

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANGEL MICHALAK

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor

Cause No. 14-1-01392-6

BRIEF OF RESPONDENT

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Statutes and Rules

ER 7015
RAP 2.5(a)2

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May Michalak raise the issue of improper witness testimony for the first time on appeal, despite the fact that her brief fails to allege material prejudice?
2. When Officer Boling testified as to whether it appeared that Michalak sought to kick him, or was merely flailing her legs, did this constitute impermissible opinion testimony regarding Michalak's guilt?
3. Even if Officer Boling's statement was in error, was such error rendered harmless when the jury was shown three separate videos of the incident?

B. STATEMENT OF THE CASE

On September 13, 2014, the Tumwater Police Department responded to a possible domestic violence situation at a local gas station. RP 43. A woman, subsequently identified as the Appellant, Angel Michalak, was reportedly angrily punching a wall, as her associate lay on the ground nearby. RP 43. Believing Michalak and her companion may have been involved in a domestic dispute, Officer Tyler Boling of the Tumwater PD, sought to separate the two. RP 46-49. As he attempted to escort Michalak to his vehicle, Boling testified that he used a "Level One Firm Grip" on Michalak's arm. RP 46-49. Michalak resisted, fell to the ground and kicked Boling in his thigh, RP 49-50, with three separate police vehicles capturing video footage of the struggle through their dash cameras. RP 66, 86, 94. Following the altercation, Michalak was arrested for assault. RP 51.

At trial, Officer Boling was asked if the kick appeared to be the unintentional flay, or if it were directed at him. RP 52. Boling responded “No, it was directed at me.” RP 52. The three videos of the struggle were also played for the jury. RP 66, 86, 94. Ultimately, Michalak was convicted of third degree assault, and sentenced to six days confinement, one year of community custody, and mandatory substance abuse treatment. RP 160; Sentencing Record 15-16.

C. ARGUMENT

1. **Because Michalak Did Not Object to Officer Boling’s Statement at Trial, and Does Not Allege That She Was Materially Prejudiced, Her Claim Must Be Denied.**

In her only point of error, Michalak claims that Officer Boling offered an impermissible opinion regarding her guilt when he testified that Michalak’s kick was directed at him. App. Brief at 5; RP 52. However, no objection was made to Boling’s statement at trial, and Michalak’s brief fails to address this issue.

Because Michalak failed to object at trial, she now bears the burden of proving that Boling’s testimony was “manifest error affecting a constitutional right.” RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 332-333, 899 P.2d 1251 (1995) (“As a general rule, appellate courts will not consider issues raised for the first time on appeal.”); *State v. Kirkman*, 159 Wn.2d 918, 926, 935, 155 P.3d 125 (2007) (“No case of this court has

held that a manifest error infringing a constitutional right necessarily exists where a witness expresses an opinion on an ultimate issue of fact that is not objected to at trial.”); *State v. Scott*, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). Specifically, Michalak must identify a constitutional error and show how, in the context of this particular trial, the alleged error actually affected her rights; as “it is this showing of actual prejudice that makes the error "manifest", allowing appellate review.” *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 686-87.

By failing to even mention actual prejudice in the context of this case, Michalak has plainly failed to meet her burden of establishing that she was prejudiced by Boling’s statement. Nevertheless, even if Michalak had attempted to argue actual prejudice, the record establishes that she was not harmed by the alleged error. Through video evidence, the jury was able to view the kick from three different angles, and determine for themselves whether Michalak had the intent to kick Boling, thus any potential harm was mitigated. Additionally, had Michalak objected at trial, any potential error could have been cured by instructions to the jury. *Kirkman*, 159 Wn.2d at 935 (“Appellate courts will not approve a party's failure to object at trial that could identify error which the trial court might correct (through striking the testimony and/or curative jury instruction)..

Failure to object deprives the trial court of this opportunity to prevent or cure the error.”)

Finally, the jury received specific instructions to decide the facts based upon the evidence presented; that they were the sole judges of credibility; and that Michalak was presumed innocent. RP 124-29. Presuming that juries properly follow instructions, courts have held that such language can cure potential prejudice caused by improper witness opinions. *See Kirkman*, 159 Wn.2d at 937 (“This court has even found such [jury] instructions relevant (and curative) in claims of judicial comment on the evidence.”); *State v. Montgomery*, 163 Wn.2d 577, 595-596, 183 P.3d 267 (2008); *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012) (“Important to the determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed... Proper instructions obviate the possibility of prejudice.”).

Consequently, because Michalak has failed to establish that she was actually prejudiced, she has not met her burden of proving manifest error, and her claim must be denied.

2. Officer Boling’s Testimony Did Not Amount to an Impermissible Opinion.

Next, critically, Officer Boling's testimony that Michalak's kick was directed towards him was not impermissible.¹ Opinion testimony is not necessarily impermissible, even if it concerns ultimate issues of fact. *State v. Blake*, 172 Wn. App. 515, 528, 298 P.3d 769 (2012); *State v. Collins*, 152 Wn. App. 429, 436, 216 P.3d 465 (2009) ("The fact that an opinion supports a finding of guilt... does not make the opinion improper.").

In the present case, the disputed testimony occurred when Officer Boling was asked whether it appeared that the kick "was just an unintentional flay or did this appear directed at you," to which he responded "No, it was directed at me." RP 52. Such a statement is rationally based on Boling's perception, which is a permissible ground for a layperson to offer an opinion under ER 701.² *Collins*, 152 Wn. App. At 436 ("It is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.").

¹ On a more practical level, Boling's disputed testimony has characteristics of both fact and opinion. In fact, nearly any witness testimony involves some degree of opinion if it is reduced far enough. But, the question of whether a defendant made contact/struck/shot their victim by accident or design is hardly an uncommon question. To hold Boling's testimony impermissible would open the door to second guessing of a substantial amount of previously unchallenged witness testimony.

² In some circumstances a police officer can be considered an expert witness, however the disputed testimony is in line with what could be offered by a layperson, as it is not based upon scientific, technical or other specialized knowledge. ER 701. Therefore, ER 701 is the appropriate rule.

Moreover, although the question of whether the kick appeared accidental or not ultimately went to the issue of Michalak's intent, that alone doesn't render Boling's testimony impermissible. *Blake*, 172 Wn. App. at 528. Instead, for Boling's testimony to constitute impermissible opinion testimony, he must have made a direct comment on Michalak's guilt or witness veracity. *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993) (“[T]estimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.”). Here, Boling's testimony concerned whether it appeared that Michalak's kick was accidental or intentional, which is an indirect statement regarding intent, not a direct comment on her guilt. RP 52.

In light of these facts, Boling's testimony should be considered permissible testimony, rationally based upon his first hand observations. Accordingly, Michalak's claim must be denied.

3. Any Potential Error Was Harmless, Any Prejudice Caused by Boling's Testimony Was Mitigated, Rendering Any Potential Error Harmless.

Finally, any potential error was rendered harmless by the three separate videos of the incident shown at trial.³ RP 66, 86, 94. Under the harmless error doctrine, unless there is a reasonable belief that Michalak

³ The videos were submitted as part of the clerk's papers. Supp. CP 72.

would have been found innocent, but for the alleged error, her conviction must be sustained. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) (“the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’”). Considering that the jury viewed the altercation from three different angles, yet still found beyond a reasonable doubt that Michalak intended to kick Boling,⁴ it is not reasonable to suggest that she may have been found innocent, but for Boling’s testimony. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (“The harmless error rule preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.’”).

Based upon the video evidence showing Michalak appearing to intentionally kick Boling, it is clear beyond a reasonable doubt that even if Boling had offered no testimony regarding the kick, Michalak would have

⁴ As with the manifest error analysis, the instructions to the jury are also relevant to harmless error analysis. The jury received specific instructions to decide the facts based upon the evidence presented; that they were the sole judges of credibility; and that Michalak was presumed innocent. RP 124-29.

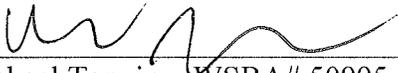
been convicted of assault.⁵ Accordingly, any error caused by Boling's testimony was harmless error, and Michalak's conviction must be affirmed.

D. CONCLUSION

For these reasons, the State asks that the court affirm Michalak's conviction.

Respectfully submitted this 24th day of March, 2017.

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⁵ Michalak cites *Quale* as an instance where a court held that improper witness testimony was not harmless error. However, there the facts were far from black and white. *State v. Quale*, 182 Wn.2d 191, 340 P.3d 213 (2014). In fact, in *Quale*, the defendant's first trial ended with a mistrial as the jury could not agree on a verdict. *Id.* at 195. Comparing *Quale* to the present case, Michalak's actions can be distinguished by the fact that they were caught on video, making the State's case much stronger. Additionally, in *Quale*, a police officer stated "Absolutely. There was no doubt he was impaired." *Id.* That statement is a more direct comment on an issue of fact, and more prejudicial than an individual stating whether he believed a kick was directed towards him.

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 24th day of March, 2017, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

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