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Court of Appeals
Division III
State of Washington
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NO. 36481-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MANUEL MEJIA PENALOZA, Appellant.

BRIEF OF RESPONDENT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT5

A. PENALOZA HAS WAIVED ANY CLAIM THAT THE JURY INSTRUCTIONS WERE VAGUE BY FAILING TO OBJECT TO THE COURT’S INSTRUCTIONS.....5

B. PENALOZA HAS FAILED TO OVERCOME THE PRESUMPTION THAT THE SECOND DEGREE ASSAULT STATUTE IS CONSTITUTIONAL.....7

1. THE SECOND DEGREE ASSAULT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE FOR FAILING TO DEFINE “SUBSTANTIAL DISFIGUREMENT.”.....8

2. THE SECOND DEGREE ASSAULT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE FOR FAILING TO DEFINE “REASONABLE AND MODERATE.”11

IV. CONCLUSION.....14

TABLE OF AUTHORITIES

	Page
Cases	
<i>City of Spokane v. Douglass</i> , 115 Wn.2d 171, 795 P.2d 693 (1990).....	8
<i>Seattle v. Rainwater</i> , 86 Wn.2d 567, 546 P.2d 450 (1976).....	6
<i>State v. Atkinson</i> , 113 Wash. App. 661, 54 P.3d 702, 705 (2002).....	7
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993).....	6
<i>State v. Billups</i> , 62 Wn.App. 122, 813 P.2d 149 (1991).....	9
<i>State v. Blair</i> , 117 Wn.2d 479, 816 P.2d 718 (1991).....	5
<i>State v. Duncalf</i> , 177 Wash. 2d 289, 300 P.3d 352, 356 (2013).....	9
<i>State v. Fowler</i> , 114 Wn.2d 59, 785 P.2d 808 (1990).....	5-6
<i>State v. Gordon</i> , 172 Wn.2d 671, 260 P.3d 884 (2011).....	6
<i>State v. Kinchen</i> , 92 Wn. App. 442, 963 P.2d 928 (1998).....	12-3
<i>State v. Releford</i> , 148 Wn. App. 478, 200 P.3d 729 (2009)	5
<i>State v. Riles</i> , 135 Wn.2d 326, 957 P.2d 655 (1998)	8
<i>State v. Saunders</i> , 132 Wn.App. 592, 132 P.3d 743 (2006)	9
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	6
<i>State v. Watson</i> , 160 Wn.2d 1, 154 P.3d 909 (2007)	11
<i>State v. Whitaker</i> , 133 Wn. App. 199, 135 P.3d 923 (2006).....	7
<i>State v. Worrell</i> , 111 Wn.2d 537, 761 P.2d 56 (1988).....	9
<i>United States v. Mazurie</i> , 419 U.S. 544, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975)	8
Statutes	
RCW 9A.15.100.....	13
Jury Instructions	
WPIC 2.03.01.....	9
WPIC 17.07.....	7, 12

I. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. Has Penalzoa waived any claim that the jury instructions were vague by failing to object to the court's instructions?
2. Has Penalzoa failed to overcome the presumption that the second degree assault statute is constitutional?

II. STATEMENT OF THE CASE

The appellant, Manuel Mejia Penalzoa, was charged with second degree assault on his daughter, M.P. CP 4. The crime was alleged to have occurred between May 1, 2016 and July 9, 2016. *Id.* On October 25, 2018, Penalzoa was convicted. CP 27, 29. He was sentenced to 5 months in jail. CP 30. His conviction stems from the following facts:

Police officer Randy Jimenez did a welfare check on a minor, M.P., on July 11, 2016. RP 69. An anonymous person called and was concerned about what their son told them that occurred the night before. *Id.* Officer Jimenez went to the home of M.P., an 11-year old girl with Down Syndrome who acts younger than her age. RP 61, 63, 70, 128; SE 2. A relative described her as acting like a 5- or 6-year-old. RP 51. When Officer Jimenez visited her, he saw saw deep bruising along her entire back. RP 72. The bruising was consistent with being caused by a rope or switch of some sort. *Id.* A CPS investigator took M.P. into protective custody and took photos of her injuries. RP 65.

An emergency physician, Jeremy Hutchins, treated M.P. on July 11, 2016. RP 83-4. Dr. Hutchins diagnosed M.P. as having multiple abrasions and contusions of her back, arms, and chin. RP 85, 96; SE 3, 5-16. The secondary diagnosis was non-accidental trauma. RP 85, 94. Dr. Hutchins testified that there was blood in M.P.'s urine, indicative of a contusion to a kidney or a condition called rhabdomyolysis. RP 85-6, 98, 99, 101. He also testified that the injuries were consistent with being caused by an object such as a belt or cord and that M.P.'s skin was broken. RP 88, 90, 92, 98, 102. From the injuries, it appeared to the doctor that the same object was used repeatedly on M.P. RP 102. He concluded that the contusions and abrasions were two to five days old. RP 98. He also testified that depending on the severity of an abrasion, it can leave a permanent mark. RP 97.

M.P.'s cousin, fifteen-year-old L.G., testified. RP 41. He was in the room next door when he heard Penaloza striking or spanking M.P. RP 44, 45. He said that he counted her being struck 25 times. RP 58-9. He testified that when M.P. came out 5 minutes later, she was crying and bleeding from her mouth, and her glasses were broken. RP 47, 53; SE 1. The area around her mouth and chin were covered with blood. RP 57. M.P. was complaining about her back. RP 47. L.G. lifted her shirt and

saw bruises. *Id.* L.G. took a video of the bruises and sent it to his mom. RP 47; SE 18.

At trial, the defendant called his father, E.P, to testify. E.P. testified that when he saw M.P's wounds, he felt really bad and had never seen anything happen like that. RP 121. He said he was surprised and horrified. RP 122. He said everyone was asleep when it happened. *Id.* He spoke to Penaloza very seriously. *Id.* Penaloza told him that he "doesn't know what happened that day" and "doesn't understand what happened that day." *Id.*

Penaloza also testified at his trial. RP 123. He said that he has four kids and disciplines them with "time outs" and spanking. RP 126-7. He testified that he has spanked all of his children before and has used a belt. RP 146.

He testified that his daughter, M.P., started taking her clothes off and showing her body when she was around 8 or 9 years old. RP 129-30. He did not think that M.P. appreciated what he wanted her to do. RP 130. He testified that it was hard for her to communicate and to understand. RP 129. He said that when he talks to her "she would like space off." *Id.*

He said that in July of 2016, spanking was his last resort. RP 133. He said M.P. was naked in the living room in front of everybody and she thought it was funny. RP 138-9. He said that she saw him and started

putting her clothes on. RP 139. He said he tried talking to her for 30 minutes, but she could not understand him. RP 140. He said he spanked her 4 of 5 times with his belt and that she cried. RP 140-1, 161. He said that while he was spanking her, she was moving around. RP 142. He said he then spoke to her for 30 more minutes and told her to think about what she did. RP 142. He said he did not see any blood on her face. RP 144.

On cross-examination, Penalzoza admitted that he just lost his mind and that he got mad. RP 147-8, 161. He said he could not believe it when he saw the picture. *Id.* He testified that he had no idea he caused those wounds until his dad asked him and he had no idea that he went that far. RP 158, 161.

At trial, the defense made no objections to the State's proposed jury instructions. RP 166. The defense proposed one instruction, WPIC 17.07. CP 6. Penalzoza's instruction and the State's proposed instructions were given to the jury. CP 22. The defendant did not ask for any jury instructions defining "reasonable and moderate" or further defining "substantial disfigurement." RP 166. Penalzoza was convicted of second degree assault. CP 27, 29. He now appeals.

III. ARGUMENT

A. PENALOZA HAS WAIVED ANY CLAIM THAT THE JURY INSTRUCTIONS WERE VAGUE BY FAILING TO OBJECT TO THE COURT'S INSTRUCTIONS.

For the first time on appeal, Penalzoza claims that the court did not define the phrase “reasonable and moderate” for the jury. Appellant’s Brief at 2, 6, 7, 9. He also claims for the first time that in the jury instructions, the court did not provide guidance on how jurors should determine if any disfigurement was “substantial.” *Id.* at 2, 6, 9. However, Penalzoza did not object to any of the court’s jury instructions or request that these terms be defined for the jury. RP 166.

In *State v. Fowler*, a defendant claimed that the trial court failed to define the phrase “unlawful force” in the jury instruction defining assault. 114 Wn.2d 59, 69, 785 P.2d 808 (1990), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). The State Supreme Court held that a trial court’s jury instruction may not be challenged on vagueness and overbreadth grounds for the first time on appeal. *Id.*; see also *State v. Releford*, 148 Wn. App. 478, 493-94, 200 P.3d 729 (2009) (holding that a challenge to the trial court’s instructions concerning the definition of “firearm” was waived when defendant failed to object). In *Fowler*, the court quoted from *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976):

Exceptions to the failure of the trial court to give an instruction must clearly apprise the trial judge of the points of law involved. Where the exception and the discussion of it does not do so, points of law or issues involved will not be considered on appeal.

The court rejected Fowler's argument that the error was one on constitutional magnitude. *Fowler*, 114 Wn.2d at 69-70. The court held that the constitution only requires the jury to be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule. *Id.*; see also *State v. Gordon*, 172 Wn.2d 671, 260 P.3d 884 (2011).

In *State v. Benn*, 120 Wn.2d 631, 845 P.2d 289 (1993), a defendant also claimed for the first time on appeal that the terms "common scheme or plan," "single act," and "leniency" were not defined in the jury instructions. Relying on the reasoning of *Fowler*, the court rejected those claims. See also *State v. Whitaker*, 133 Wn. App. 199, 233, 135 P.3d 923 (2006) (failure to propose a definition of "major participant" precluded review of vagueness claim).

Similarly, because the court here instructed the jury on each element of second degree assault, CP 15-6, Penaloza has not raised an issue of constitutional magnitude. His claim that the jury instructions were vague because they failed to define terms is waived. Other than

WPIC 17.07, he did not offer any proposed jury instructions and did not object to the State's instructions. Penaloza had a remedy at the trial court. He could have proposed a clarifying instruction.

In fact, trial courts have considerable discretion in wording jury instructions. *State v. Atkinson*, 113 Wash. App. 661, 666-67, 54 P.3d 702, 705 (2002). Courts have approved the use of dictionary definitions of words, even defining the word "disfigurement." *Id.* at 668 (holding that the Black's Law Dictionary definition of "disfigurement" was accurate and merely supplemented and clarified the statutory language). As such, because Penaloza did not object to the jury instructions in this case or propose any definitions or clarifying instructions, his claim on appeal is waived and the court need not decide whether he has overcome the presumption that the second degree assault statute is constitutional.

B. PENALOZA HAS FAILED TO OVERCOME THE PRESUMPTION THAT THE SECOND DEGREE ASSAULT STATUTE IS CONSTITUTIONAL.

Even if review was not precluded by Penaloza's failure to propose clarifying instructions, he cannot overcome the presumption that the statute is constitutional. Penaloza argues that the second degree assault statute is void for vagueness. The due process vagueness doctrines seeks to ensure that the public has adequate notice of what conduct is proscribed and to ensure that the public is protected from arbitrary ad hoc

enforcement. *State v. Riles*, 135 Wn.2d 326, 348, 957 P.2d 655 (1998). The vagueness doctrine is violated if the provision (1) fails to define the criminal offense so that ordinary people can understand what conduct is proscribed, and (2) fails to provide ascertainable standards of guilt to prevent arbitrary enforcement. *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). A statute fails the second part of the vagueness test only if it contains “no standards” or lacks “minimal guidelines...to guide law enforcement.” *Id.* at 180-1.

The party challenging the statute had the burden of overcoming the presumption that the statute is constitutional. *Id.* at 177. Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand. *United States v. Mazurie*, 419 U.S. 544, 550, 42 L. Ed. 2d 706, 95 S. Ct. 710 (1975).

**1. THE SECOND DEGREE ASSAULT
STATUTE IS NOT UNCONSTITUTIONALLY
VAGUE FOR FAILING TO DEFINE
“SUBSTANTIAL DISFIGUREMENT.”**

Penaloza claims the court did not provide guidance on how jurors should determine if disfigurement is “substantial.” Appellant’s Brief at 2, 6, 9. The terms “substantial bodily harm” and “substantial disfigurement” are not new terms. Jurors have been instructed on “substantial bodily

harm” in countless cases over time. The standard Washington pattern jury instruction, WPIC 2.03.01, was used in this case as well. CP 18.

The term “substantial” is used in a number of criminal statutes that have withstood due process vagueness challenges. *State v. Duncalf*, 177 Wash. 2d 289, 297, 300 P.3d 352, 356 (2013); *see, e.g., State v. Worrell*, 111 Wn.2d 537, 544, 761 P.2d 56 (1988) (“interferes substantially with his liberty” in kidnapping statute is not unconstitutionally vague); *State v. Billups*, 62 Wn.App. 122, 129, 813 P.2d 149 (1991) (“substantial step” in criminal attempt statute is not unconstitutionally vague).

In *State v. Saunders*, 132 Wn.App. 592, 599, 132 P.3d 743 (2006), the defendant challenged the terms “substantial pain” and “considerable suffering” as not being defined in the third degree assault statute. Sanders argued that the jury could have convicted him based on “persistent emotional suffering.” *Id.* at 600. The court of appeals held that “[t]he statute is not void for vagueness because it provides adequate notice of the proscribed conduct and possesses ascertainable standards to prevent arbitrary enforcement.” *Id.* at 599-600. The court explained that the statute proscribed the infliction of bodily harm, not the infliction of emotional pain. *Id.* at 599. As such, the statute was not void for vagueness.

In the case at hand, the jury was instructed that “A person commits

the crime of assault in the second degree when he intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” CP 15. In jury instruction number 7, the jury was instructed that “substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement.” CP 18. Penaloza claims that jurors were not instructed on what is “substantial” disfigurement. Appellant’s Brief at 6.

However, the fact that the word “substantial” is not defined does not mean that the statute is unconstitutionally vague. A common understanding of the word “substantial” provides a sufficient standard to prevent arbitrary enforcement. The requirement that the disfigurement be “substantial” does not invite an inordinate amount of discretion. An ordinary person could reasonably conclude that the injuries inflicted in this case constitute “temporary but substantial disfigurement” as the term is commonly understood. M.P. had multiple contusions on her back, arms, and chin, multiple abrasions, and small lacerations. RP 85, 91; SE 3, 5-16, 18. The emergency physician testified that M.P.’s skin was broken open. RP 90; SE 9-15. The doctor also testified that depending on the severity of an abrasion, it can leave a permanent mark. RP 97.

The legislature was free to leave the meaning of “substantial” up to the jury because people of common intelligence can understand what constitutes “substantial disfigurement.” The term “substantial” speaks for

itself. No further definition was necessary. The meaning of “substantial disfigurement” was correctly left to the common experience of the jury.

As the court explained in *State v. Watson*, 160 Wn.2d 1, 7, 154 P.3d 909

(2007) (internal citations omitted):

We have noted, however, that “[s]ome measure of vagueness is inherent in the use of language. Because of this, we do not require “impossible standards of specificity or absolute agreement.” “[V]agueness in the constitutional sense is not mere uncertainty.” Thus, “a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct’.” Instead, a statute meets constitutional requirements “[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.”

2. THE SECOND DEGREE ASSAULT STATUTE IS NOT UNCONSTITUTIONALLY VAGUE FOR FAILING TO DEFINE “REASONABLE AND MODERATE.”

Here, at Penaloza’s request, the jury was instructed on the defense of physical discipline of a child. It was to his benefit that the jury be instructed on this defense. He now challenges the same instruction he proposed be given to the jury. The instruction reads as follows:

It is a defense to a charge of assault that the force used was lawful as defined in this instruction. The physical discipline of a child is lawful when it is **reasonable and moderate**, and is inflicted by a parent for purposes of restraining or correcting the child. You must determine whether the force used, when viewed objectively, was **reasonable and moderate**. You may, but are not required to, infer that it is unreasonable to do the following act(s) to correct or restrain a child: throwing, kicking, burning, or cutting a child, striking a child with a closed fist, shaking a child under age three, interfering with a child's breathing, threatening a child with a deadly weapon, doing any act that is likely to cause, and that does cause, bodily harm greater than transient pain or minor temporary marks. You shall consider the age, size, and condition of the child, and the location of the injury, when determining whether the bodily harm is reasonable or moderate. This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given. The State bears the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty.

WPIC 17.07 (emphasis added), CP 22.

In a similar case, *State v. Kinchen*, 92 Wn. App. 442, 963 P.2d 928 (1998), the defendant challenged language in a jury instruction that

explained under what circumstances parental discipline is with legal or lawful authority. In that case, he claimed that the statute was void for vagueness, based on the phrase “without legal authority.” *Id.* at 449. The court held:

Here, the jury was instructed...“When done by a parent for purposes of restraining or correcting a child, physical discipline of a child is with lawful authority when it is reasonable and moderate.” Kinchen’s argument that the statute fails to provide notice to parents or citizens of proscribed conduct is not convincing. The statute is not unconstitutionally vague as applied here.

Id. at 451. The court noted that “A standard of reasonableness or moderateness has been applied in this state to actions of a parent.” *Id.* at 450 (citing RCW 9A.15.100).

Here, the jury did not need a further definition of what “reasonable and moderate” means. Based on the testimony and evidence presented at trial, a jury could reasonably conclude that discipline inflicted upon M.P. went beyond what was “reasonable and moderate.” The victim’s cousin counted her being struck 25 times. RP 47. The physical evidence showed extensive injuries. SE 3, 5-16, 18. Penaloza even admitted that he “just lost his mind” and couldn’t believe it when he saw the picture of M.P. RP 147-8. Persons of common intelligence could understand and find that this went beyond reasonable and moderate discipline. No further

definitions were needed. The terms speak for themselves and what amounts to “reasonable and moderate” discipline was correctly left to the common experience of the jury. As such, Penaloza has not proven that the second degree assault statute is unconstitutionally vague.

IV. CONCLUSION

For all the above reasons, the State asks that Appellant’s conviction be affirmed. The second degree assault statute is not unconstitutionally vague as applied to Penaloza. The statute defines the criminal offense so that ordinary people can understand what conduct is proscribed, and provides ascertainable standards of guilt to prevent arbitrary enforcement.

Respectfully submitted this 22nd day of July, 2019,

s/Tamara A. Hanlon
TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, David Trefry, state that on July 22, 2019, I emailed, via the portal, a copy of BRIEF OF RESPONDENT to Jodi R. Backlund and Manek R. Mistry. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of July, 2019 at Yakima, Washington.

s/ David B. Trefry
David B. Trefry WSBA # 16050
Special Deputy Prosecuting Attorney
Yakima County, Washington
Telephone: (509) 534-3505
Fax: (509) 534-3505

YAKIMA COUNTY PROSECUTORS OFFICE

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