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Court of Appeals
Division II
State of Washington
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NO. 52649-2-II

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

STATE OF WASHINGTON, Respondent

v.

KENNETH ANTONE HANSEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-02153-7

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. Instruction no. 8 was a proper statement on the law and did not relieve the state of its burden of proof.**

STATEMENT OF THE CASE

The State charged Kenneth Hansen (hereafter 'Hansen') with Assault in the Third Degree for spitting on a police officer while he was being arrested for trespass. CP 1; RP 50-57. Hansen was convicted as charged after a jury trial. CP 2.

At trial, the evidence showed that Officer Ken Suvada of the Vancouver Police Department contacted Hansen on a large privately-owned field one afternoon. RP 43-44, 48. Hansen did not have permission to be on the field and was therefore trespassing. RP 45-46. Officer Suvada told Hansen he needed to leave the field, and gave him 24 hours to do so. RP 45-46.

The following day, Officer Suvada returned to the field and saw Hansen still there, sitting by a tent. RP 47-48, 59. Officer Suvada arrested Hansen for trespassing; he placed handcuffs on Hansen and escorted him to the patrol vehicle parked nearby. RP 49-50. As they were walking to the patrol vehicle, Hansen got angry at Officer Suvada and called him a "punk ass bitch" multiple times. RP 50. Hansen remained angry as they arrived at the patrol vehicle. RP 52. As Officer Suvada was trying to unlock the

patrol vehicle, Hansen spit in his face; the spittle landed on Officer Suvada's face and the inside of the vehicle door. RP 52-53. Another officer who was assisting, Officer Adam Millard, saw Hansen spit on Officer Suvada's face. RP 78. Officer Suvada immediately wiped the spit from his face; Officer Millard held Hansen until Officer Suvada could get the door open and they could put Hansen in the patrol vehicle. RP 79-80.

Hansen did not testify in his defense and did not present any witnesses. RP 91. The State proposed an instruction on the definition of assault that stated:

An assault is an intentional touching or spitting upon another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or spitting is offensive if the touching or spitting would offend any ordinary person who is not unduly sensitive.

CP 56; RP 19, 93. Hansen agreed to this jury instruction and did not object or take exception to the Court giving this instruction to the jury. RP 19, 93.

The jury convicted Hansen. CP 2; RP 122. Hansen received a standard range sentence. CP 3-13. He then timely filed the instant appeal. CP 20-21.

ARGUMENT

I. Instruction no. 8 was a proper statement on the law and did not relieve the state of its burden of proof.

Hansen claims, for the first time on appeal, that instruction no. 8 contained an improper judicial comment on the evidence. The instruction was an accurate statement of the law and did not constitute a judicial comment on the evidence. Hansen's claim fails.

Under RAP 2.5(a), typically issues that were not raised at the trial court level are waived on appeal. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009). CrR 6.15(c) requires timely objections to jury instructions. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). However, a party may raise a manifest error affecting a constitutional right for the first time on appeal. RAP 2.5(a)(3). The Washington Constitution prohibits judicial comments on the evidence. WASH. CONST., art. IV, sec. 16. Thus Hansen's claim of an improper judicial comment on the evidence constitutes an allegation of a manifest error affecting a constitutional right. *See State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Thus, Hansen's claim is reviewable for the first time on appeal.

A trial court's instructions to the jury "shall declare the law." *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting CONST. art. IV, sec. 16). A judge may not comment on the evidence presented at trial, and shall not do so through the jury instructions. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). A comment on the evidence is improper when it conveys the judge's attitude on the merits of the case, or permits the jury to infer whether the judge believed or disbelieved certain witnesses' testimony. *Id.* This "prevent[s] the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivins*, 138 Wn.App. 52, 58, 155 P.3d 982 (2007). However, the court in Hansen's case did not comment on the evidence, but merely accurately reflected the law pertaining to the definition of assault. When a jury instruction accurately states the law and goes no further, then it does not constitute an impermissible comment on the evidence. *State v. Woods*, 143 Wn.2d 561, 591, 23 P.3d 1046 (2001). The trial court in Hansen's case did not err and the jury instruction was an accurate reflection of the law.

Intentionally spitting on another person can constitute an assault. *State v. Jackson*, 145 Wn.App. 814, 821, 187 P.3d 321 (2008); *State v. Humphries*, 21 Wn.App. 405, 409, 586 P.2d 130 (1978). Such an act constitutes an assault if it is intentional and offensive. *Jackson*, 145

Wn.App. at 821; *Humphries*, 21 Wn.App. at 409. The jury instruction that Hansen now complains of stated that an “assault is an intentional touching or spitting upon another person, that is harmful or offensive.” CP 56. Nothing in this language suggested that the judge believed that Hansen’s spitting on Officer Suvada was an assault, that his spitting was intentional, or that it was offensive. Instead, the instruction correctly stated the law—that an intentional spitting on another person, that is harmful or offensive, is an assault. Because the instruction did not convey the judge’s attitude on the merits of the case, did not permit the jury to infer the judge’s belief or disbelief of testimony, and did not convey the judge’s opinion on the weight, credibility, or sufficiency of the evidence, it was not a judicial comment on the evidence. Instruction no. 8 correctly stated the law and permitted the jury to determine whether Hansen did spit on Officer Suvada, whether that spitting was intentional, and whether it was offensive. The instruction was not a comment on the evidence.

In the unpublished case of *State v. Valdez*, 194 Wn.App. 1050 (unpublished, Div. 2, 2016),¹ this Court addressed this identical issue. In *Valdez*, the defendant had been charged with assault in the third degree for spitting upon an officer. *Valdez*, slip op. at 2. The trial court instructed the

¹ GR 14.1 permits citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding authority and may be given as much persuasive value as this Court chooses.

jury that “an assault is an intentional touching of or spitting on another person, that is harmful or offensive.” *Id.*, slip op. at 3. This Court found that the instruction was not an improper comment on the evidence and was simply a correct statement of the law. *Id.*

As a matter of law, spitting is a touching and thus can constitute an assault. In *Humphries, supra*, this Court addressed whether the prosecutor improperly characterized a spitting as an assault in her closing argument. *Humphries*, 21 Wn.App. at 409. In deciding the case, the Court concluded that “battery is a consummated assault” and that “[s]pitting may constitute a battery.” *Id.* The Court found no error in the prosecutor’s characterization of a spitting as an assault. *Id.* Similarly, in *Jackson, supra*, this Court analyzed whether ejaculation onto another person could constitute a “touching.” *Jackson*, 145 Wn.App. at 821. The Court held that it did constitute a “touching,” and in so doing noted that there were “a multitude of cases holding that spitting on another is physical contact constituting either a battery or a criminal assault.” *Id.* The Court concluded that “for over three centuries the common law has considered the projection of one’s bodily fluid onto another a touching sufficient to support a criminal conviction.” *Id.*

Thus as a matter of law, spitting is a touching and can constitute an assault if it is done intentionally and if it is offensive. The jury instruction

in Hansen's case conveyed exactly this and was therefore a correct statement of the law and did not constitute a judicial comment on the evidence. Hansen's claim fails.

Hansen also argues the instruction relieves the state of its burden of proving that Hansen intentionally touched Officer Suvada. However the instruction is clear that the spitting had to be an intentional spit *on* another person. The jury could not possibly have convicted Hansen if it found he did not intentionally spit upon Officer Suvada.

This Court reviews jury instructions as a whole to determine whether the instructions properly inform the jury of the applicable law, are not misleading, and allow the parties to argue their theories of the case. *State v. Embry*, 171 Wn.App. 714, 756, 287 P.3d 648 (2012). The adequacy of the instructions are reviewed de novo. *Id.*

An assault is an intentional touching that is offensive. *State v. Shelby*, 85 Wn.App. 24, 28-29, 929 P.2d 489 (1997). In Hansen's case, the instruction stated that an assault is an intentional touching or spitting that is harmful or offensive. CP 56. The jury instruction was accurate on the law. The instructions required that the state prove that the spitting was both intentional and offensive. There is no requirement that the State prove that the spitting is a touching as that has been established as a matter of law. *Valdez, supra*, slip op. 3 (citing *Jackson*, 145 Wn.App. at 821 and

Humphries, 21 Wn.App. at 409). "...[T]he fact that spitting is touching was not an issue of fact the State bore the burden of proving." *Id.* The instruction did not relieve the state of its burden of proving an assault occurred.

Just as in *Valdez*, the instruction in Hansen's case did not relieve the State of its burden of proving an intentional touching that was harmful or offensive. The instruction did not allow the jury to convict based on an unintentional spitting upon another person. Hansen's claim fails.

CONCLUSION

The jury instruction in Hansen's case was a correct statement of the law, did not constitute a comment on the evidence, and did not relieve the state of its burden of proof. Hansen's conviction should be affirmed.

DATED this 3rd day of July, 2019.

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