

62146-7

62146-7

NO. 62146-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN BRADFORD,

Appellant.

REC'D  
NOV 19 2009  
King County Prosecutor  
Appellate Unit

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

The Honorable Jeffrey Ramsdell, Judge

FILED  
NOV 19 2009  
FRI 4:20  
SUPERIOR COURT  
WASHINGTON

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR<sup>1</sup>

1. Insufficient evidence supports appellant's second degree assault conviction.

2. The second degree assault statute is unconstitutionally vague as applied.

3. The trial court's improper restriction on defense counsel's cross-examination of the State's expert witness and closing argument deprived Bradford of his rights to confront witnesses, to counsel, and to present a defense.

4. The trial court's restriction on defense counsel's closing argument deprived appellant of his constitutional right to counsel and to due process.

Issues Pertaining to Assignments of Error

1. The State alleged appellant caused substantial bodily harm by causing a facial fracture. The State presented expert testimony that in medical jargon the term "fracture" includes a mild bending of a "suture," or the line between two bones of the head, and the assault victim suffered this type of fracture to his nose.

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<sup>1</sup> This appeal was consolidated with appellant's motion for discretionary review (no. 62842-9-I), filed December 12, 2008, which this Court granted.

a. Where under the plain meaning of the statute, a “fracture” requires a break, does insufficient evidence support appellant’s second degree assault conviction?

b. In the alternative, the statute is ambiguous because it does not state whether a “fracture” encompasses the technical medical concept or the word’s common meaning. Does the rule of lenity require this Court to interpret the ambiguous term against the State, and therefore does insufficient evidence support appellant’s conviction?

2. Is the statute unconstitutionally vague because the ambiguous term “fracture” requires an ordinary person to guess at its meaning and fails to establish standards to preclude arbitrary enforcement?

3. The trial court limited defense counsel’s cross-examination of the expert witness on the meaning of “fracture” and prohibited counsel from arguing in closing argument the common meaning of “fracture” was established by its dictionary definition. Did the court deprive appellant of his right to confront witnesses, to the assistance of counsel, and to due process?

B. STATEMENT OF THE CASE<sup>2</sup>

1. Charges, Verdicts, and Sentence

The King County prosecutor charged appellant Allen Bradford with second degree assault following an incident at a basketball game at the Intramural Activities Center at the University of Washington (UW). CP 4-6. The prosecutor later added a bail jumping charge, but after the court severed the charges they were tried separately. CP 7-9, 10-21; 1RP 58-79.<sup>3</sup>

The court instructed the jury on the lesser degree crimes of third and fourth degree assault. CP 80-81, 90-91. The jury convicted Bradford as charged on both counts and the court sentenced him within the standard range. CP 101-11; 12RP 17.

2. Trial Testimony

Bradford, Allen Foulstone, and Foulstone's friend Ryan Purugganan frequented five-on-five pickup basketball games at the IMA gyms. 7RP 21. Ad hoc teams formed on a first-come, first-served basis,

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<sup>2</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – 4/17 and 4/21/08 (morning); 2RP – 4/21/08 (afternoon); 3RP – 4/22 and 4/23/08; 4RP – 6/12, 6/16, and 6/17/08; 5RP – 6/18/08; 6RP – 6/23/08; 7RP – 6/24/08; 8RP – 6/25/08; 9RP – 6/26/08; 10RP – 6/30/08; 11RP – 7/1/08; and 12RP – 8/1/08.

<sup>3</sup> This brief raises no issues related to the bail jumping charge.

and no referees officiated the games. 7RP 22-23; 8RP 21. After each game, the winning team kept the court. 7RP 26.

During one of these outings, Bradford was playing on a team when Foulstone and Purugganan's team took the court. 7RP 27-28; 10RP 48. Foulstone and Bradford were both playing the "guard" position and played man-to-man defense against each other. 7RP 29. Foulstone characterized the game as more "physical" than average but not out of the ordinary. 7RP 28-29, 58, 61. Purugganan testified Foulstone was playing "hard-nosed" as usual. 8RP 24-26, 50.

Foulstone testified that at one point, Bradford shoved Foulstone in an attempt to get open for a pass, and Foulstone careened of bounds. 7RP 31, 35-36; 8RP 61-62. Foulstone quickly stepped back in bounds and used his body to force Bradford away from the basket so Foulstone could secure the rebound. 7RP 31, 34, 62-65. Purugganan described Foulstone's move as "aggressive." 8RP 27. When Bradford's team made the shot, however, possession changed automatically, and Foulstone stepped out of bounds to pass the basketball to another teammate. 7RP 31, 34. Without warning, Bradford approached and struck Foulstone in the face. 7RP 31, 40-41, 76.

Purugganan recalled Bradford said something to Foulstone and Foulstone responded, "I didn't foul you" and raised his hands as if to say,

“What are you talking about?” 8RP 27, 33. Bradford stepped toward Foulstone and punched him in the face with a closed fist. Foulstone fell to the court. 8RP 27, 33-34, 76.

Foulstone did not recall what he was struck with, but vaguely recalled getting up dazed and walking to the bathroom. 7RP 31, 39, 66. In the bathroom, Foulstone discovered he was bleeding from a small cut on the bridge of his nose and from his lip. 7RP 42; 8RP 37-38, 90.

Foulstone’s injuries did not hurt at first, but he later felt pain in his face and in his hip. 7RP 46. Foulstone’s nose swelled almost immediately. 7RP 46. The next morning, his left eye was swollen, but the swelling subsided as the day progressed. 7RP 46, 48.

Foulstone sought medical treatment two days after the incident. 7RP 44, 66-68. The treatment provider referred Foulstone to the radiology department, but Foulstone received no other treatment for his injury. 7RP 47, 70.

The State introduced four photos of Foulstone. Two were taken the day of the incident, and two were taken three days later. 7RP 47; Exs. 1-4. The photos show facial swelling, bruising, and a small cut.

Bradford denied punching Foulstone but acknowledged injuring him. 10RP 54-56. According to Bradford, Foulstone was doing whatever he could to prevent Bradford from getting the ball, and even tripped him at

one point. 10RP 51, 53. Bradford then performed a move in which the player on offense runs at the defender, bumps into him, then moves back to his original position to receive a pass. 10RP 54. After that, Foulstone elbowed Bradford in the mouth. 10RP 54. Shortly thereafter, Bradford's teammate made a shot and Foulstone collected the basketball. 10RP 54-55. Bradford stuck out his elbow so Foulstone would run into it and Foulstone received a bloody nose. 10RP 54-56, 75.

### 3. Medical Testimony and Cross-Examination

Nurse practitioner Heidi Bray treated Foulstone. 8RP 130; 10RP 9. Foulstone told her he had been punched in the nose two days earlier. 8RP 135. Bray observed Foulstone had bruising under his left eye, swelling on the left side of his nose, and a small laceration on the bridge of his nose. 8RP 131.

Suspecting a nasal fracture, Bray ordered a CT scan.<sup>4</sup> 8RP 135. The radiology department's report indicated Foulstone suffered a mild bending of the suture line<sup>5</sup> between Foulstone's nasal bone and another bone located between the bridge of the nose and the eye. 10RP 9-11, 33. According to Bray, "fracture" was an umbrella term used to describe a

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<sup>4</sup> Bray had training in reading simple x-rays but lacked formal training in reading more complex CT scans. 8RP 129; 10RP 18.

<sup>5</sup> A "suture" is the line at which two facial bones join. 10RP 8-9.

variety of medical anomalies, including a mild bending. 10RP 10, 33-35, 37. Based on the radiology report and her observations of Foulstone, Bray diagnosed this type of fracture. 10RP 9-10, 33.

On cross-examination, defense counsel asked Bray about the absence of the word "fracture" in the radiology report and began to list various types of fractures. 10RP 34-35.

[Defense counsel]: So [the radiologist knows how] to express the term fracture . . . ?

[Bray]: I'm certain that the radiologist knows how to dictate the word fracture.

[Defense counsel]: Certainly they can refer in their report and report back to you that there's any number of the different types of fractures that exist, complete fracture, incomplete fracture are terms you've heard expressed, correct?

[Bray]: Should they elect to describe an anomaly they see with the word fracture they certainly do so in many cases and oftentimes they don't, oftentimes they . . . may use more specific [language].

[Defense counsel]: Linear fracture, transfer fracture, all different types of fractures of these --

[Bray]: Not so much in the case of facial bones though. And we're talking about facial bones here.

[Defense counsel]: We're talking about bone here, right?

[Bray]: Well, in this case we're talking about facial bone, suture line, right.

. . . .

[Defense counsel]: Oblique fractures, compression fractures, spinal fractures --

[The State]: Objection to the relevance --

[Defense counsel]: All different types --

[The State]: Objection.

[The Court]: Relevance?

[The State]: Yes, Your Honor.

[The Court]: I'll sustain the objection. I think you made your point. There are many different types of fractures. But we're talking about facial fractures in this specific circumstance.

10RP 34-35.

4. Closing Argument and Court's Ruling to Limit Argument

The State argued in closing that even under Bradford's version, Bradford intentionally assaulted Foulstone because he held out his elbow in retaliation. 10RP 131, 137.

According to the prosecutor, the next issue presented was whether the "fracture that occurred . . . result[ed] in substantial bodily harm?" 10RP 138. Noting Foulstone received a "permanent scar" and experienced bruising and swelling, the prosecutor returned to her argument that substantial bodily harm was demonstrated by a fracture:

Now you may all come into this courtroom thinking, well I thought . . . a fracture was when somebody snapped a bone in two. And that may be your ordinary understanding, but it's not the understanding we have here. Because . . . Bray testified . . . the definition of a fracture is quite broad. In fact, she testified that there were numerous types of fractures. And that a bending of a body part is a fracture.

10RP 139. She then argued the jury should not reject the defense argument that Bradford committed only third or fourth degree assault: "[T]hose inferior offenses are a compromise, aren't they? Because the

facts indicate very clearly that [Bradford] intentionally assaulted . . . Foulstone on that day. And caused his nose to be broken.” 10RP 140.

Defense counsel argued Bray suspected a fracture when sending Foulstone for a CT scan, but the radiologist’s report revealed only mild bending. 10RP 143. He went on:

[Defense counsel]: Fracto [sic] is from the Latin word: fractus, to separate --

[The State]: Objection, Your Honor.

[Defense counsel]: -- from the --

[The State]: Objection, objection, Your Honor.

10RP 143. The State requested a side bar. 10RP 144. Immediately afterward, the following exchange occurred:

[Defense counsel]: From the fracture --

[The State]: Objection.

[The Court]: . . . [G]o ahead sir.

[Defense counsel]: The verb transitive. To burst asunder. Mild bending. Inconsistent.

10RP 144. Defense counsel then went on to argue the radiologists did not in fact confirm Bray’s diagnosis because they never used the term fracture in their report, instead using the term “mild bending.” 10RP 144-46, 155. Because a fracture was commonly understood as a break, the State presented insufficient evidence of a fracture. 10RP 156-57.

The State argued in rebuttal the radiology report was, in fact, consistent with Bray’s diagnosis and that defense counsel unfairly belittled Bray’s diagnosis because she was not a doctor. 10RP 165-67.

After the jury retired, the parties discussed the sidebar:

[The Court]: [Defense counsel] began to discuss the derivations of the word fracture . . . . There was an objection. We discussed the issue in chambers. I sustained the objection on the grounds that there is an abundance of case law including State vs. Anderson . . . that says . . . an undefined term in the statute will be given its usual and ordinary meaning, and the court may use dictionary definitions to determine the usual and ordinary meaning of a term.

In this particular case the jury is left to its own devices to make a determination as to what the ordinary meaning of the term fracture is. There is no more specific definition provided by statute. . . .

[I]s there anything you want to add?

[Defense Counsel]: . . . . [While cross-examining Bray, a]fter . . . we got to the third or fourth [type of fracture] there was an objection. I don't know what the grounds were. . . . But the Court truncated that cross examination.

[The Court]: . . . . I think the ruling was correct . . . [b]ecause . . . the jury has to make its decision based on the ordinary meaning of the term. . . .

[Defense counsel]: Well, there were ten . . . types of fracture. And I think I got to transverse fracture, . . . [number] 4 . . . . And then there were definitions of those particular types of fracture. And, I intended to go . . . into those definitions. . . .

[The Court]: Well, . . . my only concern is that the fact that there isn't a statutory definition, I think the jury needs to go with the ordinary meaning. The ordinary meaning may not comport with what a medical professional might call a fracture.

So . . . the jury may find that the notion of a bent suture, doesn't comport with their common understanding of the term fracture.

[Defense counsel]: And I think the point . . . I was trying to make is . . . that area of testimony was truncated. And I think that the instruction based on the dictionary

definitions may be permissible [and] I think argument as it relates to that, was appropriate.

[The Court]: Okay. Well, let's wait and see if the jury asks for further clarification of the term fracture and we'll see where we go from there.

10RP 172-76. The jury did not inquire during deliberations returned a guilty verdict of second degree assault. CP 95.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS BRADFORD'S SECOND DEGREE ASSAULT CONVICITON.

The State presented evidence Foulstone sustained mild bending of the line between two facial bones. While the State's expert testified she considered this a "fracture," the State presented insufficient evidence Foulstone sustained a fracture based on the common meaning of the word.

a. Due Process Required The State to Prove Each Element of the Second Degree Assault Beyond a Reasonable Doubt.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

RCW 9A.36.021(1)(a) provides one means a person may be guilty of second degree assault: If under circumstances not amounting to first degree assault, he or she “[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.” “Substantial bodily harm” is defined for purposes of that statute as “bodily injury that involves a temporary but substantial disfigurement, a temporary but substantial loss or impairment of any bodily part or organ, or a fracture of any bodily part.” RCW 9A.04.110(4)(b).

- b. Under the Statute’s Plain Meaning, the State Presented Insufficient Evidence the Victim Sustained a Fracture and thus Insufficient Evidence of Substantial Bodily Harm.

Clear and unambiguous statutory language is not subject to judicial construction. State v. Anderson, 58 Wn. App. 107, 111, 791 P.2d 547, 549 (1990). An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term. State v. Van Woerden, 93 Wn. App. 110, 116, 967 P.2d 14 (1998), review denied, 137 Wn.2d 1039 (1999). Moreover, criminal statutes must be given a strict and literal interpretation. Id.

The term “fracture” is defined by neither statute nor Washington case law. Common dictionary definitions of the term include “the act or

process of breaking or the state of being broken,” “the breaking of hard tissue (as a bone, tooth, or cartilage)” or “the rupture (as by tearing) of soft tissue.” Webster's Third New International Dictionary 901 (1993)

Although Bradford is aware of no Washington case directly on point, other jurisdictions addressing the term in the context of their assault statutes treat “fracture” according to its common meaning, as determined by its dictionary definition. See People v. Jaramillo, 183 P.3d 665, 671 (Colo. App. 2008) (where “serious bodily injury” includes fractures, dictionary definition of “fracture” indicates the statute covers broken cartilage) (citing Webster's Third New International Dictionary 901 (1986)): State v. Tiscareno, 190 Ariz. 542, 543-44, 950 P.2d 1163, 1164-65 (Ariz. App. 1997) (“The definition of ‘fracture’ in a medical context is ‘the breaking of a bone or cartilage and the resulting condition.’ New Webster's Dictionary of the English Language 387 (1981).”)

Here, consistent with the photos introduced a trial, nurse Bray noted slight swelling and a small cut on Foulstone’s nose. 8RP 131, 151; 10RP 23. As expressed in closing argument, however, the State’s theory of substantial bodily harm rested squarely on Bray’s “fracture” diagnosis. 10RP 129-31, 137-40, 165-67. But Bray testified only that Bradford suffered a “mild bending” of the suture. 10RP 8-10, 33.

The State therefore did not prove Bradford “fractured” Foulstone’s nose under the common meaning of the term. Because the State did not prove Foulstone suffered a “breaking,” it failed to prove Bradford inflicted substantial bodily harm. The remedy, accordingly, is reversal and dismissal of the charge. Smith, 155 Wn.2d at 505.

c. Assuming the Statute is Ambiguous, the Rule of Lenity Applies.

A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Van Woerden, 93 Wn. App. at 116. If a statute is ambiguous, courts look to other sources of legislative intent to discern the statute’s meaning. Id. at 116 (citing State v. Rhodes, 58 Wn. App. 913, 915-16, 795 P.2d 724 (1990)). If there is no clear contrary legislative intent, this Court applies the rule of lenity, which resolves statutory ambiguities in favor of the accused. Van Woerden, 93 Wn. App. at 116 (citing In re Personal Restraint Petition of Sietz, 124 Wn.2d 645, 652, 880 P.2d 34 (1994)).

The legislature adopted the definition of substantial bodily harm in 1986 contemporaneously with amendments significantly altering the assault statutes. Laws of 1986, ch. 257, §§ 2-7. According to the Final Legislative Report, “[a] significant change in the new assault laws is that, in determining the level of the crime, the seriousness of the harm intended

. . . may not be as important as the harm which actually results.” 1986 Final Legislative Report, 49th Wash. Leg., at 61-62. The statutes also altered the mental elements required for first and second degree assault. Id. at 62.

The legislative history, however, is silent as to whether the undefined term “fracture” should be given its common meaning or a technical medical meaning. Van Woerden, 93 Wn. App. at 116. Without legislative direction, the definition of "fracture" is thus ambiguous. The rule of lenity therefore applies, and this Court should adopt the construction of “fracture” most favorable to Bradford. Id. at 117. That definition, a "breaking" was not proved.

The remedy, again, is reversal and dismissal of the charge. Smith, 155 Wn.2d at 505.

## 2. THE SECOND DEGREE ASSAULT STATUTE IS UNCONSTITUTIONALLY VAGUE.

Alternatively, the Legislature’s failure to define “fracture” renders the definition of “substantial bodily harm” unconstitutionally vague.

The Fourteenth Amendment and article I, section three of the state Constitution protect citizens from impermissibly vague penal statutes. City of Sumner v. Walsh, 148 Wn.2d 490, 499, 61 P.3d 111 (2003).

To avoid unconstitutional vagueness, therefore, a statute must (1) define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and (2) establish standards to permit police to enforce the law in a non-arbitrary, non-discriminatory manner. Walsh, 148 Wn.2d at 499. Unless First Amendment interests are involved, statutes are evaluated in light of the facts of the case, i.e., by “inspecting the actual conduct” of the challenger rather than hypothetical outlying situations. City of Spokane v. Douglass, 115 Wn.2d 171, 182-83, 975 P.2d 693 (1990).

The facts of this case illustrate the ambiguity inherent in the term “fracture,” which in turn renders the “reckless infliction of substantial bodily harm” means of committing second degree assault unconstitutionally vague as applied to Bradford.

“Substantial bodily harm” means “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4)(b). The State relied on evidence of a “fracture” to prove Bradford inflicted “substantial bodily harm.” 10RP 129-30, 137-40, 165-67.

But the undefined term “fracture” fails to specify whether a person could be punished for committing second degree assault by (1) causing a

mere bending or dislocation (according to Bray, within the technical medical definition of “fracture”) or (2) only for causing a break (the common meaning of the word as established by its dictionary definition). Where, as here, "persons of common intelligence must necessarily guess at its meaning and differ as to its applicability," a statute is impermissibly vague. Douglass, 115 Wn.2d at 178.

This ambiguity also invites arbitrary enforcement and subjective decision-making. The ambiguity permitted the State to charge, and the jury to convict, Bradford of second degree assault without proving he caused a “fracture” under the plain meaning of the word.

Because the statute is unconstitutionally vague it is therefore void, and this Court should reverse Bradford’s conviction. Walsh, 148 Wn.2d at 502.

3. THE TRIAL COURT’S LIMITATION ON CROSS-EXAMINATION AND CLOSING ARGUMENT DEPRIVED APPELLANT OF HIS RIGHT TO CONFRONTATION, COUNSEL, AND A FAIR TRIAL.

The trial court improperly limited defense counsel’s cross-examination of an expert’s definition of “fracture” and then prohibited counsel from arguing the common meaning of “fracture” was its dictionary definition. Reversal is required because the court’s rulings

deprived appellant of his right to confront witnesses, to the assistance of counsel, and to due process.

a. The Improper Limitations on Cross-Examination and Closing Argument Deprived Bradford of a Fair Trial.

The confrontation clauses of the United States and Washington Constitutions guarantee the right of a criminal defendant "to be confronted with the witnesses against him." U.S. Const. amend. VI; Const. art. I, § 22; State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). The essential purpose of the confrontation clause is to secure the right of cross-examination, "the principle means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 415 U.S. 308, 315-16, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). A court's decision limiting the scope of cross-examination thus affects the defendant's right to confront the witnesses against him. Davis, 415 U.S. at 315; Hudlow, 99 Wn.2d at 14.

The Sixth Amendment also provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. The right to counsel includes the delivery of closing argument based on all theories supported by the evidence. Herring v. New York, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975); State v. Frost, 160 Wn.2d 765, 768, 161 P.3d 361

(2007), cert. denied, 128 S. Ct. 1070 (2008); City of Seattle v. Erickson, 55 Wash. 675, 677, 104 P. 1128 (1909).

Closing argument is “a basic element of the adversary fact-finding process in a criminal trial.” Herring, 422 U.S. at 858. It serves to “sharpen and clarify” the issues the trier of fact must decide in a criminal case. Id. at 862. Thus, during closing argument, counsel may discuss the evidence and all inferences that may be drawn from the facts in evidence. Frost, 160 Wn.2d at 777-78. Counsel may also argue matters of common knowledge in closing. Wilhelm v. State, 272 Md. 404, 438, 326 A.2d 707 (1974).

A trial court may limit closing argument insofar as it may ensure that argument does not “stray unduly” or “impede the fair and orderly conduct of the trial.” State v. Perez-Cervantes, 141 Wn.2d 468, 475, 6 P.3d 1160 (2000) (quoting Herring, 422 U.S. at 862). A court’s improper limitation on closing argument, however, may infringe on a defendant’s right to counsel. Frost, 160 Wn.2d 765.

A court’s improper limitation of closing argument may also violate Fourteenth Amendment due process rights. Frost, 160 Wn.2d at 773 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Due process requires that the State prove every fact necessary to constitute a charged offense beyond a reasonable doubt. State v.

McHenry, 88 Wash.2d 211, 214, 558 P.2d 188 (1977). Where a trial court limits argument as to any fact necessary to constitute a charged offense, the trial court may lessen the State's constitutionally required burden. Conde v. Henry, 198 F.3d 734, 739 (9<sup>th</sup> Cir.1999) (concluding trial court's action in limiting scope of argument as to element of crime "relieved the prosecution of its burden to prove its case beyond a reasonable doubt").

Here, the most compelling defense theory was that Bradford committed only a lesser degree of assault because Foulstone's injuries were not sufficiently serious to constitute substantial bodily harm. As such, Bradford sought to cross-examine the State's expert on the fact that even in a medical setting a fracture was generally synonymous with a break. 10RP 33-35; 10RP 172-76. Through cross-examination, the defense can introduce substantive evidence that corroborates its theory of the case, thus presenting part of its defense. See State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990) (an accused has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible). The trial court, however, prohibited Bradford from fully exploring that critical area of inquiry on cross-examination.

In closing, Bradford then attempted to argue the jury should consider the everyday meaning of the term "fracture" as set forth in the

dictionary. 10RP 143. But the court prohibited Bradford from doing so. 10RP 143-44, 172-76.

The court erred in restricting Bradford's cross-examination and closing argument. It is true that "trial courts . . . need not define words and expressions that are of ordinary understanding or self-explanatory." State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998). But the court recognized the validity of the defense theory, acknowledging, "the jury may find that the notion of a bent suture doesn't comport with their common understanding of the term fracture." 10RP 176. Citing Anderson,<sup>6</sup> the court also recognized that dictionary definitions were appropriate to determine a term's "usual and ordinary meaning." 10RP 173; see, e.g., Van Woerden, 93 Wn. App. at 116; cf. Wilhelm, 272 Md. at 438 (counsel may argue matters of common knowledge). But the trial court inexplicably prohibited Bradford from arguing that under the dictionary definition of fracture, the State failed to prove Foulstone sustained a fracture and therefore failed to prove substantial bodily harm. This was error. Conde, 198 F.3d at 739.

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<sup>6</sup> 58 Wn. App. at 111 ("An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term.")

b. The Error was not Harmless and this Court Should Reverse the Assault Conviction.

The court's erroneous rulings require reversal because they were not harmless. A constitutional error is harmless only if the State proves beyond a reasonable doubt that "any reasonable jury would have reached the same result in the absence of the error." Frost, 160 Wn.2d at 782 (quoting State v. Guloy, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986)).

The State cannot meet this burden. The court's improper limitation of cross-examination and closing argument went to the core of the defense theory and prohibited Bradford from developing his argument that the State did not prove second degree assault beyond a reasonable doubt. This is demonstrated by the fact that, as argued above, the State did not prove beyond reasonable doubt that Foulstone's nose was fractured.

But even if this Court finds minimal evidence supporting the jury's verdict, the court's act was tantamount to an endorsement of the State's interpretation of the term "fracture" according to its broader medical usage. The limitation on argument propounding the defense's narrower interpretation of "fracture" was therefore capable of affecting the jury's decision-making to Bradford's detriment.

D. CONCLUSION

Because it is supported by insufficient evidence, this Court should reverse and dismiss the second degree assault conviction. Alternatively, the statute is unconstitutionally vague, and therefore void, and thus reversal is required. Finally, this Court should also reverse Bradford's conviction because the trial court's limitation on cross-examination and closing argument denied Bradford his rights to confrontation, counsel, and due process.

DATED this 19<sup>TH</sup> day of November, 2009.

Respectfully submitted,

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