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No. 49871-5-II

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

State of Washington,

Respondent,

v.

Purcell Devoir Toston, Jr.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Because a chipped tooth does not constitute a fracture within the meaning of RCW 9A.04.110(4)(b), insufficient evidence supports Mr. Toston's conviction for assault in the second degree.

After Geovanny Blanco called Purcell Toston a “drama queen,” Mr. Toston and Mr. Blanco began “cursing at each other” and “getting in each other’s faces.” RP 74, 111, 113. Mr. Toston ultimately hit Mr. Blanco in the mouth, resulting in Mr. Blanco experiencing some swelling on his nose and a slight chip on one of his lower teeth. RP 132. The State charged Mr. Toston with assault in the second degree. CP 5. One of the essential elements of assault in the second degree requires the State to prove that the defendant inflicted “substantial bodily harm” on the complainant. RCW 9A.36.021(1).

Because RCW 9A.04.110(4)(b), in part, defines “substantial bodily harm” as an injury that causes “the fracture of any bodily part,” the State’s advanced the theory that it met its burden in proving assault in the second degree. Relying on a dictionary definition of the term “fracture”, the State arguing Mr. Blanco’s chipped tooth was a “fracture” within the meaning of the statute. RP 67, 167. Mr. Toston was ultimately convicted of this crime. RP 173.

However, under accepted principles of statutory interpretation, the term “fracture” under RCW 9A.04.110(4)(b) must be afforded its medical meaning rather than its dictionary meaning. *See* Br. of Appellant at 8-13. In sum, three interrelated principles compel this interpretation of the term: 1) the doctrine of *expresio unius est exclusio alterius*¹ (providing that “the legislative inclusion of certain items in a category implies that other items in that category [were] intended to be excluded.” *Bour v. Johnson*, 122 Wn.2d 829, 836, 864 P.2d 380 (1993)); 2) the presumption that the legislature uses no superfluous words when drafting a statute;² and 3) the fundamental rule that the legislature is deemed to intend a different meaning when it uses different terms in a statute.³ These principles are used to discern the plain meaning of a statute.

RCW 9A.04.110(4)(b) defines “substantial bodily harm” 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 *the fracture of any bodily part*.

(emphasis added).

¹ In other words, a court must presume that the Legislature’s omission of a term used elsewhere within a statute was deliberate; therefore, the term cannot be “read in” to a portion of the statute that does not mention the term in question.

² *See Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (“statutes *must* be interpreted and construed so that *all* language used is given effect, with *no* portion rendered meaningless or *superfluous*”) (emphasis added).

³ *See State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (“when the legislature uses different words within the same statute, we recognize that a different meaning is intended”).

Because the Legislature omitted the term “organ” from the section of the statute that allows a trier of fact to find that a person inflicted “substantial bodily harm” if he or she caused the “fracture of any bodily part,” the “fracture” of an organ does not constitute “substantial bodily harm” within the meaning of the statute. If the legislature intended for the term “fracture” to also apply to an organ, it would have included the term under this section of the statute.

Accordingly, this Court should reject the State’s invitation to ignore multiple canons of statutory construction and render the term “organ,” as it appears elsewhere in the statute, superfluous. Resp. Br. at 8-10; *See State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (rejecting an interpretation of a statute that would violate numerous fundamental principles of statutory construction).

In keeping with the canons of statutory construction, the term “fracture” must be afforded its medical meaning. The medical meaning of “fracture” applies only to fractured bones.⁴ Teeth are not bones;⁵

⁴ *See Fracture*, Oxford Reference Concise Medical Dictionary (9th ed. 2015); *Fracture*, Black’s Medical Dictionary 86, 281 (41st ed. 2005); Danielle Campagne, MD, *Overview of Fractures, Dislocations, & Sprains*, Merck Manual: Professional Version, <http://www.merckmanuals.com/professional/injuries-poisoning/fractures,-dislocations,-and-sprains/overview-of-fractures,-dislocations,-and-sprains>.

⁵ *See* Black’s Medical Dictionary, *supra* note 4, at 695 (defining “teeth” as “hard organs developed from the mucous membranes of the mouth and embedded in the jaw bones); *see also* Remy Melina, *Why are Teeth not Considered Bones?*, Live Science

consequently, Mr. Blanco's chipped tooth was insufficient to convict Mr. Toston of assault in the second degree.

Nevertheless, the State insists that Dr. Kim Thuy Le's testimony demonstrates that a chipped tooth is still a "fracture" within its medical definition. Resp. Br. at 11-12. This argument is unavailing for two reasons. First, a single trial witness is not the final arbiter of the definition of a statutory term; rather, it is this Court's duty to interpret the law and ascertain the meaning of terms within a statute. *See Moses v. State Dep't of Soc. & Health. Serv.*, 90 Wn.2d 271, 274, 581 P.2d 152 (1978). Second, neither the State nor Mr. Toston asked Dr. Le to provide a medical definition of the term "fracture." Thus, this argument is unpersuasive.

For the reasons stated in pages 12-13 of the opening brief, the minor swelling on Mr. Blanco's nose and his slightly chipped tooth was not a "substantial disfigurement" within the meaning of RCW 9A.04.110(4)(b); *see also* Exs. 2 & 3, Ex. 6, pg. 4. Additionally, after the incident, Mr. Blanco chose not to get his tooth repaired, which demonstrates that he did not believe the slightly chipped tooth "disfigured" him enough to warrant further medical treatment. RP 87.

(Mar. 18, 2011), <https://www.livescience.com/33130-why-are-teeth-not-considered-bones.html>.

Insufficient evidence supports Mr. Toston's conviction for assault in the second degree. This Court should dismiss Mr. Toston's conviction with prejudice.

2. The jury instructions were legally deficient because they misstated the law, and the jury instructions constituted an impermissible comment on the evidence.

Jury instruction 7 was legally deficient because it allowed the jury to find Mr. Toston guilty of assault in the second degree based on an incorrect definition of the term "fracture." *See* Br. of Appellant at 14-17. To this argument, the State merely replies that the jury instruction accurately stated the law. Resp. Br. at 17. For the reasons stated in both this brief and in the opening brief, this Court should reject this assertion.

Additionally, Jury Instruction 7 constitutes an impermissible comment on the evidence because the instruction resolved a contested factual issue in favor of the State. *See* Br. of Appellant at 15-17. Nevertheless, relying on *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002), the State asserts that because courts have held that it may be permissible to use a dictionary definition to define a term, the Court did not comment on the evidence when it supplied a jury instruction with the dictionary definition of the term "fracture." Resp. Br. at 16-17. But in *Atkinson*, the Court held that an instruction defining the term "disfigurement" according to its dictionary definition was proper only

because the definition was legally consistent with the statute in question. 113 Wn. App. at 668. Conversely, where an instruction is legally inconsistent with the statute in question and also resolves a contested factual issue in favor of the State, such an instruction amounts to a comment on the evidence. *See State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986); *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). That is the case here.

The State cannot meet its heavy burden in proving that Jury Instruction 7 did not prejudice Mr. Toston beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). However, the State argues it has met its burden, once again pointing to Dr. Le's testimony that Mr. Blanco had a fractured tooth. Resp. Br. at 18-19. For the reasons stated in page 4 of this brief and in light of Mr. Blanco's minor injuries, this argument is unavailing.

3. Mr. Toston was entitled to an assault in the fourth degree instruction.

Mr. Toston was entitled to an assault in the fourth degree jury instruction. *See* Br. of Appellant at 17-20. While the State concedes the legal prong of the *Workman*⁶ test is satisfied because assault in the fourth

⁶ A defendant is entitled to an instruction on a lesser-included/inferior degree offense instruction if two conditions are satisfied. *State v. Workman*, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). "First, each of the elements of the lesser offense must be a

degree is an inferior degree offense to assault in the second degree, the State maintains the factual prong of the *Workman* test was unsatisfied because Mr. Toston's trial attorney could not articulate a factual basis that would warrant the instruction. Resp. Br. at 22, 24-25.

This Court should reject the State's erroneous and extremely narrow view on the evidence a judge must evaluate prior to instructing the jury on a lesser-included/inferior degree offense. A trial court must consider *all* of the evidence produced at trial when it decides whether the jury should receive the instruction, regardless of the source of the evidence. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); *accord State v. Bright*, 129 Wn.2d 257-269-70, 916 P.2d 922 (1996). The judge possessed abundant evidence that should have resulted in an instruction for assault in the fourth degree. For example, Mr. Blanco only sustained a slightly chipped tooth and some swelling on his nose. Exs. 2 & 3, Ex. 6, pg. 4. Mr. Blanco denied any loss of consciousness and did not appear in acute distress just 20 minutes after the incident. Ex. 6, pg. 2. In light of these minor injuries, Dr. Le only recommended that Mr. Blanco take ibuprofen if he experienced any pain and apply some ice on his nose to ease the swelling. RP 107.

necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed." *Id.* at 447-48.

Because Mr. Blanco's injuries were minor, the jury could have rationally found that the assault did not result in Mr. Blanco experiencing "substantial bodily harm." Therefore, affirmative evidence existed that only an assault in the fourth degree occurred. The State's argument to the contrary is misplaced.

4. The community custody condition that requires Mr. Toston to comply with conditions "as ordered by [his] CCO" is unconstitutionally vague, and this issue is ripe for review.

The condition of community custody that permits Mr. Toston's Community Corrections Officer (CCO) to impose any condition of community custody he or she deems fit should be stricken because it is unconstitutionally vague. *See* Br. of Appellant at 20-22. In response, the State does not argue that this condition is constitutionally permissible; rather, the State argues this condition is not ripe for review. Resp. Br. at 25-26.

Challenges to community custody are ripe for review on direct appeal "if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *State v. Sanchez-Valencia*, 169 Wn.2d 782, 786, 239 P.3d 1059 (2010) (quoting *First United Methodist Church v. Hr'g Exam'r for Seattle Landmarks Pres. Bd.*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996)). The State agrees that the

present issue is primarily legal and that the challenged action is final, but argues further factual development is needed. Resp. Br. at 25-26.

This argument is ripe for review because no factual development is necessary for this court to determine whether this condition is unconstitutionally vague. This challenged condition of community custody contains no language that limits the CCO's discretion to conditions that are permissible by statute or by the constitution. CP 56. Therefore, this Court simply has to answer the question of whether a condition of community custody that gives a CCO unbridled discretion to impose any condition of community custody he or she deems fit is unconstitutionally vague. *See State v. Valencia*, 169 Wn.2d 782, 789, 239 P.3d 1059 (2010) (finding that no factual development was necessary on a condition of community custody because "either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not").

Because this condition is subject to arbitrary enforcement, this Court should strike this condition.

5. The State's concession regarding the Court's imposition of discretionary LFOs is well-taken, and Mr. Toston encourages this Court to accept it.

The State concedes the trial court erred when it failed to conduct the required individualized inquiry into Mr. Toston's ability to pay before it imposed legal financial obligations (LFOs). Resp. Br. at 27-29; *see* Br. of Appellant at 22-25. This concession is well-taken, and Mr. Toston asks this Court to accept the State's concession.

B. CONCLUSION

Insufficient evidence and deficient jury instructions warrant this Court's reversal of Mr. Toston's conviction.

Alternatively, this court should remand so that the sentencing court may strike the offending condition of community custody and conduct an individualized inquiry into Mr. Toston's ability to pay.

DATED this 17th day of November, 2017.

Respectfully submitted,

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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 49871-5-II
v.)	
)	
PURCELL TOSTON,)	
)	
Appellant.)	

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