

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

OPENING BRIEF

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INTRODUCTION AND STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This appeal challenges

A. ASSIGNMENTS OF ERROR

Appellant TM raises the following assignments of error:

1. The trial court erred by failing to consider admitted

evidence regarding the defendant's and victim's ages and the context of their relationship when determining that the incident amounted to a common law assault and, separately, that the defendant was reckless as defined by statute.

a. The common law definition of assault does not

extend to impulsive acts between adolescent school

boys whose horseplay, without animus or aggression,

includes impulsive acts that offend adult sensibilities

but are part of the normal behavior matrix of

children.

b. The statutory definition of recklessness, used in one

of the alternative methods of committing second

degree assault, requires both a "disregard of substan-

tial risk" as well as a "gross deviation from conduct

of a reasonable person” and, as applied to young adolescents, the statute must consider brain development in the young adolescent as a part of the culpability determination.

2. The trial court’s evidentiary ruling sustaining the State’s objection to portions of psychologist Paul Wert’s testimony regarding “what factors have been contemplated in determining motivations for impulsive behavior?” were an abuse of discretion.

B. STATEMENT OF THE CASE & PROCEEDINGS

The defendant, aged 14, was originally charged in juvenile court with a single count of Second Degree Assault pursuant to RCW 9A.35.021(1); the charge was amended to include an alternative count of Assault in the Second Degree by either strangulation or by assaulting resulting in serious bodily injury. RCW 9A.35.021(1)(A),(G). CP 1, 37.

The defendant was tried before Judge Plese on February 12 and 13, 2018. On February 14, the court determined that the defendant was

guilty of Second Degree Assault under both sub-sections (A) and (G). CP 85-92 (findings and conclusions) and RP 2/14/18¹ at 12:21-24.

On March 9, 2018, the trial court imposed disposition upon TM. Finding that the statutory standard range of 15-36 weeks confinement would effectuate a manifest injustice, the court imposed an exceptional sentence of 2 weeks of confinement converted to electronic monitoring. CP 77. In addition, the court imposed one year of community supervision and 80 hours of community restitution. CP 76.

This timely appeal followed. CP 84.

C. FACTS

The State, through Deputy Prosecutor Sean Plunkett, presented the testimony of three witnesses: substitute teacher Cody Ableman student, and two 14-year-old students — BS, and victim AC. The defense presented the testimony of respondent TM, classmate KC, and psychologist Dr. Paul Wert, Ph.D. CP 85 ¶¶ 1-3.

The lower court's findings of fact can be found at CP 85 through 92. In summary, the court's findings follow:

¹ Each trial day's hearing was transcribed by a different court reporter with pagination beginning at page 1 for each day. The citation to the Report of Proceedings for February 12, 13, and 14 will include the date and page number.

On June 2, 2017, respondent TM, victim AC, and friend BS were eighth graders at Cheney Middle School in Cheney, WA. CP 86 ¶ 1.

The three boys were in the same sixth period class together. CP 86 ¶ 2.

At the time, TM was 14 years old, and was a good student with mostly A's and B's. TM participated in wrestling, football, and baseball at school. CP 88 ¶ 23. BS was also involved in the school wrestling program. RP 2/14/18 at 23-25.

On June 2, 2017, a substitute teacher – Cody Ableman – was assigned to TM, AC, and BS's sixth period class. CP 86 ¶ 3.

Just prior to the incident in this case, defendant TM, AC, BS, and the other children in the sixth period class outside on recess. CP 86 ¶4; 89 ¶ 24.

BS testified that he was a friend of both TM and AC's, stating further that he had never observed any problems between TM and AC. CP 87 ¶ 12. He had, however, seen other boys at the same school push people into lockers and walk by and unzip others backpacks in the school hallways. CP 87 ¶ 12.

For his part, TM gave similar testimony that it was common among his peers at school to push and shove each other and play “punching games.” CP 89 ¶ 27.

BS testified that on June 2, 2017, he was talking with AC when TM walked up behind AC and put a choke hold on AC. CP 87 ¶ 13. BS testified that respondent TM did not say anything to AC before approaching AC and putting his arm around AC's neck. CP 87 ¶ 13.

According to TM's testimony, he decided to show a wrestling move to his friend BS when he approached AC from behind and put his right arm across AC's neck and locking the right arm with his left. CP 89 ¶ 25; CP 89 ¶ 26.

TM testified that he believed he had permission to do this physical move to AC as long as he didn't hurt AC. CP 89 ¶ 27. He testified that he did not intend to cut off blood flow or air flow, but that the purpose of the move was to control AC's body. CP 89 ¶ 26.

Victim AC testified that there were no words prior to the incident, just that he felt an arm around his neck and pain and that he couldn't breathe. CP 87 ¶ 20.

Substitute teacher Cody Ableman testified that he was stacking chairs for the end of the day when the class returned from the

playground. CP 86 ¶ 3. He heard someone say, “don't tap out” and recognized it to be TM's voice. CP 86 ¶ 5. BS also testified that he believed that TM stated something like, “fight 'til you tap out,” a technique he associated with Ultimate Fighting Championship wrestling. CP 87 ¶ 14. Other testimony concurred with the use of the phrase “tap out” but there was some variance with the TM's words in connection with the phrase “tap out.” See CP 89 ¶ 28.

Mr. Ableman turned and observed TM having placed AC in a choke hold. CP 86 ¶ 5. The boys were facing the same direction, and TM had his arm around AC's neck with TM's other hand locking TM's grip. CP 86 ¶ 6.

BS observed that TM squeezed AC's neck in this hold for approximately 10-15 seconds. BS also stated that the TM's hold was not a wrestling move taught by their wrestling coach. CP 87 ¶¶ 16-17; RP 2/14/18 6:7-11.

BS testified that AC appeared to show fear and that AC grabbed TM's arm. CP 87 ¶ 15. BS did not think AC could breathe in the hold. *Id.* BS testified that he did not react nor try to help AC. CP 88 ¶ 18.

TM remembered saying something to AC about “tapping out,” a phrase that, to him, was like saying “enough.” CP 89 ¶ 28. He testified he held the hold for approximately 5-10 seconds. *Id.*

TM admitted that he had knowledge, prior to the incident, that this choke hold can cause someone to not be able to breathe and that it could result in unconsciousness. CP 89 ¶ 30. TM agreed on cross examination that the choke hold was not a wrestling move he learned in his school wrestling program. CP 89 ¶ 31. TM stated that it was a “pro wrestling” or a Ultimate Fighting Championship move. *Id.* TM stated he had seen the choke hold utilized before in the UFC and that the referee usually stops the fight when the move is applied. *Id.*

Meanwhile, Teacher Ableman yelled to TM to let go of AC, and within a second TM did let go. Ableman saw AC fall to the ground unconscious. CP 86 ¶ 6.

TM testified that he immediately let go when he felt AC get heavy. CP 89 ¶ 28.

AC did not recall details other than waking up on the floor and bleeding. CP 88 ¶ 20.

TM bent down to help AC get up from the floor and noticed AC was bleeding. CP 89 ¶ 29. TM immediately apologized to AC. CP 87 ¶ 8; 88 ¶ 22; 89 ¶ 29.

At least one other student in the sixth period classroom, KC, heard portions of the encounter between TM and AC. CP 88 ¶ 22. She did not witness what happened initially but turned when she heard AC falling to the floor and TM apologizing to AC. *Id.*

Teacher Ableman noted that when AC got up he was bleeding profusely from a cut on his nose and a gash under his chin. CP 86 ¶ 7; 88 ¶ 20. The injury to AC's jaw was serious and prior to trial TM stipulated that AC sustained a broken jaw and required stitches. The parties stipulated that AC's fall after TM released his hold was the cause of AC's injuries. CP 91 ¶ 40.

After AC got up, Mr. Ableman described TM as crying and apologetic. Ableman noted that he had not observed any animosity between TM and AC nor did he believe there were any problems between them. CP 87 ¶ 8. Mr. Ableman walked both boys to the principal's office. *Id.*

No evidence was given by any witness whether TM had ever used the hold on anyone before he placed his arms around AC, nor

was there evidence that TM had knowledge regarding the degree of pressure needed to control the person in the hold, cut off airflow, or render the subject unconsciousness.

Psychologist Dr. Paul Wert gave expert testimony regarding the current understanding of adolescent brain development. According to Dr. Wert, adolescents' brains are known not to reach full development before their 20's. CP 90 ¶ 33. He testified lack of brain development can affect or impair decision making, especially in young males. *Id.* Furthermore, he testified that hormones in young males can also impair or affect decision making. *Id.* There were, however, no claims of diminished capacity or mental disease or defect. CP 90 ¶ 34.

Relevant to this appeal, Dr. Wert was not permitted to answer the following questions due to the State's objections:

Q [By defense] Okay. So in your experience and knowledge when a young male is acting in -- when a young male takes an action and testosterone is involved, do results occur that weren't intended?

A Yes.

Q Okay. If you were the decision maker here, what characteristics or factors or facts would you look to in determining what the goal of the defendant is?

MR. PLUNKETT: Objection.

THE COURT: And I'll sustain it to the form of the question.

Q (By [defense]) In the studies you read and were aware of, what factors have been contemplated in determining motivations for impulsive behavior?

MR. PLUNKETT: Objection, Your Honor, as relevance.

THE COURT: And I would sustain as to relevance.

RP 2/14/18 at 61-62.

The Court's Ruling. The lower court analyzed the alternative elements that the State had to establish in order to establish TM's guilt.

1. Assault recklessly resulting in substantial bodily harm (RCW 9.9A.36.021(1)(A)). In its ruling, the lower court recited the full statutory definitions for reckless conduct resulting in bodily injury, RP 2/14/18 at 10:23 to 11:2. Applied to this case, the court reasoned as follows:

Since a person acts recklessly when he knows and disregards that substantial risk by using a choke hold causing loss of air to the victim, even [TM] testified that he knew there was a possibility. His disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

RP 2/14/18 12:7 and see CP 89 ¶ 30; 91 ¶ 37. The lower court held that the statutory alternative sub-part (A) was met. *Id.*

2. Assault by strangulation. Further, the lower court applied the evidence to the alternative charge, sub-part (B). The court noted that the State proved beyond a reasonable doubt that the defendant intentionally assaulted AC by strangulation, that being the compressing of a person's neck, obstructing their ability to breathe. RP 2/14/18 at 12:16-24; CP 91 ¶¶s 38 and 43; CP 92 ¶ 46. The court noted that Assault is defined in case law as an intentional touching that would be offensive to an ordinary person, and the fact that TM grabbed AC around his neck and squeezed it to control his body would be offensive to an ordinary person. CP 90 ¶ 35; 91 ¶ 39.

The court found that TM's intent was to choke hold AC to control his body, and — regardless of the fact that the hold unexpectedly resulted in unconsciousness — TM's admitted objective was to wrap his arm around and seek control over AC. CP 91 ¶ 42. TM's objective constituted sufficient intent to meet the strangulation alternative. RP 2/14/18 12:16-20.

Accordingly, the lower court found beyond a reasonable doubt that 14-year-old TM was guilty of the felony of second-degree

assault under both alternatives under RCW 9.9A.36.021(1)(A) and (G). CP 92 ¶¶ 46-47.

The Court sentenced TM to 14 days, converted to electronic monitoring, one year of Community Supervision, and 80 hours of Community Restitution. CP 76.

ARGUMENT

Summary. The trial court found 14-year-old TM guilty in juvenile court of two alternatives under Second Degree Assault². The evidence showed that, 3 weeks after his 14th birthday, TM intentionally put his arms around the neck of classmate AC to “control his body.” TM was imitating a wrestling move used in adult fighting contests but, personally, he had no experience with the move’s effectiveness. TM’s hold interfered with AC’s breathing and circulation and TM unintentionally rendered AC unconscious. The parties stipulated at trial that AC suffered “substantial bodily injury” following his unconscious fall to the ground.

² RCW 9.9A.36.021(1)(A),(G). The full text of both alternatives is set forth in the attached Appendix along with the definitions for “intent,” “recklessness,” and common law “assault.”

There was no evidence of TM having an animus or intent to harm AC. Rough physical contact was common among TM and his classmates, including punching games.

The court found TM guilty under both of the charged alternatives, i.e., intentional assault resulting in substantial bodily injury *or* intentional assault by strangulation. RP 2/14/18 at 12:21-24. Key to the court's ruling was its determination that TM's intent to control AC's body met the standard for common law assault. "That result [sic] does constitute a crime." RP 2/14/18 at 11:17 through 12:3.

This appeal challenges the trial court's failure to apply — at the guilt phase³ — the proper mens rea standard appropriate to behaviors common to adolescents within their social cohort, notwithstanding unchallenged admissible evidence by expert psychologist Dr. Paul Wert regarding brain development in adolescents such as TM and unchallenged evidence of rough physical contact by adolescents upon one another at school. The court's distinction — RP 2/14/19 at 12:13-

³ The lower court did consider TM's youth in arriving at TM's exceptional disposition. CP 74 (mitigating factor: "age 14 at time of offense"). Nothing in the court's rulings or commentary suggest that age was a factor in considering TM's culpability prior to the verdict.

15 — between un-sanctioned roughhousing on the playground and the un-sanctioned wrestling hold was unreasonable and unduly prejudicial.

I. The court erred by failing to take into account adolescent brain development in determining whether defendant’s conduct violated modern standards applicable to the determination of juvenile culpability.

Standard of Review This court reviews the application of statutes *de novo*. *State v. McGee*, 122 Wn.2d 783, 791 (1993).

Argument

The adolescent brain. Adolescents have different brains than adults. Adolescents are impulsive, and their immaturity is transient. They have a proclivity for thoughtless risk and an inability to assess consequences. There is a clear science-based connection between youth and decreased moral culpability for criminal conduct. *State v. Bassett*, ___ Wn.2d ___, slip op. at 20 (Oct 18, 2018).

These findings are not confined to juvenile life without parole cases such as found in *Bassett*, or *Miller v. Alabama*, 132 S.Ct. 2455 (2012). In *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011), the Supreme Court concluded that the reasonableness of a juvenile defendant’s *perception* of custody under *Miranda v. Arizona*⁴ must be

⁴ 384 U.S. 436 (1966).

age-appropriate. Commentators reviewing *Miller* and *J.D.B.* have shown that the Court's direction applies into the criminal law's mens rea standards.

The logic of the Court's decisions, however, applies just as strongly to the application of substantive criminal law. Likewise, scholars writing in the field have limited the application of neuroscience to either the territory staked out by the Court or to objective mens rea standards alone. The science, however, does not support such limitations. Just as modern neuroscience counsels against the imposition of certain penalties on juvenile offenders and an adjustment of *Miranda's* reasonableness analysis, so it counsels toward a reconsideration of culpability as applied to juvenile offenders through the element of mens rea. The failure to extend this jurisprudence of youth to *every mental state element undermines the very role of mens rea as a mechanism to determine guilt.*

J. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 64 N.C. L. Rev. at 540 (2015) (emphasis added). A child-centered mens rea standard acknowledges the well-recognized differences between adolescent versus adult thought processes and the effect that such differences have on an actor's criminal culpability.

The United States Supreme Court has acknowledged this legal differentiation. In the fourth amendment context, the Supreme Court has stated that "children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand

the world around them.” *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) (citing 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 464-65 for common law and historical context). A child’s age, the Court has stated, is “more than a chronological fact”; it is the cognitive and moral base upon which we evaluate a child’s lack of experience and mature judgment. *See Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982); *Gall v. United States*, 552 U.S. 38, 58 (2007); *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion). In case after case, the Court in its modern jurisprudence has signaled its concern that children not be presumed under a legal fiction to be merely small adults.

The Court has turned to objective clinical neuroscience to advance the proposition that adolescents engage in a different thought process than their adult counterparts. *See Roper v. Simmons*, at 569-70, 575; *Graham v. Florida*, 560 U.S. 48 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (adolescent brain development influences decision-making processes and calculation of risk differently than adults). Even the perception of police custody must be viewed in the case of the child detainee from the child’s level of brain development, not as might be

viewed by a “reasonable adult.” *See J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (noting that the acknowledgment of the difference between juvenile and adult judgment as “common sense”).

Longitudinal fMRI studies and brain imagery now provide scientists a clinical objective basis in neuro-biological science to account for adolescents’ inability to reasonably and reliably comprehend risks, their unthinking engagement in dangerous behavior, and their susceptibility to peer influence to overcome their own best judgment. *See Carroll* at 45-47; B.J. Casey, et al., *The Adolescent Brain*, 1124 ANNALS N.Y. ACAD. SCI. 111, 119-121 (2008). This behavior is shared by all adolescents. The immaturity and poor decision-making as described by the Court in its holdings *is the norm for adolescents*. The adult standards for *mens rea* in juvenile cases holds adolescents to a standard for risk and consequences that is inappropriate to their neuro-biology.

An adolescent’s impulsive and risky behavior does not eradicate their culpability. But fact-finders cannot fairly assess an adolescent’s culpability unless their conduct is aligned with their age specific maturity.

A child-centric *mens rea* standard in juvenile cases is appropriate. It is consistent with the underlying concept and purported role of *mens*

rea in assessing the culpability of the accused. It is supported by Washington own differentiation between adult and child actors as well as recent United States Supreme Court decisions recognizing and endorsing the inherent distinctions between adult cognition and moral engagement and how children are not as well-equipped as their seniors.

For example, Washington State defines two *mentes reae* relevant to this appeal, but do so using terms that do not clearly reflect distinctions between a juvenile and an adult brain. The Revised Code defines *intent* as follows:

A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

RCW 9A.08.010. Both attorneys correctly recited the statutory definition of intent. RP 2/13/18 at 66:24 and 74:16. The trial court here found that TM intended to assault AC because TM intended to put his arms around AC's neck to demonstrate a wrestling move TM associated with adult wrestlers. No consideration was given by the trial court to consider whether TM had an objective or purpose to assault AC or whether he contemplated any act constituting a crime. He was horsing around, in a manner that for adults would be criminal,

but in a manner that is commonplace for an adolescent male whose cohort shoves and engages in punching games.

Similarly, this State defines *recklessness* as follows:

A person acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur, and that this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

RCW 9A.08.010. This definition can be readily applied to an adult and the adult's behaviors can be set against those of a "reasonable person" in the "same situation." But applied to a juvenile, it must consider whether the phrase "in the same situation" extends broadly, and subjectively, to the circumstances of 14-year-old boys whose brains are not yet fully developed and who therefore are prone to poorly appreciate risks. The trial court did not reflect upon a reasonable 14-year-old's conduct for whom a "gross deviation" would be entirely different from an adult standard.

II. The court failed to take into account the two *mentes reae* requirements in RCW 9A.36.021(1)(A).

Argument

In State v. Keend, 140 Wn.App. 858, 865 (Div 2, 2007), the appellate court examined the interplay of mens rea requirements in RCW 9A.36.021(1)(A)'s recklessness alternative. Sub-section (1)(A)

contains two *mentes rea*: “the *mens rea* of intentionally relates to the act (assault), while the *mens rea* of recklessly relates to the result (substantial bodily harm).” In turn, “[r]eckless conduct includes a subjective and objective component.” *Keend*, at 869. “Whether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.” *Keend, id., citing State v. R.H.S.* 94 Wn. App. 884, 847 (1999).

Keend argued unsuccessfully that a fact-finder could conclude that a “single punch does not create a ‘substantial risk’ of a broken jaw.” *Keend*, at 869. The appellate court noted that previous case law had held that “any reasonable person knows that punching someone in the face could result in a broken jaw, nose, or teeth, each of which would constitute substantial bodily harm.” *Id.*

Applied to the facts in TM’s appeal, *Keend* instructs on two grounds. First, a defendant is presumed to know the reasonable risks posed by his intentional conduct and, second, being mindful of those risks the defendant must be reckless by acting in a manner “grossly deviating from conduct that a reasonable person would exercise in the same situation.”

The evidence in this case, however, does not establish that TM was

mindful at the time he placed his arms around AC's neck what outcomes might actually result. There is no evidence that TM had seen any wrestlers, professional or otherwise, rendered unconscious, nor evidence that he had any inkling of what amount of pressure or time was needed to render unconsciousness. His testimony, which was not contradicted, was that referees stop fights when the hold is applied. TM's knowledge was not sufficiently developed to show that he had any real understanding of the actual risks posed by his acts.

TM's surprise and tears following AC's injury strongly support a contrary conclusion. Not only did TM not intend harm, but *he was not mindful of a risk of harm* when he put his arms around AC's neck. The gap between what a child *knows* versus what a child is mindful of at the moment of action is the essence of impulsive behavior.

TM admitted "knowing" — that is, intellectually understanding — that the hold potentially posed risks. But TM did not state and the evidence does not suggest that he was mindful — that is, that he gave present consideration — to any risk of injury that AC might suffer.

The "actual subjective knowledge" requirement discussed in *Keend* states unequivocally that to find subjective knowledge there must be "*sufficient* information that would lead a reasonable person to believe a

fact exists.” TM’s knowledge is easily summed up: unconsciousness “could” follow and referees stop bouts when the hold is applied. TM’s knowledge did not extend to the degree of pressure, time, and technique required to even trigger an actual risk of harm.

In contrast, the trial court determined, based upon no analysis or testimony, that because the hold TM placed upon AC was not used in the “regular school wrestling” program, there was a legal difference between TM’s conduct and a “push on the playground.”

[BS] indicated you don’t use that hold in any regular school wrestling. This would be a substantial difference than a push on the playground.

RP 2/14/18 at 12:13-15.

The trial court’s conclusion is not based upon the evidence. First, the trial court’s actual finding was not restricted to a playground push, rather, the court acknowledged that TM’s subjective understanding of his classmates’ standard of conduct allowed shoving each other and playing “punching games.” CP 89 ¶ 27. Had the court actually considered punching games as part of the standard underlying 14-year-old male behavior, then TM’s UFE inspired wrestling move on AC falls within the ambit of general adolescent horseplay.

This was Dr. Wert's conclusion. Dr. Wert has, for the last 15 years, focussed on risk evaluations involving both adult and adolescent offenders. RP 2/13/18 at 51:19 to 52:6. He testifies regarding his conclusions for both the defense and prosecution in court cases. The advances of psychology in this area are not speculative. RP 2/13/18 at 55. The modern understanding of adolescent behavior and impulsivity is based on objective clinical research involving MRI evidence showing that the adolescent prefrontal cortex (the seat of executive functioning, decision making, and judgment) is not fully developed until the individual is in his or her twenties. RP 2/13/18 at 53:17-25. These new findings come decades after Washington State adopted its mens rea definitions.

Dr. Wert's conclusion was that clinical science shows that a lot of adolescents, males more frequently than females, have impaired decision making faculties as compared to the standards of adult behavior. RP 2/13/18 at 54:7. Thus, even normal male adolescent behavior may fall short of reasonable conduct as compared to the adult population. *Id.*

Most important to this appeal, Dr. Wert stated that the adolescent mind has a tendency to leap before looking. “There’s not a great deal of planning that goes into some of the impulsive acts and a lot of times [adolescents] don’t anticipate the consequences of what might occur given a specific behavior on their part.” RP 2/13/18 at 59:11-15.

Then Dr. Wert turned to matters believed relevant in assessing the circumstances that motivate adolescent behavior, which TM takes up next, below.

III. The court erred in restricting opinion testimony by Dr. Wert regarding factors considered in evaluating the adolescent brain and impulsivity.

Standard of Review. This court reviews under the abuse of discretion standard evidentiary rulings barring expert opinion testimony. *State v. Demery*, 144 Wn.2d 753, 758 (2001) citing *State v. Sutherland*, 3 Wn.App 20, 21 (1970). Where reasonable persons can dispute a trial court’s evidentiary ruling the trial court has not abused its discretion. *Id.*

Argument

Dr. Wert was not permitted to answer the following defense question: “What I want to ask you is your opinion on the reasons, based on your knowledge of all the facts in interviewing [TM], the

police report, for [TM] to have put this wrestling move on [AC].” Similarly, Dr. Wert was not permitted to answer the question whether he had “an opinion on what Ty’s goal was here?” or “what characteristics or factors or facts would you look to in determining what the goal of the defendant is?” or “what factors have been contemplated in determining motivations for impulsive behavior?” Finally, Dr. Wert was not permitted to answer questions regarding the “factors that scientists in this area have looked to and they would be interactions of the parties.” RP 2/13/18 at 59:23 through 62:5. The trial court held that she permitted Dr. Wert’s testimony in order “to give some general knowledge about basically brain thinking in adolescents, but you’re going into very specifics and the truth of the matter asserted...” RP 2/13/18 at 62:1-5.

Generally, in Washington, an expert may give evidence that goes to an ultimate issue in question. ER 704. Nevertheless, here Dr. Wert’s prohibited testimony did not go to the ultimate question — whether or not TM had a particular mental state or condition constituting an element. The defense’s final question for Dr. Wert — dispensing with the defense’s original inquiry into TM’s “goals” — went to the *factors* relevant to an evaluation of adolescent

impulsivity. This was within his sphere of competence, and under the circumstances of the case relevant to whether the defendant formed an intent and whether his conduct was reasoned. It further addressed the context of the two boys' interaction: adolescent impulsivity and awareness of risk.

Dr. Wert was not being asked in the final question to opine on TM's specific state of mind as to recklessness or intent. The defense questions went to the *circumstances* in which TM acted and the *triggers* for impulsive behavior. These were not questions regarding Dr. Wert's opinion as to TM's actual mens rea, but what psychological matters a factfinder would want to consider in determining the circumstances in which TM acted.

These circumstances are relevant to the defense: recklessness is defined as a "gross deviation from the conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010. The "same situation" encompasses the circumstances as they applied to TM: an adolescent, just coming in from recess, whose classmates engage in pushing, slapping, and punching contests. Dr. Wert's testimony would have elucidated the type of triggers for adolescents such as TM in engaging in impulsive behavior. This testimony would have been

relevant to a fact-finder needing to evaluate the elements of statutory recklessness. As such, the testimony would have been relevant under ER 401, and not inadmissible under ER 403, 701 or 702.

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

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

The court's rejection of Dr. Wert's testimony was without basis in law. The court's ruling prohibited defense counsel from informing the court of factors that would come under the analysis of TM's intent (versus an impulsive act) and the extent to which he knew but disregarded risks to AC in a manner that was a "gross deviation from the conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010. No jurist in the context of this case would reasonably exclude evidence of adolescent brain development from an expert psychologist regarding "what factors have been contemplated in determining motivations for impulsive behavior?"

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 19th day of November, 2018.

FINER & WINN



Jeffrey K. Finer, WSBA #14610
Attorney for Ty C. Mansfield

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:

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DATED this 19th day of November 2018.

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

APPENDIX

RCW 9A.36.021

Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or**
- (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
- (c) Assaults another with a deadly weapon; or
- (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
- (e) With intent to commit a felony, assaults another; or
- (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
- (g) Assaults another by strangulation or suffocation.**

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

Common-law assault – As defined by the trial court.

The law defines an assault as an 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.

**Statutory recklessness –
As applied by the trial court.**

A person acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur, and that this disregard is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

CP 91, ¶ 37; see also RCW 9A.08.010

**Statutory strangulation –
As applied by the trial court.**

The law defines strangulation as compressing a person's neck and thereby obstructing the person's blood flow or their ability to breathe.

CP 91, ¶ 37.

The legislature's finding on stragulation states:

The legislature finds that assault by strangulation may result in immobilization of a victim, may cause a loss of consciousness, injury, or even death, and has been a factor in a significant number of domestic violence related assaults and fatalities. While not limited to acts of assault against an intimate partner, assault by strangulation is often knowingly inflicted upon an intimate partner with the intent to commit physical injury, or substantial or great bodily harm. Strangulation is one of the most lethal forms of domestic violence. The particular cruelty of this offense and its potential effects upon a victim both physically and psychologically, merit its categorization as a ranked felony offense under chapter **9A.36 RCW.**"

**Statutory intent –
RCW 9A.08.010.**

Intent. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

**Statutory intent –
As applied by the trial court.**

[I]ntent is defined as a person acting with an objective or a purpose to accomplish a result... [TM's] intent was to choke hold A[C] to control his body, ... his objective was to wrap his arm around and seek control [resulting in AC's obstructed breathing]. That result does constitute a crime.

RP 2/14/18 at 11:17-19.

FINER & WINN

November 19, 2018 - 3:20 PM

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