

NO. 41127-0-II

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

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

STATE OF WASHINGTON, Respondent

v.

ROBERT MICHAEL NORDGREN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-02039-6

BRIEF OF RESPONDENT

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A. STATEMENT OF FACTS

Between October 10, 2009 and October 11, 2009, Robert Nordgren punched Jon Eichstadt in the jaw and then, while Jon Eichstadt was on the ground, punched him on the neck. John Eichstadt (hereafter, "Eichstadt") spent two and one-half days in the Intensive Care Unit at Legacy Hospital, Portland. (RP 137). He was diagnosed with a fractured jaw (which required surgery and the implantation of metal plates). (RP 139, 156). He was further diagnosed with a fractured hyoid bone.¹ (RP 139, 155). For the next few months, Eichstadt was unable to fully open his mouth and was on a strict diet of baby-type food. (RP 138). At the time of trial, Eichstadt still experienced numbness in his face. (RP 156).

On the above date, Robert Nordgren (hereafter, "defendant") attended a birthday party for his girlfriend at her father's residence in Clark County, Washington. (RP 186). Eichstadt also attended the party.² (RP 144). At some point in the evening, some guests reported the wallets from their purses were missing. (RP 33). The defendant believed Eichstadt had been in the room where the purses had been located. (RP

¹ The hyoid bone is located within the lower throat. (RP 139, 155).

² Approximately 25 people attended the party. (RP 186). Guests consumed alcohol. (RP 30). Eichstadt consumed alcohol, but was not intoxicated. (RP 142, 169). The defendant did not consume any alcohol. (RP 186).

188). The defendant suspected Eichstadt of the theft and confronted Eichstadt, in the dining room of the residence. (RP 38, 188).

Eichstadt testified the defendant's demeanor was "angry" and "accusing" when the defendant confronted him. (RP 151). Eichstadt told the defendant he had nothing to do with the theft of the wallets.³ (RP 151). Eichstadt's next memory was waking up to a man asking him if he was okay and telling him to "wipe the blood off [his] face." (RP 150-51). Eichstadt was unaware that he had been hit. (RP 151). Eichstadt denied that anyone was ever "holding [him] back" after he regained consciousness.⁴ (RP at 168).

Erin Fine, Kathleen Martin, and Grace Lamkin testified for the State. Each testified they saw and heard the defendant confront Eichstadt regarding the missing wallets. (RP 38, 85, 114-16, 119). Each agreed the defendant's demeanor was aggressive throughout the encounter.⁵ (RP 39, 86, 97). Each witness said Eichstadt's back was facing a sliding glass door at the time he was confronted. (RP 38, 85). The defendant stood in the middle of the dining room. (RP 38). Fine, Martin, and Lamkin testified that Eichstadt's demeanor was never aggressive; rather he

³ Some wallets were ultimately found, others were not. No evidence was presented that Eichstadt had any role in the theft.

⁴ Erin Fine corroborated that no one was holding Eichstadt back from the defendant. (RP 51).

⁵ The witnesses described the defendant as aggressive, as well as: "loud," "fierce," and "agitated," (RP 39, 89, 97).

continuously appeared confused by the defendant's behavior and in disbelief that he was being confronted. (RP 39, 42, 43, 53, 86, 117). Fine and Martin heard Eichstadt laugh nervously and then saw Eichstadt raise his hands in the air, in a surrendering motion. (RP 39, 42, 117). Each witness testified Eichstadt neither made any postures with his body, nor said anything, to indicate he was going to assault the defendant. (RP 43, 97-99, 117-18, 120). Fine testified, prior to the assault, he saw Eichstadt try to walk away. (RP 44). Each witness testified he/she saw the defendant punch Eichstadt in the face, with enough force to knock Eichstadt off of his feet and onto his back, where he lay flat on the ground. (RP 38, 41, 88, 114-16, 119). Martin and Lamkin left the room immediately after they saw the defendant punch Eichstadt for the first time. (RP 88). Fine observed the defendant punch Eichstadt for a second time (while Eichstadt lay on the ground) and then observed the defendant cock his arm back, as if to punch Eichstadt a third time. (RP 38, 41). Fine testified guests at the party pulled the defendant off of Eichstadt before the defendant could hit him again. (RP 38). It was uncontested by the State's witnesses that Eichstadt did nothing to provoke the assault. (RP 43, 97-99, 117-18, 120).

The defendant testified. He agreed he confronted Eichstadt because he suspected Eichstadt of stealing the missing wallets. (RP 188-

89). The defendant also agreed Eichstadt's back was facing a sliding glass door at the time of the confrontation. (RP 190). The defendant testified he swung first and he intentionally punched Eichstadt in the face. (RP 193, 199). He agreed his punch caused Eichstadt to fall backwards. (RP 193). The defendant said some people helped Eichstadt get up. (RP 194).

The defendant said he assaulted Eichstadt because he was "concerned for [his] safety." (RP 191-93). He claimed Eichstadt had taken an "aggressive posture;" however, he agreed Eichstadt never took a swing at him, never pushed him, and never shoved him (RP 192, 198). Further, the defendant never claimed Eichstadt said anything to provoke him. (RP 198). The defendant said he had been released from the hospital thirty-one days prior to the party, after being diagnosed with a blood-clot in his leg. (RP 186). When asked why he felt concerned for his safety, the defendant said it was because of his own "physical state" and because he was "essentially accusing somebody of being a thief." (RP 191).

Clark County Sheriff's Office Deputy Jason Hafer testified that he spoke to the defendant approximately three weeks after the incident. (RP 211). Deputy Hafer said the defendant agreed he must have hit Eichstadt more than once. (RP 217). The defendant told Deputy Hafer he believed Eichstadt was "squaring-off" with him; however, he could provide no details as to what Eichstadt was doing or saying to make him believe this.

(RP 215). The defendant admitted to Deputy Hafer that he had anger issues. (RP 218). He also told Deputy Hafer that he had learned, in prison, “if you swing first, you don’t lose.” (RP 218). The defendant apologized for his actions.⁶ (RP 218).

Following trial, a jury found the defendant guilty of one count of Assault in the Second Degree. (CP 19).

B. RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court did not err when it instructed the jury as to the definition of recklessness because the instruction was an accurate statement of the law and it did not relieve the State of its burden of proof.

The defendant alleges his conviction for Assault in the Second Degree violated his right to due process because the instruction defining recklessness was a misstatement of the law that created a mandatory presumption. (See Appellant’s Brief, p. 1). The jury was instructed “to convict” the defendant of Assault in the Second Degree, it must find the defendant “intentionally” assaulted Jon Eichstadt” and “recklessly inflicted substantial bodily harm.” (Instruction No. 6, CP 10, Appendix A). The jury was also provided with an instruction that defined “recklessness.” (Instruction No. 8, CP 12, Appendix B). The defendant

⁶ Shari Eichstadt, the victim’s wife, said the defendant apologized to her immediately after the assault. (RP 136).

specifically takes issue with the final sentence of the recklessness definition, which provided:

[w]hen recklessness also is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

(See Appellant's Brief, at 12-13, Instruction No. 8, CP 12).

The defendant claims this instruction was a misstatement of the law because it did not "limit" the element to which "intent" applied. (See Appellant's Brief, p. 13). Consequently, the defendant claims the instruction created a mandatory presumption that relieved the State of its burden of proof. (See Appellant's Brief, p. 13). The defendant cites State v. Goble and State v. Hayward as authority. (Appellant's Brief, p. 7-9, 12, 14-15 (citing State v. Goble, 131 Wn. App. 194, 202, 126 P.3d 821 (2005); State v. Hayward, 152 Wn. App. 632, 635, 217 P.3d 354 (2009))).

In State v. McKague, this court squarely addressed and resolved the argument raised by the defendant here. State v. McKague, 159 Wn. App. 489, 246 P.3d 558 (2011). Pursuant to the court's holding in McKague, and for the reasons set forth below, the defendant's argument fails.

An alleged error in jury instructions must be objected to at the trial court level in order to preserve the issue for appeal. State v. Scott, 110

Wn.2d 682, 685-86, 757 P.2d 492 (1988). “No error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made.” Scott, 110 Wn.2d at 686, *citing State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1976).

An exception to this rule arises when a party alleges manifest error in an instruction that affects a constitutional right. McKague, 159 Wn. App. at 507. This exception is a “narrow one,” which affords review only of “certain constitutional questions.” Scott, at 687, (*citing* Comment (a), RAP 2.5). It is the defendant’s burden to make a showing that manifest error occurred at the trial court. See State v. Sibert, 168 Wn.2d 306, 316, 230 P.3d 142 (2010). If the defendant cannot make this showing, then a non-preserved error is not ripe for review by the appellate court. Scott, at 689.

Manifest error may exist if an instruction erroneously creates a mandatory presumption. McKague, at 507. A mandatory presumption is an error of law that relieves the State of its burden of proof and, thereby, implicates the defendant’s due process rights. Id.; Scott, at 688 n.5. A mandatory presumption exists when a jury is required “to find a presumed fact from a proved fact.” Hayward, 152 Wn. App. at 642 (*quoting State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996)). Such a

presumption exists if a reasonable juror would interpret the presumption to be mandatory. Hayward, at 642.

Errors of law in jury instructions are reviewed de novo. Scott, at 507. A jury instruction is sufficient when it allows counsel to argue his/her theory of the case, when it is not misleading, and when read as a whole it properly informs the trier of fact of the applicable law. State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005). In order to consider the effect of a particular jury instruction, the reviewing court reviews the instructions as a whole and reads the allegedly erroneous instruction in the context of all of the instructions given. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

In Goble, a trial for Assault in the Third Degree, Division Two found the instruction defining “knowledge” created a mandatory presumption that implicated the defendant’s right to due process. Goble, 131 Wn. App. at 202. Goble was charged with assaulting a police officer while the officer was performing his official duties. Goble, at 196. The issue was whether Goble knew the person he assaulted was a law enforcement officer who was performing his official duties. Id., at 203. In Goble, the “two convict” instruction for Assault in the Third Degree provided, in pertinent part, the State must prove beyond a reasonable

doubt “that on or about...the defendant assaulted Deputy D.

Riordan...[and] that the defendant knew at the time of the assault that Deputy D. Riordan was a law enforcement officer...who was performing his official duties.” Id., at 200-01, CP at 40, Instruction No. 4 (emphasis added).

Regarding the definition of “knowledge,” the jury was instructed:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

...

Acting knowingly or with knowledge also is established if a person acts intentionally.

Id., at 202. CP at 44, Instruction No. 8 (emphasis added).

Instruction 8 (knowledge definition) was derived from WPIC

10.02. Goble, at 202-03. WPIC 10.02 was derived from RCW

9A.08.010(1)(b).⁷ Id.

⁷ RCW 9A.08.010(1)(b) – Knowledge, provides:

[a] person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

Goble alleged instruction 8 did not follow the exact wording of RCW 9A.08.010(1)(b) because the underlined portion “relieved the State of the burden of proving [Goble’s] knowledge of [the officer’s] status at the time of the offense.” Id., at 202. Therefore, the instruction was “confusing, misleading, and a misstatement of the law.” Id.

Division Two agreed with the defendant. Id., at 202-03. The court found the underlined portion of instruction 8 was a misstatement of the law because it permitted the jury to presume that Goble knew the officer’s status at the time of the offense, so long as the jury found Goble intentionally assaulted the officer. Id., at 203. Consequently, instruction 8 erroneously conflated two separate elements (intent and knowledge) into one element. Id., at 203-04. The court found instruction 8 created a mandatory presumption that relieved the State of its burden of proof (to wit: its burden to prove two separate mental states, which applied to two separate acts). Id. This error implicated the defendant’s right to due process. See Id., at 204.

Similarly, in Hayward, a trial for Assault in the Second Degree, Division Two found the jury instruction defining “recklessness” erroneously conflated two separate elements (intent and recklessness) into one element. Hayward, 152 Wn. App. at 635, 217. In Hayward, the “to

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

convict” instruction for Assault in the Second Degree provided, in part, that the jury must find beyond a reasonable doubt “[t]hat on or about...the defendant intentionally assaulted Tyson Baar...[and] that the defendant thereby recklessly inflicted substantial bodily harm on Tyson Barr...”

Hayward, at 639-40, CP 30, Instruction No. 7 (emphasis omitted).

Regarding the definition of “recklessness,” the jury was instructed:

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.

Hayward, at 640, CP 33, Instruction No. 10 (emphasis added).

Instruction 10 (reckless definition) was derived from WPIC 10.03.

Hayward, at 643-44. WPIC 10.03 was derived from RCW

9A.08.010(1)(c)⁸ and RCW 9A.08.010(2).⁹ Id. The Court in Hayward noted that RCW 9A.08.010(2) allows for the substitution of mental states.

Id., at 644; See FN 9. However, the court found the underlined language

⁸ RCW 9A.08.010(1)(c) – Recklessness, provides: “[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 his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.”

⁹ RCW 9A.08.010(2) - Substitutes for Criminal Negligence, Recklessness, and Knowledge, provides in part: “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.”

used in instruction 10 (defining recklessness) did not sufficiently mirror RCW 9A.08.010(2) because it did not include language that limited the substituted mental states (“here, intentionally”) to the specific element at issue (“here, infliction of substantial bodily harm”). Id., at 646. Therefore, pursuant to this instruction, the jury could find the defendant “recklessly” inflicted substantial bodily harm on the victim, so long as it found the defendant “intentionally” assaulted the victim. Id., at 645.

The court found, similar to Goble, instruction 10 conflated into a single element “the intent the jury had to find regarding Hayward’s assault against Baar with an intent to cause substantial bodily harm required by the recklessness mental state.” Id. As such, instruction 10 was a misstatement of the law. Id. The instruction erroneously created a mandatory presumption, thereby relieving the State of its burden of proof and implicating the defendant’s right to due process. Id.

The court in Hayward noted that WPIC 10.03 (which defines recklessness) was amended in 2008 to mirror the statutory language of RCW 9A.08.010(2) more closely. Id., at 644, (citing 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.03 cmt. At 211 (3d ed. 2008), see also 11 WPIC 10.03 note on use at 209 (2008)). WPIC 10.03 was amended in 2008 to read:

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

Id., at 644, 11 WPIC 10.03, at 209 (2008) (alterations in original).

In contrast, pre-amendment WPIC 10.03 stated in part:

[Recklessness also is established if a person acts [intentionally] or [knowingly].].

Id., 11 WPIC 10.03, at 153 (alterations in original).

The court found amended WPIC 10.03 was a correct statement of the law because it made clear “recklessness” was an additional “element of the crime” that must be proven by the State beyond a reasonable doubt. See Id., at 646. The court speculated that, in Hayward’s case, Instruction 10 may have been extrapolated from the pre-amended version of WPIC 10.03. Id., at 644. The court implied that, had amended WPIC 10.03 been used, it may not have found error. Id., at 645-46.¹⁰

¹⁰ The court acknowledged that, in State v. Keend, 140 Wn. App. 858, 166 P.3d 1268 (2007), (review denied, 163 Wn.2d 1041 (2008)), it did not find error when the jury was similarly instructed that “[r]ecklessness also is established if a person acts intentionally or knowingly.” Id., at 645 (quoting Keend, 140 Wn. App. at 862 (quoting Clerk’s Papers at 33)). Keend was also charged with Assault in the Second Degree. Id. The court explained that it decided Keend in 2007, prior to the amendment of WPIC 10.03. Id. The Court said the fact that WPIC 10.03 was revised in 2008, to more closely mirror RCW 9A.08.010, was indicative that, prior to the revision, WPIC 10.03 was inadequate. Id. (noting its result in Keend may have been different if the case had been considered after the amendment to WPIC 10.03).

In McKague, a trial for Assault in the Second Degree, this court found no constitutional error occurred when the instruction used to define “recklessness” was taken from amended WPIC 10.03. McKague, 159 Wn. App. at 510.

In McKague, the jury instruction defining “recklessness” (WPIC 10.03) provided in part:

[w]hen recklessness as to a particular fact is required to establish an element of the crime, the element is also established if a person acts intentionally or knowingly.

McKague, at 508, CP 47.

The court in McKague noted that this definition of “recklessness” sufficiently mirrored RCW9A.08.010(2) and amended WPIC 10.03. Id. at 510. The court contrasted the instruction that was used in this case with the instruction used in Hayward. Id. at 508-09. The court found, in Hayward, the “to convict” instruction properly set forth two separate mental states (intent and recklessness), each of which corresponded to a separate act (assault and the infliction of substantial bodily harm). Id. However, the “recklessness” instruction provided in Hayward, then improperly conflated those separate mental states and separate corresponding acts into an offense with only a single mental state, which,

if found, could be applied to satisfy both acts. Id., at 509 (citing Hayward, at 644-45).¹¹

In contrast, the court said the “recklessness” instruction provided in McKague’s case avoided the Hayward problem because this instruction

made clear that (1) only if the jury found intentionality as to the discrete act of assault could it also find recklessness as to the discrete act of assault; but (2) unlike in Hayward, the jury could not, as a consequence, also find recklessness as to the infliction of substantial bodily harm.

McKague, at 510 (alterations in original).

Therefore, the instruction used in McKague did not improperly conflate two mens rea elements into one element; it did not create a mandatory presumption that relieved the State of its burden of proof; and it did not implicate the defendant’s right to due process. Id.

In our case, the instruction defining “recklessness” mirrored that which this court found was appropriately provided in McKague.

The “to convict” instruction for Assault in the Second Degree provided, in pertinent part, that the jury must find beyond a reasonable doubt:

¹¹ The court stated the “recklessness” instruction in Hayward “[a]llowed the jury to conclude that if Hayward had intentionally assaulted the victim, then recklessness in general was established and, therefore, Hayward must have also recklessly inflicted substantial bodily harm.” McKague, at 509 (citing Hayward, at 645) (alterations in original).

(1) [t]hat on or about October 10, 2009 to October 11, 2009, the defendant intentionally assaulted Jon W. Eichstadt;

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Jon W. Eichstadt; and

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

...

- (CP 10, Instruction No. 6, Appendix A).

Regarding the definition of “recklessness,” the jury was instructed:

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

- (CP 12, Instruction No. 8, Appendix B (emphasis added)).

Instruction 8 (recklessness definition) is an accurate statement of the law. First, instruction 8 mirrors amended WPIC 10.03. Hayward, at 644, 11 WPIC 10.03, at 209 (2008). Instruction 8 also mirrors RCW 9A.08.010(2). Id.; RCW 9A.08.010(2). Further, instruction 8 mirrors the instruction that this court found was appropriately provided in McKague. McKague, at 508.

Instruction 8 made it clear to the jury that the crime of Assault in the Second Degree involved two separate and distinct mental states (intent and recklessness), each of which applied to two separate and distinct elements (assault and the infliction of substantial bodily harm). Alike the instruction that was provided in McKague, the instruction provided in our case avoided the problem of Hayward because it made clear that the mental state of “recklessness” was required to establish an additional “element of the crime.” (CP 12, Instruction No. 8, Appendix B) Only if the jury found the defendant intentionally assaulted Eichstadt, could it then find the defendant recklessly (or intentionally) inflicted substantial bodily harm. (Compare, McKague, at 510 ; contrast Hayward, at 644-45).

Unlike the instruction that was provided in Hayward, instruction 8 (recklessness definition) did not “collaps[e] second degree assault into an offense with only a single mental state.” McKague, at 509-510, (contrasting Hayward) (emphasis added). Because it did not conflate two mental states, instruction 8 did not create a mandatory presumption that relieved the State of its burden or proof. For this same reason, instruction 8 did not implicate the defendant’s right to due process.

It is also worth noting that the trial court set forth the mental states of Assault in the Second Degree in the “to convict” instruction and it separately defined “intent” and “recklessness.” (CP 10, 11, 12, Instruction

No. 6, 7, 8, Appendix A, C, B). Further, the jury was instructed as to self-defense and it was instructed that the State had the burden of proving each element beyond a reasonable doubt. (CP 6, 14, Instruction No. 2, 14).

The jury is presumed to read the instructions as a whole, in light of all instructions given. Keend, at 868, (citing State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999)).¹²

Viewing the instructions as a whole, it is not reasonable to believe the jurors were at all confused as to the separate elements that needed to be proven by the State beyond a reasonable doubt.

The trial court properly applied RCW 9A.08.010(1)(c), RCW 9A.08.010(2) and amended WPIC 10.03 to instruction 8 (defining recklessness). In McKague, this court found an instruction that was identical to instruction 8 was a proper application of the law. Further, when viewing the instructions as a whole, it is not reasonable to believe instruction 8 was confusing or misleading.

The defendant did not object to instruction 8. For each of the reasons stated above, this court should find the trial court did not err and the defendant cannot meet his burden of showing the trial court committed manifest error affecting a constitutional right.

¹² In Keend, this court found there was no possibility the jury was confused when the trial court set forth the mental states of Assault in the Second Degree in the “to convict” instruction and separately defined “recklessness” and “intent”.

II. Assuming arguendo this court finds manifest error affecting a constitutional right, the error was harmless.

“[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;” it does not necessarily relieve the State of its burden; and it does not necessarily require reversal. State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) at 844-45 (*quoting Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed 35 (1999)). A jury instruction that misstates the law or omits an element of the crime is subject to harmless error analysis. Id., at 844, (*citing Neder*, at 9). A constitutional error is harmless if it appears beyond a reasonable doubt that the error did not contribute to the verdict. Thomas, at 845, (*citing Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed 2d 705 (1967)). When harmless error analysis is applied to misstatements of elements in jury instructions, the error is harmless if the element is supported by “uncontroverted evidence.” Thomas, at 845, (*citing State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (*citing Neder*, at 18)); Hayward, at 648.

In Hayward, the court found the error in the jury instruction (defining recklessness) was not harmless because the State had not presented uncontroverted evidence that the defendant acted “recklessly”

when he caused substantial bodily harm to the victim, Baar. Hayward, at 648. While at a party, Hayward and Baar became engaged in a verbal argument, which ended with Hayward punching Baar in the face. Id. at 635. Baar was diagnosed with a broken jaw. Id. Witnesses testified that Baar was grossly intoxicated. Id., at 636. Witnesses also testified that prior to the assault Baar had threatened to “beat up” another guest at the party. Id. Prior to the assault, witnesses also heard Hayward and Baar yelling back and forth to each other. Id. Hayward testified that Baar “wouldn’t leave” and, prior to the assault, Baar slapped Hayward in the face. Id., at 637. By all accounts, Hayward punched Baar only one time. Hayward testified “the force [he] used could not have broke[n] [Baar’s] jaw.” Id.

The facts in our case are distinguishable from the facts in Hayward. First, in our case, there was no on-going quarrel between the defendant and Eichstadt: the uncontroverted testimony was that the defendant took Eichstadt by surprise when he confronted him about “stealing wallets.” By multiple accounts, the defendant’s demeanor was aggressive and agitated throughout the encounter, while Eichstadt remained confused and nervous (as he tried to calm the situation and

extricate himself from it).¹³ Eichstadt was not visibly intoxicated.¹⁴

Multiple witnesses testified Eichstadt never behaved belligerently or said or did anything to suggest he was going to assault the defendant.¹⁵ The defendant testified that he felt cornered by Eichstadt, but said he felt this way because he was accusing Eichstadt of a crime and because he had a pre-existing injury.¹⁶

Further, the defendant in our case did not punch Eichstadt only one time – he punched him twice, and attempted to punch him a third time.¹⁷ The second punch occurred when Eichstadt lay flat on the ground.¹⁸ The fact that Eichstadt had two injuries in two distinct locations (jaw and hyoid bone) was corroborative evidence that the defendant had struck him more than once.¹⁹

In addition, the defendant here seemed to appreciate that he had lost control because he apologized to Eichstadt's wife after the assault and then apologized to the investigating officer three weeks later.²⁰ The

¹³ (RP 39, 42, 43, 53, 86, 97, 117).

¹⁴ (RP 142).

¹⁵ (RP 43, 97-99, 117-18, 120).

¹⁶ (RP 191).

¹⁷ (RP 38, 41).

¹⁸ (RP 38, 41).

¹⁹ (RP 139).

²⁰ (RP 136-218).

defendant here acknowledged he had an anger problem and acknowledged he learned in prison to strike the first blow.²¹

The evidence in our case proved beyond a reasonable doubt that the defendant knew of and disregarded a substantial risk that his actions would result in substantial bodily harm to Jon Eichstadt. Multiple witnesses corroborated the fact that the defendant's actions were violent, forceful, repeated, irrational, not provoked, and completely unnecessary. This evidence was uncontested, but for the defendant's personal beliefs, which were wholly unsupported by the evidence. Given the overwhelming evidence in this case, any reasonable jury would have reached the same result in the absence of the alleged error. Brown, 147 Wn.2d at 341.

III. Assuming arguendo this court finds manifest error affecting a constitutional right, even under the test applied in Yates v. Evatt, the error was harmless.

The defendant asks this court to apply the harmless error test that was set-forth in Yates v. Evatt. (Appellant's Brief, at 10-11); Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991). The court in Yates opined there should be a stricter harmless error test when there is a showing of manifest error in jury instructions. This is the case because the standard presumption is that jurors follow the instructions they are

²¹ (RP 218).

given. State v. Van Atkins, 156 Wn. App. 799, 813, 236 P.3d 897 (2010) (citing Yates, 500 U.S. at 403).

The Yates test has not been adopted by Division Two and has not been adopted by the Washington Supreme Court; therefore, the court should not apply the Yates standard here. Hayward, at 647 (court acknowledged Yates test but never affirmatively stated whether it should apply, since it found the error was not harmless under the standard harmless error test); McKague, 159 Wn. App. 489 (court made no reference to Yates test); Keend, 140 Wn. App. 858 (court made no reference to Yates test); Goble, 131 Wn. App. 194 (court made no reference to Yates test); Siebert, 168 Wn.2d 306 (case involving manifest error in jury instructions but Supreme Court made no reference to Yates test); Thomas, 150 Wn.2d 821 (case involving manifest error in jury instructions but Court made no reference to Yates test); Van Atkins, 156 Wn. App at 813 (Division One applies Yates test).

Even if the court applies the Yates test in our case, it should still find any alleged instructional error was harmless. The Yates test is two parts: first the reviewing court must “identify the evidence the jury reasonably considered under the instructions given on the pertinent issue;” second, “the court must determine whether the evidence considered by the jury in accordance with the instructions is so overwhelming that there is

no reasonable doubt as to the verdict rendered.” Van Atkins, at 813-14 (citing Yates, at 404-06).

In regards to the first prong of the Yates test, in our case, the jury considered evidence from at least four witnesses each of whom said Eichstadt never said or did anything aggressive towards the defendant. These witnesses also testified that Eichstadt never engaged in any actions that would cause the defendant to believe he was going to be assaulted. Multiple witnesses testified that the defendant punched Eichstadt with enough force that he was knocked off of his feet and fell flat on his back. There was testimony that, while he was on the ground, the defendant punched Eichstadt again. Medical evidence supported this testimony because Eichstadt had multiple injuries. By his own admission, the defendant had problems with aggression and learned in prison to strike first. The defendant was immediately aware that he had lost control and apologized accordingly.

Under the second prong of the Yates test, this evidence was overwhelming evidence of reckless behavior on the part of the defendant. By all accounts, the defendant knew of and disregarded the risk that his wrongful actions would result in substantial bodily harm and this disregard was a gross deviation from the conduct a reasonable person would have

exercised. WPIC 10.03. There is no reasonable doubt as to the verdict rendered.

C. CONCLUSION

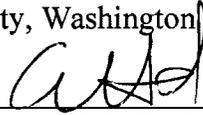
For each of the foregoing reasons, the trial court should be affirmed.

DATED this 29 day of June, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



ABIGAIL E. HURD, WSBA #36937
Deputy Prosecuting Attorney

APPENDIX A

INSTRUCTION NO. 6

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

- (1) That on or about October 10, 2009 to October 11, 2009, the defendant intentionally assaulted Jon W. Eichstadt;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Jon W. Eichstadt; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX B

INSTRUCTION NO. 8

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

000012

APPENDIX C

INSTRUCTION NO. 7

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

ROBERT MICHAEL NORDGREN,
Appellant.

No. 41127-0-II

Clark Co. No. 09-1-02039-6

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On June 29, 2011, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Lisa E Tabbut
Attorney at Law
PO Box 1396
Longview WA 98632

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

[Signature]
Date: June 29, 2011.
Place: Vancouver, Washington.