

No. 49985-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

AKEEN HEYER,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Akeen Heyer made his living buying cars at auctions and selling them. Repeatedly harassed and threatened by another man who frequented these auctions, Mr. Heyer defended himself and punched this man in the face during an auction. Charged with second degree assault, Mr. Heyer elected a bench trial. The court rejected Mr. Heyer's self-defense claim, but convicted Mr. Heyer of the lesser offense of third degree assault. Because the trial court used inadmissible hearsay in reaching its verdict, this Court should reverse and remand for a new trial. Alternatively, the Court should remand for entry of conviction for fourth degree assault because the trial court's findings support conviction only for this lesser offense.

B. ASSIGNMENTS OF ERROR

1. Violating the rules of evidence, the trial court erred in admitting hearsay from the purported victim about what medical professionals said to him.

2. Violating the rules of evidence and misapplying the business records exception, the trial court erred by admitting hospital records.

3. As a result of the foregoing erroneous rulings, the trial court erred in entering finding of fact VII. CP 20.¹

4. Finding facts inadequate to justify a conviction for third degree assault, the trial court erred by entering conviction for third degree assault rather than fourth degree assault.

C. ISSUES

1. Absent an exception, hearsay is inadmissible. Although hearsay, statements made for the purpose of medical diagnosis or treatment may be admissible. This exception applies only to statements made by the patient to the medical professional, not the reverse. Did the trial court misapply this exception by admitting statements made by medical professionals to a patient about their diagnoses?

2. Medical records may be admissible under the business records exception. To qualify, appropriate foundation must be laid by a witness. The exception does not apply if professional judgement was necessarily involved in creating the evidence or if cross-examination would be of value. Did the trial court err in admitting hospital records containing diagnoses by professionals without any supporting testimony?

¹ A copy of the findings of fact and conclusions of law are attached in the appendix.

3. A person commits third degree assault if, with criminal negligence, he or she causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. In convicting Mr. Heyer of this offense, the trial court found bodily harm, but not substantial pain or considerable suffering. Should this Court remand for entry of conviction for fourth degree assault because the trial court only found facts warranting conviction for this lesser offense?

D. STATEMENT OF THE CASE

Based on events at an automobile auction on January 15, 2016, the State charged Akeen Heyer with one count of second degree assault. CP 1-3. Mr. Heyer elected a bench trial and trial began on January 23, 2017. CP 6; RP 5.²

On January 15, 2016, Mr. Heyer was attending an automobile auction in Lakewood. RP 29, 115; CP 19 (Finding of Fact (FF) I). Mr. Heyer testified that he was self-employed and made a living for himself and his family, in part, by selling cars bought at auctions. RP 114-15, 170. The auctions in the local area occurred at least three times per week and Mr. Heyer attended most of them. RP 116-17. He had been to this particular auction location about eight times before. RP 124-25.

² Unless otherwise noted, the “RP” citations refer to proceedings from 1/23/17.

Another man named Anthony Jones also regularly attended the same auctions. RP 65-66, 80, 115; CP 19 (FF II). He worked at an auto wrecking yard and bought automobiles to stock the yard. RP 65. Mr. Jones was aggressive in his bidding and was not friends with Mr. Heyer. RP 117.

Over a decade earlier, based on acts while Mr. Heyer was in high school, Mr. Heyer was convicted for “sexual exploitation of a minor.” RP 120; CP 30. Based on this conviction, he was required to register as a sex offender. RP 120. Mr. Heyer had no subsequent criminal convictions for any sex offense. CP 26, 30

Mr. Jones was aware Mr. Heyer’s conviction and regularly taunted him about it. RP 120.

During the auction on January 15, Mr. Jones was present. RP 118; CP 19 (FF I). He and Mr. Heyer bid on the same vehicle. CP 19 (FF III). Surveillance video of the auction yard shows the men and a small group of people standing outside by some vehicles. Ex. 9; RP 23, 119. Mr. Heyer placed the high bid and won the vehicle. RP 125-26; CP 19 (FF III).

Immediately upon Mr. Heyer winning the vehicle, Mr. Jones taunted Mr. Heyer, saying something along the lines of “go spend your commissary money, you child mo[lester].” RP 128; CP 20 (FF IV)

(finding that Mr. Jones “made a statement to the effect that the defendant could use his commissary money to buy the vehicle”).

Mr. Heyer testified he saw Mr. Jones take his hands out of his pockets and move towards him. RP 129-30. Scared and believing that Mr. Jones was about to attack him, Mr. Heyer struck first, striking Mr. Jones in the face once or twice. RP 129-31; CP 20 (FF V); Ex. 9. Mr. Heyer was then immediately escorted out of the auction site. CP 20 (FF VI); Ex. 9.

Mr. Jones testified he stayed for the remainder of the auction and then went to the hospital for treatment. RP 73, 91-92. During his testimony and over Mr. Heyer’s objection, Mr. Jones was permitted to testify about what medical professionals said to him, including that he had a nasal fracture. RP 74-75. Mr. Jones took pain medication for about a week. RP 76.

Over Mr. Heyer’s objection, the court also admitted the hospital’s record of the notes by the medical professionals who attended to Mr. Jones. 112-13.

The trial court rejected Mr. Heyer’s self-defense claim, but acquitted him of the charge of second degree. CP 20-21 (FF V; Conclusion of Law (CL) I-IV). The court, however, convicted Mr. Heyer of the lesser offense of third degree assault. CP 21 (CL IX). The court

sentenced Mr. Heyer to a low-end standard range sentence of 12 months and one day. CP 30, 33. Mr. Heyer appeals.

E. ARGUMENT

1. Violating the rules of evidence, the trial court erred by admitting hearsay from medical professionals and hospital records.

a. Absent an exception, hearsay is inadmissible.

Hearsay is an out-of-court statement offered for the truth of the matter asserted. ER 801(c); In re Det. of Coe, 175 Wn.2d 482, 504, 286 P.3d 29 (2012). Unless provided for by the rules of evidence, other court rules, or statute, hearsay is inadmissible. ER 802. Where there are multiple levels of hearsay, each level must have an independent basis for admission. ER 805; State v. Alvarez-Abrego, 154 Wn. App. 351, 366, 225 P.3d 396 (2010). Interpretation of a rule evidence, including the hearsay rules, is an issue of law reviewed *de novo*. State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255 (2001); State v. Hudlow, 182 Wn. App. 266, 281, 331 P.3d 90 (2014).

b. What medical professionals said to their patient was hearsay and not admissible under the medical diagnosis or treatment exception.

The hearsay rule does not exclude statements made for purposes of medical diagnosis or treatment. ER 803(a)(4). The rule does not exclude:

[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4). This exception “applies only to statements made by the patient to the doctor, not the reverse.” Bulthuis v. Rexall Corp., 789 F.2d 1315, 1316 (9th Cir. 1985); 5C Wash. Prac., Evidence Law and Practice § 803.20 (6th ed.) (citing Bulthuis). It “creates a hearsay exception for statements *made for purposes of* medical diagnosis or treatment, not a physician’s statement *describing* medical diagnosis or treatment.” 5C Wash. Prac., Evidence Law and Practice § 803.20 (6th ed.).

During his testimony, Mr. Jones was permitted to testify about what medical professionals said to him. Over Mr. Heyer’s objection, Mr. Jones was permitted to testify he was told he had a fracture:

A They did some kind of a scan. I went in a tube, and they made some x-rays, then referred me to a specialist because they saw a fracture.

[defense counsel]: Your Honor, I would object as to the last part of what the diagnosis was or wasn’t.

[prosecutor]: Medical diagnosis isn’t hearsay, Your Honor. I don’t think it’s precluded.

[defense counsel]: Well, hearsay to him.

THE COURT: Yeah, it’s -- it just goes to the weight. It’s -- I believe it’s a statement of a medical diagnosis or treatment.

RP 74. Immediately following this testimony and again over Mr. Heyer's objection, Mr. Jones was then permitted to testify that the doctor told him his nose was fractured and that his nasal passage would need corrective surgery:

Q (By [the prosecutor]) Did you discuss the results of those tests with your doctor?

A I did.

Q And what was wrong with your nose?

A There was a fracture. He said that the -- that my air nasal passage was --

[defense counsel]: And I would just object --

A -- distorted --

[defense counsel]: -- as to hearsay, Your Honor.

A -- and that I needed corrective surgery --

THE COURT: Hold on a second. I'm going to allow the statement as a statement of his medical diagnosis and treatment. Although it's secondhand, this is what apparently the physician told him, and so...

[defense counsel]: Thank you, Your Honor.

THE COURT: Okay. You can finish.

A That I needed corrective surgery to correct the nasal passage.

RP 74-75.

The court erred as to both rulings. What the medical professionals said to Mr. Jones was hearsay and did not fall within ER 803(a)(4). Bulthuis, 789 F.2d at 1316. Further, what other hospital personnel (apparently a radiologist) said about Mr. Jones' condition was a second layer of hearsay. See State v. Hamilton, 196 Wn. App. 461, 482, 383 P.3d 1062 (2016) (exception to second layer of hearsay not identified). The trial court erred by overruling Mr. Heyer's objections.

c. Hospital records were not properly admitted under the business records exception because there was no supporting testimony and professional judgment was involved in creating the evidence.

Relatedly, the trial court erred in admitting exhibit 10, which consisted of the hospital's record of the notes by the physician who attended Mr. Jones. The trial court admitted this record under the business records exception. This exception is based on a statute, which provides for admissibility of a record if a number of requirements are met:

A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

RCW 5.45.020.

The types of records subject to admission under the business records exception are generally of a clerical nature. In re Welfare of J.M., 130 Wn. App. 912, 923-24, 125 P.3d 245 (2005). “What such records have in common is that cross-examination would add nothing to the reliability of clerical entries: no skill of observation or judgment is involved in their compilation.” Id. at 924. The business records exception does not apply if professional judgement was necessarily involved in creating the evidence or if cross-examination would be of value. Id.; see Young v. Liddington, 50 Wn.2d 78, 83, 309 P.2d 761, 764 (1957) (“The rule was not adopted to permit evidence of the recorder’s opinion, upon which other persons qualified to make the same record might have differed.”).

Medical records may qualify for admission under the business records exception. State v. Hopkins, 134 Wn. App. 780, 789, 142 P.3d 1104 (2006). But the State must still lay the appropriate foundation. Id. (exception did not apply because testifying doctor “did not testify how reports were made or whether they were produced in the regular course of business.”).

Here, the State moved to admit hospital records without calling *any* witness to lay the appropriate foundation. RP 112. Although defense counsel agreed the testimony of the record custodian was unnecessary, he

argued the exhibit should not be admitted without the testimony of the attending physician:

THE COURT: Mr. Odell, any further witnesses for the State?

[prosecutor]: Well, at this time the State would ask to see Plaintiff's Exhibit No. 10.

THE CLERK: Here are all of the exhibits.

[prosecutor]: Thank you, sir. I'm going to show that now, counsel. And I'm going to move to admit Plaintiff's Exhibit No. 10, the records from Franciscan System Services at this time.

THE COURT: Thank you.

[defense counsel]: Your Honor, I don't have any objection as it relates to the -- to the fact that there are records and I didn't ask Mr. Odell -- in fact, told him he wouldn't have to bring in the records custodian to bring it in. But just seems to me without the testimony of the actual attending physician, that's my only issue, so...

[prosecutor]: So absent the objection to admitting it --

THE COURT: I'm going to admit it over objection.

[prosecutor]: It's a business record.

THE COURT: Defense has stipulated to not having the record custodian here to lay a foundation. Thank you. Anything else?

[prosecutor]: Given that that's been admitted, Your Honor, the State would rest.

RP 112-13.

The court erred. Mr. Heyer did not stipulate *no* witness would be required.³ Rather, defense counsel simply told the prosecutor “he wouldn’t have to bring in the records custodian to bring it in.” RP 112. That is consistent with the language of the statute, which provides for admissibility of the record “if the custodian or other qualified witness testifies to its identity and the mode of its preparation” RCW 5.45.020 (emphasis added); see State v. Sellers, 39 Wn. App. 799, 806 & n.3, 695 P.2d 1014 (1985) (noting this language of the statute and reasoning that lab report was admissible because physician properly identified his file containing this report). Without a true stipulation, the State was obligated to call an appropriate witness to have this record admitted.

Further, professional judgement was exercised by the physicians in treating Mr. Jones and giving their professional opinions. The report indicates that Mr. Jones was evaluated by a radiologist and physician. Ex. 10, p. 4-9. The radiologist provided a professional opinion that Mr. Jones had an acute minimally displaced right bone fracture. Ex. 10, p. 4. The

³ A “stipulation is an agreement between the parties to which there must be mutual assent.” State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993). [T]o be effective, the terms of a stipulation must be definite and certain.” Id.

physician believed that prescription pain medication was appropriate and prescribed hydrocodone-acetaminophen (Norco). Ex. 10, p. 4. Because these professionals used skill and discretion, the business records exception did not apply. See Hopkins, 134 Wn. App. at 789-90.

For these two separate and independent reasons, the trial court erred in admitting exhibit 10.

d. The errors were prejudicial, requiring reversal.

Evidentiary error is prejudicial if there is a reasonable probability that, had the error not occurred, the outcome of the trial would have been materially affected. Neal, 144 Wn.2d at 611. “Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.” Id. at 611.

Here, the court relied on the medical records and the testimony of Mr. Jones in making its ruling. CP 21 (CL of V) (“Based on the medical records and the testimony of the victim, the [S]tate has demonstrated that the victim suffered bodily injury, which is defined as ‘physical pain or injury.’”). Thus, the court relied on the inadmissible evidence in finding Mr. Heyer guilty. Moreover, to properly determine that Mr. Heyer was guilty of third degree assault, the court had to find that Mr. Heyer inflicted upon Mr. Jones bodily harm which was accompanied by substantial pain that extended for a period of time sufficient to cause considerable

suffering. RCW 9A.36.031(1)(f). The inadmissible evidence tended to support such a conclusion. Accordingly, the errors were material and there is a reasonable probability that, absent the errors, Mr. Heyer would have been convicted of fourth degree assault rather than third degree assault. This Court should reverse and remand for a new trial. If so, the court need not reach the next issue.

2. The trial court did not find the facts necessary to conclude that Mr. Heyer committed third degree assault. This Court should vacate the conviction and remand for entry of conviction for fourth degree assault.

Alternatively, the court should reverse and remand for entry of conviction for fourth degree assault. The trial court's findings only support an adjudication for fourth degree assault, not third degree assault.

After a defendant is adjudicated guilty in a bench trial, the trial court must enter written findings of fact and conclusions of law. CrR 6.1(d). A purpose of this requirement is to facilitate appellate review. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). The findings should "identify the evidence relied upon to support each element of each count." Id. at 623, 964 P.2d 1187 (1998). They "must be sufficient to suggest the factual basis for the ultimate conclusion." State v. Silva, 127 Wn. App. 148, 153 n.6, 110 P.3d 830 (2005). The absence of a finding regarding a material fact is presumptively regarded as a finding against the

party having the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Here, the trial court acquitted Mr. Heyer of the greater charge of second degree assault and convicted him of third degree assault. CP 21 (CL IV, IX). The court found that Mr. Heyer acted with criminal negligence and that he caused Mr. Jones to suffer bodily injury, meaning physical pain or injury. CP 21 (CL V-VII).

To convict Mr. Heyer of third degree assault, however, the court was required to find more than that Mr. Heyer caused bodily harm to Mr. Jones. The court had to find this harm was “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f).

The trial court did not make this necessary finding. CP 20-23. Because the State bore the burden of proof, the absence of this necessary finding is an implied negative finding. Armenta, 134 Wn.2d at 14. In other words, the trial court impliedly found that the harm done to Mr. Jones was *not* accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering. Thus, the trial court did not find facts to warrant conviction for third degree assault.

Rather, the findings only support a conviction for fourth degree assault. RCW 9A.36.041(1) (“A person is guilty of assault in the fourth

degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.”); see CP 21 (CL V-VIII). Accordingly, this Court should remand to the trial court to enter judgment and sentence for fourth degree assault. See State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) (remanding for entry of fourth degree assault where trial court erroneously convicted defendant of third degree assault, and findings supported conviction for fourth degree assault); In re Heidari, 159 Wn. App. 601, 610, 248 P.3d 550 (2011) (reasoning this is appropriate only in cases tried to the bench), affirmed 174 Wn.2d 288, 274 P.3d 366 (2012).

F. CONCLUSION

The trial court committed prejudicial error by using inadmissible hearsay to convict Mr. Heyer of third degree assault. The conviction should be reversed and the case remanded for a new trial. Alternatively, because the trial court’s findings only support a conviction for fourth degree assault, rather than third degree assault, this Court should vacate the conviction and order entry of conviction for fourth degree assault.

DATED this 15th day of September, 2017.

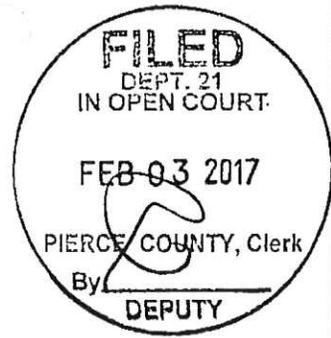
Respectfully submitted,

/s Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

Appendix



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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)	
)	
PLAINTIFF,)	No. 16-1-01035-2
)	
vs.)	FINDINGS OF FACT AND
)	CONCLUSIONS OF LAW
AKEEN RAY HEYER,)	
)	
DEFENDANT.)	

This matter, having come before the Court, after the defendant's decision to waive a jury, enters the following findings of fact and conclusions of law in support of its decision in this case.

FINDINGS OF FACT

- I. That Mr. Heyer was attending a car auction occurring at the business of Automotive Transport and Auction on January 15, 2016. The victim in this case, Anthony Jones was also attending the auction.
- II. That the victim and defendant were acquainted with each other from past auctions occurring at the above business, as well as other locations.
- III. That the defendant and victim were bidding on the same vehicle at the auction, with the defendant ultimately placing the high bid and winning the vehicle.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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[Handwritten signature]
19

1 IV. That at the moment the defendant won the vehicle or within no more than a
2 couple seconds thereafter, the victim made a statement to the effect that the defendant could
3 use his commissary money to buy the vehicle, which the court finds had the effect of
4 embarrassing the defendant, based on his prior conviction for a sex offense.

5 V. That in response to the statement, without thinking, the defendant reacted by
6 striking the victim once or twice in the face. The entire assault lasted mere seconds.

7 VI. That the defendant was then escorted out of the business location.

8 VII. That as a result of being struck, the victim suffered injuries to his face,
9 including what was designates as a "minimally displaced right nasal bone fracture", without
10 identifying what that means, medically. He suffers residual pain from being struck.

12 CONCLUSIONS OF LAW

13 As a result of the above findings, the Court enters the following conclusions of law:

14 I. The crime of Assault in the Second Degree, as charged by the state in this case,
15 requires evidence that the defendant recklessly cause substantial bodily harm to the victim.

16 II. The definition of reckless requires the state to show that the defendant "knows of
17 and disregards a substantial risk that a wrongful act may occur..." and such disregard is a
18 gross deviation from conduct that a reasonable person would exercise in the same situation.
19 Because no evidence was presented that the defendant actually knew that his conduct would
20 result in substantial bodily harm to the victim and disregarded the same, the court concludes
21 that the state has failed to prove that the defendant disregarded a substantial risk that a
22 wrongful act would occur or that such disregard was a gross deviation from conduct that a
23 reasonable person would exercise in the same situation. Thus, the state has failed to prove
24 beyond a reasonable doubt that the defendant acted recklessly.
25

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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1 III. That the state has failed to demonstrate that the victim suffered substantial
2 bodily harm because no testimony was presented as to what the doctor's diagnosis of a
3 "minimally displaced right nasal bone fracture" means.

4 IV. As a result Conclusions II and/or III the Courts finds the defendant NOT
5 GUILTY of the crime of Assault in the Second Degree.

6 V. Based on the medical records and the testimony of the victim, the state has
7 demonstrated that the victim suffered bodily injury, which is defined as "physical pain or
8 injury..."

9 VI. That the definition of criminal negligence requires that the state prove the
10 failure "...to be aware of a substantial risk that a wrongful act occur..." and the failure
11 constitutes a gross deviation from the standard of care that a reasonable person would
12 exercise in the same situation. The state has demonstrated that the defendant should have
13 known that his conduct would result in a wrongful act occurring and that this failure was a
14 gross deviation from what a reasonable person would exercise under the same situation.

15 VII. The court further concludes that defendant's actions were not reasonable under
16 the circumstances and therefore concludes that the state has demonstrated that the
17 defendant's actions were not lawful under the findings made above.

18 VIII. All of the actions occurred within the State of Washington on January 15, 2016.

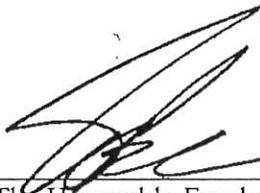
19 IX. Based on Conclusions V-VIII, the court finds that the state has proven beyond
20 a reasonable doubt that the defendant is GUILTY of the crime of Assault in the Third Degree
21 and the Court so holds.

22 ORDERED this 3rd day of February, 2017.

23
24
25
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

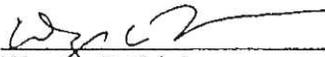
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21



The Honorable Frank E. Cuthbertson

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 49985-1-II
)	
AKEEN HEYER,)	
)	
Appellant.)	

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WASHINGTON APPELLATE PROJECT

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