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NO. 51321-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ERIC SANDERS,  
Appellant.

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

Pierce County Cause No. 17-1-01608-1

The Honorable Elizabeth P. Martin, Judge

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BRIEF OF APPELLANT

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## **ISSUES AND ASSIGNMENTS OF ERROR**

1. Prosecutorial misconduct deprived Mr. Sanders of his Sixth and Fourteenth Amendment right to a fair trial.
2. The prosecutor committed misconduct by misstating the law to the jury.
3. The prosecutor's improper argument was flagrant and ill-intentioned.
4. Mr. Sanders was prejudiced by the prosecutor's improper argument.

**ISSUE 1:** A prosecutor commits misconduct by misstating the law to the jury during argument. Did the prosecutor at Mr. Sanders's trial commit misconduct by telling the jury that it was required to convict for vehicular assault if it found that the alleged victim had suffered any impairment to the functions of a bodily organ when the statute, in fact, requires proof of a *substantial* impairment?

5. The prosecutor violated Mr. Sanders's Fourteenth Amendment right to due process by making an argument minimizing the state's burden of proof.
6. The prosecutor committed misconduct by minimizing the state's burden of proof to the jury.

**ISSUE 2:** A prosecutor commits misconduct by making an argument minimizing the state's burden of proof. Did the prosecutor at Mr. Sanders's trial commit misconduct by displaying a PowerPoint slide to the jury that described the state's burden in terms that were actually equivalent to the much lower standard for sufficiency of the evidence on appeal?

7. Mr. Sanders was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Mr. Sanders's attorney provided ineffective assistance of counsel by unreasonably failing to object to an incomplete instruction defining "substantial bodily harm."
9. Defense counsel had no valid tactical reason for waiving objection to instruction number 34.

**ISSUE 3:** A defense attorney provides ineffective assistance of counsel by waiving a valid objection without a strategic reason for doing so. Did Mr. Sanders’s attorney provide ineffective assistance by failing to object to a jury instruction providing an incomplete definition of “substantial bodily harm,” which failed to convey to the jury the severity of injury required to meet that threshold?

10. The state presented insufficient evidence to convict Mr. Sanders of vehicular assault.
11. No rational jury could have found beyond a reasonable doubt that Mr. Sanders caused substantial bodily harm to P.L.

**ISSUE 4:** Substantial bodily harm requires proof of, *inter alia*, substantial impairment or loss of the function of a bodily organ; the injury must be more severe than a typical impairment or loss. Did the state present insufficient evidence to convict Mr. Sanders of vehicular assault when the evidence showed only that P.L. experienced headaches, dizziness, and difficulty concentrating following the accident, for which her doctor did not think any treatment was necessary?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Eric Sanders – a veteran who was been diagnosed with Post-Traumatic Stress Disorder (PTSD) -- was caring for his three-week-old baby, in addition to his older twins.<sup>1</sup> RP 296-97, 300-01. The baby's mother, Megan Wetter, had asked Mr. Sanders to come help out while she went to look at a car that she intended to buy. RP 301.

While Wetter was out, Mr. Sanders left to take the twins back to their home. RP 302. He borrowed a car seat for the baby and took her with him. RP 302.

When Mr. Sanders got back to Wetter's home, Wetter and her older children were screaming, accusing him of taking the baby without permission. RP 303. Mr. Sanders dropped the baby off and left while Wetter was still hysterical. RP 303-05.

A neighbor overheard the commotion and called the police. RP 236. Mr. Sanders passed an officer coming into the gate as he was leaving. RP 299, 313. The officer asked Mr. Sanders what was going on but allowed him to get into his car and leave. RP 299, 313.

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<sup>1</sup> Apparently the baby's mother found out later, through a DNA test, that Mr. Sanders was not the baby's father. RP 118. At the time of the alleged incident, however, Mr. Sanders and the baby's mother both believed that he was her father. RP 118, 300.

When Mr. Sanders was driving down the alley toward the street, he encountered an approaching police car, with its lights on. RP 313. Believing that he was free to go, Mr. Sanders put his car in reverse and backed down the alley to exit from the other end. RP 313. As Mr. Sanders backed out of the alley, he accidentally collided with a truck that was driving down the street. RP 300, 313-14. The truck was occupied by John Van Brocklin and his fourteen-year-old granddaughter, P.L. RP 184-85.

Mr. Sanders panicked and fled from the police after the accident. RP 305, 315. He was arrested a short time later. RP 305. The state charged him with vehicular assault (based on alleged injuries to P.L.), hit and run (also known as failure to remain at the scene of an injury accident), and attempting to elude.<sup>2</sup> CP 8-11.

P.L. testified at trial. She said that she was able to “jump[] over the center console” and get out of the truck very quickly after the accident.

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<sup>2</sup> After Mr. Sanders left, Wetter claimed that he had choked her, threatened to kill her, and wrestled her phone out of her hands earlier in the day. Based on those accusations, the state also charged Mr. Sanders with second-degree assault, felony harassment, and interfering with the reporting of domestic violence but the jury acquitted him of those three charges at trial. CP 8-11; RP 89-91, 412-14.

The jury convicted Mr. Sanders of the lesser-included charge of fourth-degree assault, apparently based on his admission that he had lightly pushed Wetter when he was trying to get her to go back into her house with the baby instead of screaming outside. *See* RP 305, 309, 412.

RP 156-57. She did not know whether she had hit her head on anything during the accident. RP 167.

P.L. went to the emergency room on the day of the accident but her only complaint was a sore thumb. RP 159. She said that nothing else hurt. RP 169. The doctors concluded that her thumb did not require any treatment. RP 169.

A few days later, P.L. had headaches at school for two days in a row. RP 160-61. She testified that she felt nauseous and dizzy and that certain types of lighting and sound made her feel worse. RP 163.

P.L.'s mother took her to the emergency room. RP 161. P.L.'s exam showed normal results; there was no injury visible on her C.T. scan. RP 223. The doctor concluded that P.L. had had a mild concussion and diagnosed her with post-concussive syndrome. RP 162, 223-24.

The doctor admitted that P.L.'s symptoms were also similar to migraine headaches. RP 222. He testified that migraines commonly start around P.L.'s age because of hormonal changes. RP 231.

The doctor did not recommend that P.L. modify her activity in any way as a result of her symptoms. RP 216-34; Ex. 8. The only treatment the doctor recommended was one-time medication for motion sickness, which he gave P.L. during the visit. RP 173-74; 223.

P.L.'s mother took her to see a chiropractor a few days later for issues un-related to the headaches or car accident. RP 162, 175, 180. The chiropractor recommended that P.L. be excused from school band and P.E. class for two weeks as a result of her headaches. Ex. 9, p. 1; RP 163. But P.L. testified that she missed those classes for two and a half to three months. RP 164. She said that she could not concentrate as well as before. RP 163.

P.L. told the doctor that she did not think that she had lost consciousness during the accident. RP 220. But she testified at trial that she was not sure whether she had lost consciousness or not. RP 157, 171.

The police officer who had approached Mr. Sanders in the yard said that he told Mr. Sanders to stop before he left in his car. RP 279. Another officer testified that Mr. Sanders had been speeding when he backed down the alley and that he did not stop to check for traffic before backing into the street. RP 131-32. Mr. Sanders admitted to speeding and to failing to stop for several stop signs and lights after the accident happened. RP 329-30.

The court defined the term "substantial bodily harm" for the jury as follows: "substantial bodily harm means bodily injury that involves a temporary but substantial loss of the function of any bodily part or organ."

CP 61. Mr. Sanders's attorney did not object to that instruction or propose an alternative. RP 327, 335.

A primary issue in both the defense and prosecution closing arguments was whether P.L.'s symptoms rose to the level of substantial bodily harm, as required to convict Mr. Sanders of vehicular assault. *See* RP 338-89.

The prosecutor told the jury that any loss of any function of a bodily organ legally qualifies as substantial bodily harm. RP 384. The prosecutor argued that any impairment to any function or an organ meets the definition of substantial bodily harm:

It doesn't matter that the brain has millions of other functions. If the function of the brain, whichever one of those functions we are talking about is impaired, that's a substantial bodily harm.  
RP 386.

The prosecutor also displayed a PowerPoint slide regarding substantial bodily harm during his closing argument. The slide informed the jury that "Concussion = substantial bodily harm." *See* Ex. 17, p. 40.

The prosecutor also used a PowerPoint slide to explain the state's burden of proof to the jury. That slide read as follows:

**Reasonable Doubt**

- THERE IS NO SUCH THING AS A PERFECT TRIAL
  - You could always find something else you wanted to see or something else you wanted to hear
- Question: Do you have enough?
  - NOT Do you wish you had more

Ex. 17, p. 46 (emphasis in original)

During deliberation, the jury asked the court a question about the definition of the court: “We need a more detailed/specific definition of substantial bodily harm. What is the severity of substantial bodily harm?” CP 22.

Rather than providing the complete statutory definition of the term, the court told the jury to re-read their instructions. CP 22.

The jury found Mr. Sanders guilty of the driving-related charges. RP 413-15. This timely appeal follows. CP 128-40.

## **ARGUMENT**

### **I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. SANDERS OF HIS RIGHT TO A FAIR TRIAL.**

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor’s improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the

misconduct and its impact, not the evidence that was properly admitted.  
*Id.* at 711.

Even absent objection, reversal is required when misconduct is “so flagrant and ill intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight “not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.” Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

Images displayed during closing argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 707-709. Such images “may sway a jury in ways that words cannot,” and the effect is difficult to overcome with an instruction. *Id.* at 707 (quoting *State v. Gregory*, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)).

This is because:

[W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

*Id.* at 709 (quoting Lucille A. Jewel, *Through A Glass Darkly: Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)).

The prosecutor committed misconduct at Mr. Sanders’s trial by misstating the law regarding substantial bodily harm and minimizing the state’s burden of proof to the jury.

A. The prosecutor committed misconduct at Mr. Sanders’s trial by misstating the law regarding the definition of “substantial bodily harm.”

A prosecutor commits misconduct by misstating the law to the jury during closing argument. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

In order to convict Mr. Sanders of vehicular assault, the state was required to prove that P.L. suffered substantial bodily harm as a result of the car accident. RCW 46.61.522. Substantial bodily harm is defined 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 a fracture of any bodily part.

RCW 9A.04.011(4)(b).

The Supreme Court has held that word “substantial” in this statutory definition indicates that, in order to meet the definition of “substantial bodily harm,” the state must prove more than “an injury

merely having some existence.” *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). Rather, the state must prove that the injury was “considerable in amount, value, or worth.” *Id.*

This is because the statutory definition makes clear that not all impairments or disfigurements qualify as substantial bodily harm. *Id.* Rather, in order to give effect to the requirement that the injury be *substantial*, the state must prove that it was more severe than an a *de minimus* disfigurement, impairment, or loss of function. *Id.*

But the prosecutor at Mr. Sanders’s trial repeatedly told the jury that *any* loss or impairment of *any* function of an organ automatically qualifies as substantial bodily harm. RP 384, 386 (“If the function of the brain, whichever one of those functions we are talking about is impaired, that's a substantial bodily harm”).

The prosecutor committed misconduct and misstated the law to the jury by improperly arguing that *any* impairment or loss of function qualifies as substantial bodily harm. *Allen*, 182 Wn.2d at 373; *McKague*, 172 Wn.2d at 806.

The prosecutor exacerbated the effect of his improper oral comments by displaying a PowerPoint slide incorrectly informing the jury that a concussion categorially “= substantial bodily harm.” Ex. 17, p. 40.

That image was designed to “sway [the] jury in ways that words cannot.”  
*Glasmann*, 175 Wn.2d at 707.

There is a substantial likelihood that the prosecutor’s misstatement of the law affected the outcome of Mr. Sanders’s trial. *Glasmann*, 175 Wn.2d at 704. The issue of whether P.L.’s symptoms rose to the level of substantial bodily harm was a primary issue for the jury in this case. *See* RP 338-89. But the evidence was far from overwhelming. Indeed, the doctor who treated P.L. gave her only over-the-counter motion sickness medication and did not suggest any changes to her daily routine. RP 173-74, 223, 229. The state’s theory of substantial bodily harm relied heavily on the idea that P.L. had been unable to participate in band or P.E. class for several months. *See* RP 338-63, 382-86. But that suggestion was made only by a chiropractor who was seeing P.L. for un-related back problems. Ex. 9, p. 1; RP 163. And the chiropractor’s notes indicate that he only suggested that P.L. sit out of those activities for two weeks. Ex. 9, p. 1.

The evidence at trial rendered it inconclusive, at best<sup>3</sup>, whether P.L.’s injury was “considerable in amount, value, or worth,” as required by to prove substantial bodily harm. *McKague*, 172 Wn.2d at 806. The

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<sup>3</sup> As argued below, the state actually presented insufficient evidence to prove beyond a reasonable doubt that P.L. suffered substantial bodily harm.

prosecutor's misstatement of the law, however, encouraged the jury to find Mr. Sanders guilty simply because it had been demonstrated that P.L. suffered any symptoms at all. RP 384, 386; Ex. 17, p. 40. Mr. Sanders was prejudiced by the prosecutor's improper arguments. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law and professional standards that were available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. *McKague* was decided by the Supreme Court six years before Mr. Sander's trial. The prosecutor had plenty of opportunity to inform himself of the relevant caselaw in order to discern that juries must give effect to the *substantial* element of substantial bodily harm by finding that the state has proved something more than an injury which merely exists. The prosecutor's improper argument requires reversal even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by misstating the law regarding substantial bodily harm to the jury. *Id.*; *McKague*, 172 Wn.2d at 806; *Allen*, 182 Wn.2d at 373. Mr. Sanders's conviction for vehicular assault must be reversed. *Id.*

- B. The prosecutor committed misconduct at Mr. Sanders’s trial by making an argument designed to minimize the state’s burden of proof.

Due process permits conviction for a crime only if the state proves each element beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U.S. 275, 278, 113 S. Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

A prosecutor commits misconduct by minimizing the state’s burden of proof to the jury. *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010) *review denied*, 171 Wn.2d 1013, 249 P.3d 1029 (2011).

A prosecutor’s misstatement of the state’s burden of proof during argument to the jury “constitutes great prejudice because it reduces the state’s burden and undermines a defendant’s due process rights.” *Johnson*, 158 Wn. App. at 685-86.

At Mr. Sanders’s trial, the prosecutor displayed a slide to the jury, asserting that the jury was convinced of guilt beyond a reasonable doubt if they “ha[d] enough:”

**Reasonable Doubt**

- THERE IS NO SUCH THING AS A PERFECT TRIAL
  - You could always find something else you wanted to see or something else you wanted to hear
- Question: Do you have enough?
  - NOT Do you wish you had more

Ex. 17, p. 46 (emphasis in original).

The prosecutor’s question of “do you have enough?” describes the (very low) standard for sufficiency of the evidence, not the showing required to establish guilt beyond a reasonable doubt. *See State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015) (recounting the standard for sufficiency of the evidence). The argument improperly encouraged the jury to convict Mr. Sanders if the state had made a mere *prima facie* case for each element. But that was the question the court should have asked to determine whether the charges could survive a halftime motion, not the one the jury should have asked itself when deciding whether to convict.

Rather, the jury was required to acquit Mr. Sanders of any charge for which the jurors had less than an abiding belief that each element had been proved beyond a reasonable doubt. Thus, for example, the jury was required to acquit if the jurors harbored apprehensions about the credibility of the state’s evidence or simply did not believe that the state’s evidence constituted sufficient proof. *See State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Accordingly, for example, the jury could have believed that it “had enough” by agreeing that a reasonable jury could have found that P.L.’s injuries constituted substantial bodily harm, but could have nonetheless “wish[ed] [they] had more” because they were did not have an abiding

belief that that element had been proved. In that situation, the jury would have been required to acquit Mr. Sanders. *Id.* But the prosecutor's argument incorrectly informed them that they would have been required to convict. Ex. 17, p. 46 (emphasis in original).

The prosecutor committed misconduct by making an argument mischaracterizing and minimizing the state's burden of proof. *Johnson*, 158 Wn. App. at 685-86.

There is a substantial likelihood that the prosecutor's improper argument affected the jury's verdict at Mr. Sanders's trial. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence against Mr. Sanders (particularly that relating to whether P.L. had suffered substantial bodily harm) was far from overwhelming. The prosecutor's use of a dedicated slide to make the improper argument also emphasized its effect to the jury by employing visual as well as verbal media. *Glasmann*, 175 Wn.2d at 707. Mr. Sanders was prejudiced by the prosecutor's improper argument. *Id.*

A prosecutorial argument improperly minimizing the state's burden of proof cannot be cured by an instruction. *Johnson*, 158 Wn. App. at 685 (citing *State v. Venegas*, 155 Wn. App. 507, 523 n. 16, 525, 228 P.3d 813 (2010)).

As noted above, arguments are also flagrant and ill-intentioned if they violate standards and caselaw available to the prosecutor at the time. *Glasmann*, 175 Wn.2d at 707. The prosecutor in Mr. Sanders’s case had access to standards and caselaw prohibiting the minimization of the state’s burden of proof and warning prosecutors against the improper use of visual presentations to sway juries. *Id.*; *Johnson*, 158 Wn. App. at 685-86; *See also State v. Walker*, 182 Wn.2d 463, 341 P.3d 976 (2015).

The prosecutor at Mr. Sanders’s trial committed flagrant, ill-intentioned, prejudicial misconduct by making an argument mischaracterizing and minimizing the state’s burden of proof. *Johnson*, 158 Wn. App. at 685-86. Mr. Sanders’s convictions must be reversed. *Id.*

**II. MR. SANDERS’S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO OBJECT TO A JURY INSTRUCTION PROVIDING AN INCOMPLETE DEFINITION OF “SUBSTANTIAL BODILY HARM.”**

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).<sup>4</sup>

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance

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<sup>4</sup> Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

is deficient if it falls below an objective standard of reasonableness. *Id.*

The accused is prejudiced by counsel's deficient performance if there is a reasonable probability<sup>5</sup> that counsel's mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Mr. Sanders's defense attorney provided ineffective assistance of counsel by failing to object to the court's instruction defining "substantial bodily harm," which was incomplete and left the jury with an inaccurate picture of the level of harm required to convict Mr. Sanders of vehicular assault.

Substantial bodily harm is defined 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 a fracture of any bodily part.

RCW 9A.04.011(4)(b).

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<sup>5</sup> A "reasonable probability" under the prejudice standard is lower than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, "it is a probability sufficient to undermine confidence in the outcome." *Id.*; see also *Jones*, 183 Wn.2d at 339.

But the court’s instruction defining the term for the jury omitted key language from the statutory definition, informing the jury only that:

substantial bodily harm means bodily injury that involves a temporary but substantial loss of the function of any bodily part or organ.  
CP 61.

Jury instructions must properly inform the jury of the applicable law. *State v. Harris*, 164 Wn. App. 377, 383, 263 P.3d 1276 (2011). Then the relevant law is contained in a statute, the court must instruct the jury using the statutory language. *Id.* at 387 (citing *State v. Hardwick*, 74 Wn.2d 828, 830, 447 P.2d 80 (1968)).

The instruction defining substantial bodily harm in Mr. Sanders’s case excluded the language regarding “substantial disfigurement” and “fracture of any bodily part.” CP 61. The instruction was improper because did not include all of the necessary statutory language. *Harris*, 164 Wn. App. at 387.

Mr. Sanders’s defense attorney provided ineffective assistance of counsel by failing to object to the court’s incomplete instruction. *Jones*, 183 Wn.2d at 339; *Saunders*, 91 Wn. App. at 578.

Indeed, defense counsel acquiesced to the court’s incomplete instruction even after the jury asked for a more detailed instruction during deliberations. RP 397-99. The jury specifically indicated that it needed

more guidance regarding the severity of an injury required to establish substantial bodily harm. RP 397; CP 22.

In this context, the statutory language defining substantial bodily harm to include “substantial disfigurement” and “fracture of any bodily part” would have clarified that the state must prove a considerable and non-fleeting level of harm in order to convict for vehicular assault. RCW 9A.04.011(4)(b); RCW 46.61.522. The language would have made plain to the jury that a mere *de minimus* injury did not rise to the level permitting Mr. Sanders’s conviction for that offense.

Defense counsel had no valid tactical purpose for waiving objection to the court’s incomplete instruction on substantial bodily harm. Mr. Sanders’s received ineffective assistance of counsel. *Jones*, 183 Wn.2d at 339; *Saunders*, 91 Wn. App. at 578.

There is a reasonable probability that defense counsel’s deficient performance affected the outcome of Mr. Sanders’s trial. *Jones*, 183 Wn.2d at 339. As discussed, the evidence that P.L. had suffered substantial bodily harm was not overwhelming. The jury’s recognition of this issue is evinced by their request for a more detailed definition of the term, including clarification of the severity of harm required for conviction. CP 22. An instruction including the entire statutory definition of the term, including the language regarding “substantial disfigurement”

and “fracture of any bodily part,” would have made plain to the jury that an injury must be particularly severe in order to qualify as substantial bodily harm. *See McKague*, 172 Wn.2d at 806. Mr. Sanders was prejudiced by his attorney’s unreasonable failure to object to the incomplete instruction. *Id.*

Mr. Sanders’s defense attorney provided ineffective assistance of counsel by failing to object to an improper jury instruction absent a valid strategic reason. *Jones*, 183 Wn.2d at 339; *Saunders*, 91 Wn. App. at 578. Mr. Sanders’s vehicular assault conviction must be reversed. *Id.*

**III. NO RATIONAL JURY COULD HAVE FOUND THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT P.L. SUFFERED SUBSTANTIAL BODILY HARM AS A RESULT OF THE CAR ACCIDENT.**

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element of an offense proved beyond a reasonable doubt. *Larson*, 184 Wn.2d at 855.<sup>6</sup>

To convict Mr. Sanders of vehicular assault, the state was required to prove beyond a reasonable doubt that he has proximately caused P.L. to suffer substantial bodily harm.<sup>7</sup> RCW 46.61.522. In order to qualify as

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<sup>6</sup> The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

<sup>7</sup> As discussed above, substantial bodily harm is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or  
(Continued)

“substantial,” the level of harm must be more than a standard disfigurement or loss/impairment of the function of an organ. *McKague*, 172 Wn.2d at 806; RCW 9A.04.110(4)(b).

In Mr. Sanders’s case, P.L. did not have any visible injuries. *See RP generally*. The medical examination and C.T. scan of her brain produced only normal results. RP 162, 223-24.

Nonetheless, the state theorized that substantial bodily harm was proved if the jury found that P.L. had been knocked unconscious by the accident. *See Ex. 17*, p. 40. But P.L. testified only that she did not know whether she had been unconscious. RP 157, 171. She told her doctor that she did not think she had been. RP 220. This inconclusive evidence was not enough to demonstrated beyond a reasonable doubt that P.L. was ever unconscious. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013) (a fact is not proved beyond a reasonable doubt if the state presents only equivocal evidence). Accordingly, any alleged unconsciousness cannot form the basis of Mr. Sanders’s conviction.

Pain, alone, is also insufficient to establish substantial bodily harm under the statutory definition. *See State v. Latham*, 183 Wn. App. 390, 398–99, 335 P.3d 960 (2014); *McKague*, 172 Wn.2d at 807 n. 3.

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impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b).

Accordingly, P.L.'s headaches cannot form the basis for conviction, no matter how severe. The fact that those headaches were aggravated by certain types of light and sound is inapposite because that evidence simply exemplifies the types of situations in which P.L.'s pain occurred.

The only remaining types of harm suffered by P.L. were her alleged concentration problems and occasional nausea and dizziness. RP 163. No rational jury could have found that these supposed impairments to the function of her brain were "substantial." *Larson*, 184 Wn.2d at 855; *McKague*, 172 Wn.2d at 806. No doctor (or chiropractor) suggested that P.L. needed to modify her activity in any way to account for those symptoms. *See RP generally*. The doctor gave P.L. over-the-counter motion sickness medication without suggesting that she needed to continue taking that medication once she got home. RP 173-74; 223. There was no evidence that P.L.'s schoolwork suffered in any way as a result of her difficulty concentrating. *See RP generally*. P.L. was able to "jump over the center console" to exit the truck very shortly after the accident. RP 156-57.

The level of harm suffered by P.L. can be contrasted to that suffered by the victim in *McKague* who experienced facial bruising and swelling; lacerations to his face, head, and arm; and a concussion so severe that he was unable to stand. *McKague*, 172 Wn.2d 802, 806-07

(holding that that evidence was sufficient to show that the victim suffered from substantial disfigurement as well as substantial impairment to the function of an organ).

No rational jury could have found beyond a reasonable doubt that Mr. Sanders caused P.L. to suffer substantial bodily harm. *Larson*, 184 Wn.2d at 855. Mr. Sanders's vehicular assault conviction must be reversed. *Id.*

### **CONCLUSION**

The prosecutor committed misconduct at Mr. Sanders's trial by misstating the law regarding the definition of substantial bodily harm and minimizing the state's burden of proof. Mr. Sanders's defense attorney provided ineffective assistance of counsel by failing to object to a jury instruction providing an incomplete definition of substantial bodily harm. No rational jury could have found beyond a reasonable doubt that the state had proved that P.L. suffered substantial bodily harm as a result of the accident. Mr. Sanders's convictions must be reversed.

Respectfully submitted on April 3, 2018,



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Eric Sanders/DOC#340002  
Monroe Correctional Complex-WSR  
PO Box 777  
Monroe, WA 98272

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney  
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on April 3, 2018.



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Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

# LAW OFFICE OF SKYLAR BRETT

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