the omission of an element is harmless error, this court considers whether the omitted element was supported by uncontroverted evidence. Id., 527 U.S. at 19; State v. Jennings, 111 Wn. App. 54, 64, 44 P.3d 1 (2002), review denied, 148 Wn.2d 1001 (2003).

The only evidence presented at trial included Cohen’s facial injuries and his testimony that although he had been struck by Clemons and his accomplice he was able to drive form the scene to call 911. [RP 19-21]. Though uncontroverted, this evidence is insufficient to support a finding that either Clemons or his accomplice recklessly inflicted

substantial bodily harm on Cohen. The evidence presented at trial only supports the fact that Cohen suffered substantial injuries, not that Clemons or his accomplice acted recklessly in inflicting those injuries, with the result that the State cannot carry its burden to show that the error was harmless. It cannot be argued that beyond a reasonable doubt the verdict would have been the same without the erroneous jury instruction 11.

02. CLEMONS WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO OBJECT TO JURY INSTRUCTION 11 THAT CREATED A MANDATORY PRESUMPTION THAT RELIEVED THE STATE OF ITS BURDEN TO PROVE RECKLESSNESS AND THEREBY VIOLATED CLEMONS'S RIGHT TO DUE PROCESS.<sup>2</sup>

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d

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<sup>2</sup> While it has been argued in the preceding section of this brief that this issue can be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of error caused by the defendant, See State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Should this court find that trial counsel waived the issue set forth in the preceding section of this brief relating jury instruction 11 by failing to object to the instruction, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to properly object to jury instruction 11 for the reasons set forth in the preceding section.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident. Again, as set forth in the preceding section, had counsel properly objected to jury instruction 11 for the reasons argued, the court would not have given the instruction and the ultimate verdict would not have been the same sans the erroneous jury instruction 11.

E. CONCLUSION

Based on the above, Clemons respectfully requests this court to reverse and dismiss his conviction for assault in the second degree.

DATED this 3<sup>rd</sup> day of February 2010..

Thomas E. Doyle  
THOMAS E. DOYLE  
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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 3<sup>rd</sup> day of February 2010.

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