

FILED
Court of Appeals
Division II
State of Washington
12/14/2017 2:37 PM
NO. 49985-1-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

AKEEN HEYER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 16-1-01035-2

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court erroneously admit medical diagnosis hearsay in the form of a statement of medical diagnosis made by a doctor to a patient and related by the patient at trial?
2. Was error in the admission of that medical diagnosis testimony harmless error in light of the proper admission of the medical records in this case.
3. Did appellant present a reasonably specific objection to the admission of the medical records in this case?
4. Did the trial court find facts sufficient to find appellant guilty of assault in the third degree?
5. Is any error in the entry of the conclusions of law in this case harmless error?

B. STATEMENT OF THE CASE.

Appellant's brief adequately relates the facts of this case. Where necessary they are supplemented in the argument presented herein.

C. ARGUMENT.

1. THE STATE CONCEDES THAT THE MEDICAL DIAGNOSIS HEARSAY RELATED BY THE TESTIFYING VICTIM WAS IMPROPERLY ADMITTED MEDICAL DIAGNOSIS HEARSAY.

Respondent concedes that the victim in this case was erroneously allowed to relate medical diagnosis statements related to him in the course of his medical treatment. 11-23-17 VRP 74-75.

2. ADMISSION OF THE ERRONEOUSLY
ADMITTED MEDICAL DIAGNOSIS
TESTIMONY RELATED BY THE VICTIM WAS
HARMLESS ERROR.

The injury suffered by the victim in this case is related in Finding
of Fact VII:

That as a result of being struck, the victim suffered injuries
to his face, including what was designates [sic] as a
“minimally displaced right nasal bone fracture”, without
identifying what that means, medically. He suffers residual
pain from being struck.

CP 20. The medical diagnosis evidence related in this finding of fact
borrows nothing from the testimony appellant complains about. 1-23-17

VRP 74-75. The medical diagnosis evidence in this finding of fact is
drawn straight from the medical records admitted into evidence.

Plaintiff’s Exhibit 10. The trial court did not rely upon the hearsay
testimony related by the victim in this case. Any error in the admission of
that testimony is harmless.

3. EXHIBIT 10, THE MEDICAL RECORDS IN
THIS CASE, WAS ADMITTED INTO
EVIDENCE BY AGREEMENT.
ALTERNATIVELY, NO REASONABLY
SPECIFIC OBJECTION TO THE ADMISSION
OF THE DOCUMENT WAS INTERPOSED.

Appellant claims that error lies in the following exchange:

MR. FRICKE: Yes, Your Honor.

THE COURT: Who do you have at 1:30?

MR. ODELL: It will be the records custodian, Your Honor.

THE COURT: Okay. Thank you.

(Lunch Recess)

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

MR. ODELL: Well, at this time the State would ask to see Plaintiff's Exhibit No. 10.

THE CLERK: Here are all of the exhibits.

MR. ODELL: 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.

MR. FRICKE: 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...

MR. ODELL: So absent the objection to admitting it --

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

MR. ODELL: 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?

1-23-17 VRP 112-13. Defense counsel presented no further argument on the matter. 1-23-17 VRP 113.

“It is well established that if a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.” *State v. Ferguson*, 100 Wn.2d 131, 138, 667 P.2d 68, 73 (1983) (citing 5 K. Tegland, Wash.Prac., Evidence § 10, at 25 (2d ed. 1982) and ER 103).

Mr. Fricke, defendant’s trial counsel, explicitly told the trial court that he told the prosecuting attorney that “he wouldn’t have to bring in the records custodian to bring it in.” “It” is plainly a reference to Exhibit 10 and “bring it in” plainly means bring Exhibit 10 into evidence. There isn’t any other reasonable explanation for that statement. When that statement is followed up with the equivocal “But it seems to me...,” it is plain that the trial court had ample basis for concluding that “Defense has stipulated to not having the record custodian here to lay a foundation.” This conclusion by the trial court was not then disputed by Mr. Fricke before the trial court, and should not now be disturbed by this Court on appeal.

For the first time on appeal, defendant argues that elements of Exhibit 10 are the product of “skill and discretion” and that those elements fall outside the business records exception. Appellant’s Brief at 12-13.

That argument works, but it works only for those particular elements. It does not work for the entire document.¹ Had appellant presented this argument to the trial court, then the trial court could have considered it and then redacted those materials from Exhibit 10. Defense counsel did not ask the trial court for that relief. Defense counsel never even uttered the word “objection.” The closest defense counsel ever got was “It seems to me...”

Defense counsel’s ambiguous response to Exhibit 10 was tactical. Defense counsel obviously did not want the treating physician to come into court and testify. If the treating physician came to court, the treating physician would likely testify that the victim suffered “a minimally displaced right nasal bone fracture” (Exhibit 10) and would fully explain what that meant. That, in turn, would likely have subjected defendant to a greater likelihood of conviction, as charged, of Assault in the Second Degree. CP 1 (Information); CP 20-21. Defense counsel’s ambiguity was a trial tactic, and it was a trial tactic that was rewarded with success.

In closing argument, defense counsel exploited the lack of medical testimony for all it was worth:

¹ It does not apply to Mr. Jones’ statements for purposes of medical diagnosis or treatment contained in the document, it does not apply to observations of Mr. Jones contained in the document, and it does not relate to notation of date and time, for example. *See* Exhibit 10.

One of which, and the State kind of breezes past this and just says it's common sense, but before you even get to the injury or, in fact, let's take the injury first, the State chose not to bring the doctor in here who did the diagnosis of this case. But when you look at those reports, what the doctor says as far as the injury goes is a minimally displaced right nasal bone fracture, but there's no connection to this assault. And Mr. Jones testifies that he doesn't remember having a broken bone. But this doesn't say it's a current fracture, if it's something that's been in there -- in his nose for some period of time or whatever, but you don't have that connection.

1-23-17 VRP 146. Defense counsel prevailed with this argument. In Finding of Fact VII, the Court found that the victim suffered “a minimally displaced right nasal bone fracture,” but went on to say “without identifying what that means, medically.” CP 20. That was the hook which got this case reduced from an assault in the second degree to an assault in the third degree. Conclusion of Law III; CP 21.

No reasonably specific objection was interposed in this case. The trial court did not abuse its discretion when it admitted Exhibit 10.

4. SUFFICIENT EVIDENCE SUPPORTS THE FINDING THAT THE VICTIM IN THIS CASE SUFFERED BODILY HARM ACCOMPANIED BY SUBSTANTIAL PAIN THAT EXTENDED FOR A PERIOD SUFFICIENT TO CAUSE CONSIDERABLE SUFFERING.

Assault in the third degree is committed when a person “[w]ith criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering...”

RCWA § 9A.36.031. The suffering presented in this case was considerable and substantial.

In *State v. Saunders*, 132 Wn. App. 592, 600, 132 P.3d 743 (2006) pain lasting for three hours was sufficient to “cause considerable suffering.” In *State v. Fry*, 153 Wn. App. 235, 240–41, 220 P.3d 1245 (2009) a swollen eye and pain in the face lasting throughout a morning was “pain for a period of time sufficient to cause suffering.”

In this case, on January 15, 2016 the victim was assaulted. CP 19 (Finding of Fact I). Mr. Jones testified on January 23, 2017. 1-23-17 VRP. In finding of fact VIII, the trial court found “[t]hat as a result of being struck, the victim suffered injuries to his face, including what was designates [sic] as a ‘minimally displaced right nasal bone fracture,’ without identifying what that means, medically. He suffers residual pain from being struck. CP 20.

One year of pain resulting from an assault causing the fracture of a nose is “substantial pain that extends for a period sufficient to cause considerable suffering.” Substantial evidence supports the judgment in this case.

5. THE CONCLUSIONS OF LAW ARE
DEFICIENT, BUT THAT DEFICIENCY IS
HARMLESS.

The conclusions of law entered in this case are plainly defective because they omit a conclusion addressing the element of “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” CP 21-22. This omission is plainly a scrivener’s error as the trial court explicitly rendered that conclusion of law orally:

And I don't think there's any question that it happened in Pierce County. In this particular case I think he acted with criminal negligence and caused bodily harm accompanied by substantial pain that extended for a long period of time. Mr. Jones testified that he still has issues with his nose.

1-23-17 VRP 151-52. As discussed above, the evidence presented in this case was sufficient to establish “substantial pain that extends for a period sufficient to cause considerable suffering.”

The omission of this conclusion of law from the written order presented by defense counsel (CP 22) is harmless. *State v. Royster*, 43 Wn. App. 613, 621, 719 P.2d 149, 154 (1986).

D. CONCLUSION.

No error resulted from the victim testifying about what his doctor told him about his injury.

The medical records in this case were admitted without objection, or alternatively, without any sufficiently specific objection.

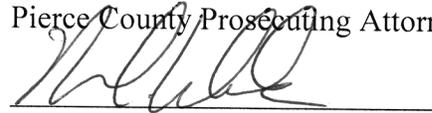
A year's worth of residual pain following an assault is
"considerable suffering."

Any error in the conclusions of law in this case is harmless.

The trial court should be affirmed.

DATED: December 14, 2017

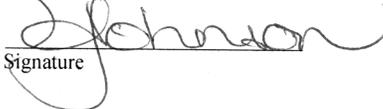
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The undersigned certifies that on this day she delivered by file or
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c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

12/14/17 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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Appellate Court Case Title: State of Washington, Respondent v. Akeen Heyer, Appellant
Superior Court Case Number: 16-1-01035-2

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