

No. 39087-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JAY McKAGUE,

Appellant.

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STATE OF WASHINGTON
BY  COUNTESS
COURT OF APPEALS
DIVISION II

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

The Honorable, Judge Anne Hirsch
Cause No. 08-1-01905-9

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In a prosecution for second degree assault where jury instructions comported with Washington Pattern Jury Instructions: Criminal (WPIC) 10.03 and Revised Code of Washington (RCW) 9A.36.021(1)(a), 9A.08.010(1)(c), and (2), whether the instructions relieved the State of its burden of proof as to the fact of recklessness through intent.

B. STATEMENT OF THE CASE.

1. See Respondent's Brief for the procedural and substantive statement of the case.

C. ARGUMENT

1. Instruction 13 did not create a mandatory presumption on the issue of recklessness.

A mandatory presumption is one in which "the jury is required to find a presumed fact from a proven fact" while a permissive inference is one in which "the jury is permitted to find a presumed fact from a proven fact but is not required to do so." State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 996 (1996). "Mandatory presumptions potentially create due process problems . . . if they serve to relieve the State of its obligation to prove all of the elements of the crime charged." Id.; Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). In order to determine whether a mandatory presumption exists, the reviewing court looks to "whether a reasonable juror would interpret

the presumption as mandatory.” State v. Hayward, 152 Wn. App. 632, 642, 217 P.3d 354 (2009).

“Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.” State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A reviewing court should review jury instructions by reading them as whole, taking the challenged segments in proper context. State v. Pirtle, 127 Wn.2d 628, 656-57, 904 P.2d 245 (1995). It is well-established law that juries are presumed to follow the instructions given them.

RCW 9A.08.010(c) defines “recklessness” as, “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010(2) allows for the substitution of recklessness saying, “[w]hen recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly.”

The second paragraph of WPIC 10.03 was revised in July 2008 “to more closely follow the statutory language” of RCW

9A.08.010(2) and address the related instructional issues which arose in State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.03, cmt. at 211 (3d ed. 2008); 11 WPIC 10.03, note on use at 209 (2008). In Goble, this court held the instruction defining “knowledge” created a mandatory presumption because it conflated the element of intentional assault with knowledge of the victim’s status as a law enforcement officer. Goble, 131 Wn. App. at 203. Even though it appeared to mirror the then current WPIC 10.03,¹ the court said the instruction, “did not follow the exact wording of RCW 9A.08.010(b),” thus it was “confusing, misleading, and a misstatement of the law,” Goble, 131 Wn. App. at 202. As a result, WPIC 10.03 now states, “[When recklessness [as to a particular [result] [fact]] is required to establish an element of a crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]” 11 WPIC 10.03, at 209 (2008) (alterations in original).

In the instant case, the jury instructions included the following, instruction number 11, which stated, “A person commits

¹ Although, not expressly found by the court, it appears the instructions in Hayward were based on the former version of WPIC,¹ whose second paragraph stated in part, “[Recklessness also is established if a person acts [intentionally] [or] [knowingly].]” 11 WPIC 10.03, at 153 (2d ed. 1994) (alterations in original).

the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” [CP 45].

Instruction number 12 defined substantial bodily harm stating, “Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.” [CP 46].

Instruction number 7 stated, “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” [CP 40].

Instruction number 13 then stated,

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

When recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

[CP 47] (emphasis added).

Finally, instruction number 14 (alternative B), stated,

To convict the defendant of the crime of assault in the second degree, *each of the following elements* of the crime *must be proved beyond a reasonable doubt*:

- (1) That on or about October 17, 2008, the defendant intentionally assaulted KEE HO CHANG;
 - (2) That the defendant thereby recklessly inflicted substantial bodily harm on KEE HO CHANG; and
 - (3) That this act occurred in the State of Washington
- If you find from the evidence that *each of these elements* has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to *any one of these elements*, then it will be your duty to return a verdict of not guilty.

[CP 49] (emphasis omitted) (emphasis added).²

In Hayward, Hayward appealed his second degree assault conviction, arguing the jury instruction defining “recklessness” created a mandatory presumption, thereby relieving the State of its burden to prove all elements of the crime charged and violating his due process rights. Hayward, 152 Wn. App. at 635. This court agreed with the defendant and found that the instructional error was not harmless. Id. at 646-47.

The second paragraph of instruction 10 in Hayward, defining “recklessness”, simply stated, “Recklessness also is established if a person acts intentionally.” Id. at 643.³ Hayward argued that because the second paragraph did not exactly follow the statutory

² McKague did not object to these instructions.

³ Although, not expressly found by the court, it appears the instructions in Hayward were based on the former version of WPIC,³ whose second paragraph stated in part, “[Recklessness also is established if a person acts [intentionally] [or] [knowingly].]” 11 WPIC 10.03, at 153 (2d ed. 1994) (alterations in original).

language (as stated in the RCW above), the instruction did not “place any limitation on the intentional acts that could establish the [required] recklessness.” *Id.* at 644 (citation omitted). Hayward was essentially arguing that had the second paragraph read in such a way as to indicate to jury that the substitution of “intentionally” for “recklessness” was permissible only for a finding of recklessness as to a particular fact, then the instructions would not have caused the jury confusion and conflated the statutory elements. *Id.* Likening it to the instructions in Goble, the court agreed the instructions “impermissibly allowed the jury to find Hayward recklessly inflicted substantial bodily harm if it found that Hayward intentionally assaulted Baar.” *Id.* at 645.

The court took express issue with the wording of the “second paragraph” of the instruction because “it did not adequately follow RCW 9A.08.010(2), as evidenced by the 2008 amendment to WPIC 10.03.” *Id.* at 645-46. It reasoned, “Without language limiting the substituted mental states . . . to the specific element at issue . . . , as required by RCW 9A.08,010(2) and revised WPIC 10.03 (2008), jury instruction 10 violated Hayward’s constitutional right to due process by creating a mandatory presumption.” *Id.* at 646.

The facts of the case are unlike those in Hayward, however. The instructions here followed the statutory language of RCW 9A.08.010(2) and revised WPIC 10.03 (2008) nearly verbatim. Unlike the disputed second paragraph in Hayward, the second paragraph in McKague's case had the previously omitted limiting language this court took issue with in Hayward. Instruction 13 said, in part, "*When recklessness as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.*" [CP 47] (emphasis added). Notably, McKague ignores this language in his analysis, instead focusing on the second clause, the language similar to that of Hayward. Pointedly though, this court did not take issue with the existing language of the second paragraph in Hayward, but rather with the omission of the limiting first clause. The State agrees that if the second paragraph of instruction 13 were simply limited to the second clause, then, like Hayward and Goble, McKague would have a valid argument. That is not the case, however. The issue complained of in Hayward, simply does not exist here because the addition of the first clause in both the revised version of the WPIC and instruction number 13 addressed this issue and synchronized

the instructions with the statutory language, thus healing the previous due process injury.

Instruction number 13 clearly and unambiguously limited the jury's ability to substitute "intentionally or knowingly" to the particular fact and element to which "recklessness" applied, not in general as McKague argues. To do as McKague suggests would mean a reasonable juror would have to ignore the limiting first clause,⁴ the single element requiring a finding of "recklessness" which immediately followed in instruction number 14, and the other 19 instructions. This is neither reasonable nor in line with the presumption juries follow the instructions given them. See Richardson v. Marsh, 481 U.S. 200, 211, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (1987).

The State was required to and, in fact, proved each element of McKague's conviction beyond a reasonable doubt. The instructions made this requirement clear to the jury. Other key factors weigh against McKague's argument as well. First, as noted, instruction 13 emphasized its limited application to the particular fact for which recklessness applied. Second, the instructions

⁴ This court appears to have approved of the sufficiency of WPIC 10.03 (2008) on this point by expressly referencing the limiting language of the added first clause. Hayward, 152 Wn. App. at 646.

separately defined “intent” and “recklessness,” emphasizing the distinctiveness of each word as related to the elements they modified. Third, the instructions ended with the “to convict” second degree assault instruction which broke down the crime into the separate elements, and no less than three times noted the separateness of each element the jury must find beyond a reasonable doubt. Specifically, it said, “each of the following elements of the crime must be proved beyond a reasonable doubt,” “each of these elements has been proved beyond a reasonable doubt,” and “as to any one of these elements[.]” [CP 49]. Finally, the language included in the instructions was in accordance with the most recent version of both WPIC 10.03 and 35.13, and, more importantly, RCWs 9A.08.010(1)(c), (2), and 9A.36.021(1)(a). McKague’s reliance on Hayward is misplaced and his argument fails. No instructional error occurred.

2. Even if Instruction 13 created a mandatory presumption, it was harmless error.

“[N]ot every omission or misstatement in a jury instruction relieves the State of its burden.” State v. Jones, 117 Wn. App. 221, 229, 70 P.3d 171 (2003) citing State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). Where a jury instruction is deemed

improper, it is harmless if it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)); State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). “When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence.” Neder, 527 U.S. at 18. In other words, in a presumption case, the reviewing court must determine “whether [the] evidence was of such compelling force as to show beyond a reasonable doubt that the presumptions must have made no difference in reaching the verdict obtained.” Yates v. Evatt, 500 U.S. 391, 407, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991). “To say that an error did not ‘contribute’ to the ensuing verdict is not, of course, to say that the jury was totally unaware of that feature of the trial later held to have been erroneous.” Id. at 403.

In approaching this issue, the court must apply a two-step analysis. First, it must determine

what evidence the jury actually considered in reaching its verdict. If, the fact presumed is necessary to support the verdict, a reviewing court must ask what

evidence the jury considered as tending to prove or disprove that fact. . . . The answer must come . . . from analysis of the instructions given to the jurors and from application of that customary presumption that jurors follow instructions, and specifically, that they consider relevant evidence on a point in issue when they are told that they may do so.

Yates, 500 U.S. at 404. Second, it must “weigh the probative force of that evidence as against the probative force of the presumption standing alone.” Id.

The State submits the analysis in Yates, Neder, and Jones, are instructive in the instant case. In Yates, after determining the jury considered all the evidence tending to prove or disprove the defendant’s intent to kill (under an accomplice liability theory), the Court determined the evidence was clear under the proffered theory as to the defendant’s intent (malice) to kill a shopkeeper, but that it was decidedly unclear, especially in light of Yates’ rebuttal evidence, as to his intent to kill the shopkeeper’s mother. Id. at 409-11. Because the instructions did not include a theory of transferred intent, the clear malice indicated in the shopkeeper’s attempted murder did not transfer to his mother’s murder. Id. at 409. The Court said, “While [the] inference [of malice] from the evidence was undoubtedly permissible, it was not compelled as a rational necessity.” Id. The “evidentiary record simply [was] not clear [as to

the defendant's] intent to kill the victim. Without more, [it] could not infer beyond a reasonable doubt that the presumptions did not contribute to the jury's finding of [Yates'] intent to kill [the shopkeeper's mother]" on an accomplice theory. Id. at 411.

In contrast, in Neder, where the Eleventh Circuit found the jury instruction constituted error and the United States Supreme Court affirmed, the Court held the error was harmless because "materiality was not in dispute" and thus it "did not contribute to the verdict obtained." Neder, 527 U.S. at 7 (quoting United States v. Neder, 136 F.3d 1459, 1465 (11th Cir. 1998) and Yates, 500 U.S. at 403). The Court explained, saying:

[W]e are entitled to stand back and see what would be accomplished by [reversal] in this case. The omitted element was materiality. Petitioner underreported \$5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed. We do not think the Sixth Amendment requires us to veer away from settled precedent to reach such a result.

Neder, 527 U.S. at 15.

Likewise, in Jones, where Jones was convicted of unlawful possession of a firearm in the first degree, Division One held that although the instructions omitted the element of “knowledge,” the error was harmless because “the jury could not have convicted Jones . . . unless it found beyond a reasonable doubt that Jones is the person who put the gun into the wastebasket in the men’s restroom, for, unless Jones is the person who put the gun into wastebasket, he never possessed it at all. Whoever put the gun into the wastebasket could not have done so without knowledge it was in fact a gun. . . .” Jones, 117 Wn. App. at 230.

In Jones, the defendant rushed into the bar where Spragg was an employee, knocked over a candy machine, and went into the men’s restroom. Id. at 224. Spragg then went into the bathroom—passing Jones who was coming out, saw a handgun, and took it to his manager’s office. Id. at 225. Spragg then saw Jones come back into the bar, and then the bathroom, and emerge looking upset. Id. Spragg further testified Jones asked him multiple times for his “piece,” told his acquaintances about his missing “piece” and went to the manager’s office at least twice to demand the return of his gun. Id. With a few minor contradictions, primarily regarding time and other people entering the restroom, a silent

video tape of the events confirmed Spragg's testimony of events. Id. Jones did not testify or present any evidence, his defense theory being someone else put the gun in the basket during the time in question (an issue in controversy during the trial). Id. at 226.

In finding the error harmless, Division One said,

Jones does not suggest that he would introduce any evidence bearing upon the element of knowledge if so allowed. Nor could he. His best defense was the one he used at trial—[that someone else put the gun in the wastebasket]. If a new trial were held, Jones would still have to cope with Spragg's testimony and the evidence on the videotape—showing that only Jones, and not any of those other men, returned to the men's restroom within minutes, came back out, spoke to Spragg in an agitated manner, and pounded on the manager's door, all the while demanding the return of his "piece." This is damning and uncontroverted evidence of knowledge.

Id. at 231. In short, it was beyond a reasonable doubt that the "erroneous omission" of the "knowledge" element (it was not considered an essential element at the time of Jones' conviction) "had no effect on the verdict." Id.

Analogous to Jones and Neder, and dissimilar to Yates and Hayward, the evidence of "recklessness" was uncontroverted in the instant case. Again, RCW 9A.08.010(c) defines a person acting recklessly "when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such

substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” Here, the record demonstrates 37-year old McKague is a much larger and younger man at approximately six feet and 230 pounds, [CP 4-5], than 54-year old Chang. [3-30-09 RP 62]; [Ex. 34]. When McKague attempted to leave the scene after being accused of shoplifting, Chang, Wolf, and Kuhn all testified that Chang stepped in front of McKague and grabbed his sweatshirt to prevent his departure. [3-30-09 RP 63, 105]; [3-31-09 RP 145]. The uncontroverted testimony is that the two then were on the ground and McKague, the much larger and younger man, was on top of Chang, causing him to strike the back of his head on the pavement. While Chang was still on the ground and McKague was over him, McKague repeatedly punched Chang in the face. [3-30-09 RP 63, 105, 122, 146, 147-48]. Once Chang was on the ground, McKague could have simply retreated to his friend’s car, but instead he chose to repeatedly punch the victim in the face—a gross deviation from conduct that a reasonable person would exercise in the same situation (especially in light of the fact that Chang was confronting McKague for shoplifting from him, a criminal act which McKague does not contest).

Moreover, at trial McKague did not argue that he did not recklessly inflict substantial bodily injury, but rather only that the injuries were not substantial and therefore did not qualify for second degree assault. [4-1-09 RP 268, 274]. The defense in this case was neither that the act did not occur nor that McKague either accidentally punched Chang repeatedly in the face or was somehow reasonably protecting himself from an attack by Chang—unsolicited or otherwise. Nor was the defense theory even that a reasonable person in the same situation would have responded in the same fashion. Rather, the only issue in controversy according to the defense was “the damages.” [4-1-09 RP 268]. The State submits that is because evidence of the defendant’s comparable size and age compared to the victim, as well as the sequence of events which ended with McKague repeatedly punching Chang while he was down was uncontroverted, thus it could only be described as reckless.

Recognizing the needless violence of the attack shown on the videotape, the defense further stated, “You’ve seen it. You’re gonna have an emotional response to [it]. You’re gonna say this is just—this is horrible. This is terrible. You see videotapes, you know, on TV of, you know, riots or those videotapes where, you know,

young men do crazy things. It's horrible, okay? It's horrible." [4-1-09 RP 273-74]. The witnesses, the photographs, and the testimony were all consistent and uncontroverted and the defense recognized this at trial. Even if the instruction was erroneous (which the State maintains is not the case), the State submits it is beyond a reasonable doubt the error had no effect on the verdict in McKague's trial.

As in Jones, if a new trial were held, McKague would still have to cope with the witnesses' testimony and the videotape—showing McKague punching Chang while Chang was on the ground and defenseless. [Ex. 33]. Again, McKague did not contest the element of recklessness at trial and he does not now suggest he would introduce any evidence bearing upon the issue of recklessness if so allowed. As the Court said in Neder, "Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial—a retrial not focused at all on the issue of [recklessness], but on contested issues on which the jury was properly instructed." Neder, 527 U.S. at 15. The State submits the Sixth Amendment does not require this court "to veer away from settled precedent to reach such a result." The jury could not have convicted McKague of second degree assault simply by

finding the act of assaulting was intentional. It had to also find the second element that the attack resulted in substantial bodily injury which, by statute, cannot occur without recklessness. The jury could not have found McKague intentionally assaulted Chang, but that the substantial bodily injuries were accidentally inflicted (i.e. they did not recklessly, intentionally, or knowingly occur). McKague's argument fails.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 15th of MARCH, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Supplemental Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 15th day of March, 2010, at Olympia, Washington.


Chong McAfee