

FILED
Court of Appeals
Division III
State of Washington
5/17/2019 3:53 PM

Cause No. 35957-3-III

**COURT OF APPEALS
STATE OF WASHINGTON
(Div. III)**

STATE OF WASHINGTON,

Respondent,

v.

TM,

Appellant,

SUPERIOR COURT No. 2017-08-00403-7
SPOKANE COUNTY
HONORABLE ANNETTE S. PLESE

REPLY BRIEF

Jeffry K. Finer
421 West Riverside • Suite 1081
Spokane, WA • 99201
(509) 279-2709
Attorney for Appellant

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
Argument	1
I. This Court has discretion to hear TY’s arguments for a child-centered interpretation of the <i>mens rea</i> requirement for Second Degree Assault	1
II. RCW 13.40.020 does not prohibit interpreting the <i>mens rea</i> for second degree assault within the circumstances of the defendant’s age and stage of brain development	3
III. Washington’s Juvenile Justice System does not account for brain development differences between juveniles and adults during the guilt phase in the application of <i>mens rea</i>	6
IV. The State misconstrues intent to do an act and mindfulness of the act’s possible consequences	8
V. Dr. Wert was asked to identify what “charact- eristics or factors or facts” would inform the decision maker as to the defendant’s goal, not to opine on an ultimate issue of fact	9
Conclusion	11

TABLE OF AUTHORITIES

CASE AUTHORITY

<i>In re Winship</i> , 397 U.S. 358 (1970)	3
<i>In State v. Keend</i> , 140 Wn.App. 858 (Div 2, 2007).....	2
<i>Jackson v. Virginia</i> , 443 U.S. 307 (1979)	3
<i>Seattle v. Heatley</i> , 70 Wn.App. 573 (Div. 1, 1993)	9, 10
<i>State v. Blazina</i> , 182 Wn.2d 827 (2015)	1, 2, 3
<i>State v. O'Hara</i> , 167 Wn.2d 91 (2009)	3

STATUTORY and RULE AUTHORITY

U.S. CONST. amend. XIV	3
WASH. CONST. art I, § 22	3
RAP 2.5	1, 2, 3
RCW 9A.35.021	4, 5
RCW 13. 40.020(21)	3, 4, 5

OTHER AUTHORITY

J. Carroll, <i>Brain Science and the Theory of Juvenile Mens Rea</i> , 64 N.C. L. Rev. (2015)	7
3 J. Weinstein & M. Berger, <i>Evidence</i> ¶ 704-3 (1991).	11

ARGUMENT

I. This Court has discretion to hear TY’s arguments for a child-centered interpretation of the *mens rea* requirement for Second Degree Assault.

The State makes a broad claim, at page 7 of its Response Brief, that RAP 2.5 bars an appellate court from considering a legal issue not first raised in the trial court. Resp. Br. at 7. The State’s citation does not support their proposition: the rule does not bar issues raised for the first time on appeal. The rule automatically permits — as a matter of right — issues not previously raised if they meet one of three conditions. RAP 2.5(a). But that is not the entire story. The full understanding of RAP 2.5(a) permits both this Court of Appeal and independently the State Supreme Court to exercise jurisdiction to consider a matter raised for the first time on appeal. See *State v. Blazina*, 182 Wn.2d 827, 832 (2015) (citing the controlling text of Rule 2.5(a), “[t]he appellate court *may* refuse to review any claim of error which was not raised in the trial court.”) (emphasis added).

As noted by the dissent in *Blazina*, Blazina’s challenge to LFO practices was permitted, despite no objection in the trial court record, and notwithstanding Blazina’s failure to raise any argument under

2.5(a)(1)-(3). *Blazina*, at 840 (Fairhurst, J.). The appellate courts have the discretion to consider matters not raised below.¹

Alternatively, TM argues that his claims meet RAP 2.5(a)'s third exception. This exception creates a right to appeal if the issue raises a manifest constitutional error. RAP 2.5(a). Here, TM was plainly prejudiced — and the error thus was made manifest — by the trial court's determination using only adult-oriented *mens rea* that TM, at age 14, violated both charged alternatives to second degree assault.²

Further, the trial court's error meets the standard under RAP 2.5(a)(3). TM argument that the elements for second degree assault

¹ The *Blazina* majority concluded:

Although a defendant has the obligation to properly preserve a claim of error, an appellate court may use its discretion to reach unpreserved claims of error consistent with RAP 2.5. In this case, we hold that the Court of Appeals did not err in declining to reach the merits. However, exercising our own RAP 2.5 discretion, we reach the merits ...

Blazina, 182 Wn.2d at 830.

² TM's Opening Br. at 20-22 argued that the rule in *In State v. Keend*, 140 Wn.App. 858 (Div 2, 2007) establishes a subjective prong to the *mens rea* for recklessness under assault as defined in 9A.36.021(1)(a). TM expressly argued that the trial court misinterpreted the scope of the subjective prong.

under 9A.36.021(1)(a) require an examination of TM’s subjective *mens rea*. Since the argument involves the interpretation of an essential element to one of the charges, the error involves a manifest error affecting a constitutional right. The right to a proper interpretation of the elements of an offense plainly affects a defendant’s constitutional right to due process. “Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. U.S. CONST. amend. XIV; *see* WASH. CONST. art I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311 (1979); *In re Winship*, 397 U.S. 358, 365-66.” *See, State v. O’Hara*, 167 Wn. 2d 91, 105 (2009).

Thus, either under RAP 2.5(a)(3) or as an exercise of this Court’s discretion under *Blazina*, TM’s appeal is properly before this court notwithstanding trial counsel’s failure to challenge the application of an adult-standard *mens rea* to the conduct of 14-year-old TM.

II. RCW 13.40.020 does not prohibit interpreting the *mens rea* for second degree assault within the circumstances of the defendant’s age and stage of brain development.

The State cites RCW 13.40.020(21) for the proposition that only the legislature can alter the custom of imposing an adult-centered

mens rea on the elements of assault. This argument assumes that TM seeks to change the *text* of the assault statute. TM does not seek to change statutory text, merely how the courts evaluate a defendant's *mens rea* statutory mens rea and the common law understanding of the terms used to define assault.

The court below used the following to define assault:

[A]n intentional touching or striking of another person that is harmful or offensive, and that touching would be offensive if the touching would offend an ordinary person who is not unduly sensitive.

CP 90, ¶ 34. TM's challenge to this common law definition does not require legislative action: court-devised common law concepts, not otherwise codified under statute, are subject to court interpretations.

The legislature has defined the term "offense" as used in juvenile proceedings to be "an act designated a violation or a crime if committed by an adult under the law of this state, under any ordinance of any city or county of this state, under any federal law, or under the

law of another state if the act occurred in that state.” RCW

13.40.020(21).

Characterizing an act as an offense “if committed by an adult” is not the equivalent of barring the application of an appropriate age-related *mens rea* of the statutory crimes of 9A36.021(a) or (g), or of the common law definition of “assault.” Thus, contrary to the State’s argument at Resp Br. page 14, TM does not argue for different standards for juveniles by altering the *text* of the Penal Code but for the use of standards that acknowledge a defendant’s brain development when that development is a purely age-related biological fact.

An adult commits assault by “intentionally touching ... another” in a manner “that is harmful or offensive”, in circumstances that “would offend an ordinary person who is not unduly sensitive.” Adopting TM’s child-centric analysis would not change this wording. Rather, the court would instruct the jury on the common law of assault with an accurate definition of assault so that impulsive and “childish” behaviors by competent juveniles (generally those over 12) are not held to an unrealistic and unnatural adult standard. That amounts to a change to the common law of assault, not to a legislative text.

Thus, it would remain an offense, under 13.40.020(21) for a juvenile to assault another by “intentionally touching ... another” in a manner “that is harmful or offensive”, in circumstances that “would offend an ordinary person who is not unduly sensitive,” and it would amount to second degree assault if the behaviors constituted a reckless infliction of substantial bodily injury under 9A.36.021(1)(a), or strangulation under 9A.36.021(1)(g). But a child-centric definition would inform what is meant by “intentional,” and “reckless”. As matters stand, these terms are measured against the adult world and adult sensibilities. That mis-measure puts competent children with incomplete brain development in an unnatural and unfair position.

III. Washington’s Juvenile Justice System does not account for brain development differences between juveniles and adults during the guilt phase in the application of *mens rea*.

The State notes that juveniles who are judged competent to be tried for an offense in juvenile court are accorded benefits not given to adults tried in an adult setting. This is true. But the State simply refuses to engage with the actual argument made in TM’s opening brief. Instead the State makes a straw-person argument claiming that TM wants to rewrite the “entire Penal Code.” Resp. Br. at 13.

TM made no such argument. The Penal Code, as we all know, is a construct of the legislature and courts are not entitled to rewrite any part of it. Rather than made such an argument, TM reasonably pointed out that the text of the Revised Code's Second Degree Assault and common law "assault" are readily adapted to juvenile defendants without any change in wording. The State nearly hits the mark in its footnote 5 when it cites with approval the following:

to achieve an accurate assessment of *mens rea* for juvenile offenders, courts may not need to alter state of mind terminology, but *they do need to alter the perspective through which that terminology is interpreted.*" 94 N.C. L. Rev. at 594 (emphasis removed from State's quote, and added to TM's).

Resp. Br. at 13. TM's argument goes no further than this: the perspective through which the *mens rea* requirements for statutory Second Degree Assault and common law assault should be interpreted against the background of the brain development standards we now apply to *Miranda* warnings and life-time sentences.

This may bring about a broad change in juvenile justice, but not through a "rewrite [of] the entire Penal Code." Resp. Br. at 13. And if we are being candid, the change is in accord with biology and modern best evidence. That 12-18 years old children are treated as criminally

culpable as adults during the guilt phase is a legal construct, not a moral or biological fact.

IV. The State misconstrues intent to do an act and mindfulness of the act's possible consequences.

The State next cites testimony, at page 23 of its response, that TM had actual knowledge of the risks inherent in his conduct. The testimony does reflect that TM was aware of rules in U.F.C. bouts and knew that U.F.C. maneuvers such as choke holds could render someone unconscious. But there was no evidence that TM was presently mindful of these possible consequences when he acted. That's the difference between knowing a fact and being "mindful." TM did not concede that he "knew of *and disregarded* a substantial risk that injury could occur by the use of the 'maneuver.'" Resp. Br. at 23 (emphasis added). TM argued that he was not mindful of these risks. That is what comes with immaturity: not thinking, not being mindful. As a young teenager would say, "it was an accident," meaning "I did not mean to harm anyone and the results were unintended." Not to diminish the harm done to his friend, but in recognition of the universality of horseplay among young males, TM's wrestling hold was committed without any present awareness of any risk to AC. The lower court's suspended

sentence suggests that this point predominated at sentencing. TM's light sentence was in recognition of the fact that the court accepted TM as acting without malice toward AC. TM had no intention of harming his friend. TM was shocked at the results of he saw as horseplay. Thus, as argued in the Opening Brief "not only did [he] not intend harm, but he was not mindful of a risk of harm when he put his arms around AC's neck."

VI. Dr. Wert was asked to identify what "characteristics or factors or facts" would inform the decision maker as to the defendant's goal, not to opine on an ultimate issue of fact.

The question put by trial counsel to Dr. Wert may have been inartful but it was not objectionable for invading the province of the trier of fact. Such an invasion may arise if an expert is asked for an opinion as to whether the defendant in fact had a particular state of mind; but

[T]estimony that is not a direct comment on the defendant's guilt or the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony.

See Seattle v. Heatley, 70 Wn.App. 573, 578 (Div. 1, 1993).

Dr. Wert was not asked to opine on TM's state of mind *per se*. He was asked what characteristics or factors or facts would assist the trier in making that determination. Dr. Wert was asked how the trier could

go about making its decision, not what that decision had to be. The lower court's complete misapprehension as to the nature of the question and the court's consequential ruling are untethered to any legal doctrine. The question did not invade the province of the decision-maker, it would give guidance in how to receive and interpret the evidence of TM's objective and intentions, and, thus, be useful to the trier of fact.

Nor was the question improper under evidence rule 704.

Under modern rules of evidence, however, an opinion is not improper merely because it involves ultimate factual issues. ER 704 provides that "[t]estimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Seattle v. Heatley, at 578. The court in *Heatley* noted the following:

ER 704 is essentially identical to Fed. R. Evid. 704(a). The Advisory Committee's Note on Fed. R. Evid. 704 states that, under modern rules of evidence, the basic approach to lay and expert opinions "is to admit them when helpful to the trier of fact." 3 J. Weinstein & M. Berger, *Evidence* ¶ 704-3 (1991).

Id.

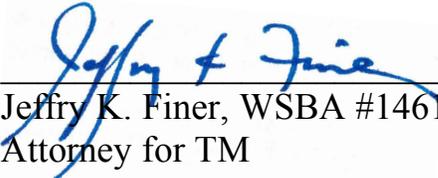
Dr. Wert's testimony was unduly truncated. His guidance on how the trier of fact could reasonably evaluate TM's conduct for criminality would have been helpful to the court. In view of the evident and compassionate reluctance to sentence TM to any time in confinement for his second degree assault, it is apparent that the trial court wrestled with the dissonance between the adult-oriented standards for common law assault and the facts of this unfortunate accident.

CONCLUSION

For the reasons set forth above, TM respectfully asks this Court to reverse the felony conviction and remand for further proceedings with instructions.

DATED THIS 17th day of May, 2018.

FINER & WINN


Jeffrey K. Finer, WSBA #14610
Attorney for TM

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing to be served via the method listed below to the following:

NAME & ADDRESS	Method of Delivery
Brian O'Brien	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> USPS postage prepaid <input type="checkbox"/> Facsimile <input type="checkbox"/> Other _____

DATED this 17th day of May, 2018.

s/ Jeffrey K. Finer
Jeffrey K. Finer
WSBA No. 14610
Attorney for Appellant

FINER & WINN

May 17, 2019 - 3:53 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35957-3
Appellate Court Case Title: State of Washington v. Ty C. Mansfield
Superior Court Case Number: 17-8-00403-7

The following documents have been uploaded:

- 359573_Briefs_20190517155108D3468512_9073.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was ♦ *Mansfield Brief Ct Apps REPLY.pdf*

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- gverhoef@spokanecounty.org
- sally@finerwinn.com
- scpaappeals@spokanecounty.org

Comments:

motion to accept late filing will be filed and served next

Sender Name: Sally Winn - Email: swinn@spokanecounty.org

Filing on Behalf of: Jeffry K. Finer - Email: jeffry@finerwinn.com (Alternate Email:)

Address:
1033 W GARDNER AVE
SPOKANE, WA, 99201-2016
Phone: 509-477-4889

Note: The Filing Id is 20190517155108D3468512