69726-9 69726-9

No. 69726-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

KIER GARDNER, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

B. FACTS 1

1. Substantive Facts 1

C. ARGUMENT 4

1. Gardner had a meaningful opportunity to present his defense notwithstanding the trial court's decision determining, following an in camera review, disclosure of alleged impeachment evidence pertaining to Officer Murphy was not required because it was immaterial to Gardner's guilt. 4

2. Gardner was not deprived of his right to present a defense or due process of law when the trial court denied his proposed volitional jury instruction, precluded irrelevant testimony and where Gardner voluntarily chose to testify to support his defense after consulting with his attorney..... 11

a.) The trial court did not abuse its discretion by excluding irrelevant testimony. 11

b.) Gardner did not present sufficient evidence to warrant the trial court giving a jury instruction that the state was required to prove beyond a reasonable doubt that Gardner acted with volition when he assaulted Officer Murphy. 13

c.) The trial court did not impermissibly compel Gardner's testimony where Gardner consulted with his attorney and tactically chose to testify even after the court informed his attorney that even if Gardner testified the court could not advise whether Gardner's proposed defense witness' testimony would be admissible. 18

D. CONCLUSION 22

TABLE OF AUTHORITIES

Washington Court of Appeals

State v. Allen, 50 Wn.App. 412, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988). 5

State v. Buss, 76 Wn.App. 780, 887 P.2d 920 (1995) 10

State v. Finley, 97 Wn.App. 129, 982 P.2d 681 (1999) 14

State v. Garcia, 45 Wn.App. 132 (1986) 10

State v. Kim, 134 Wn.App. 27, 139 P.3d 354 (2006). 11

State v. Perez, 137 Wn.App. 97, 151 P.3d 249 (2007) 6

State v. Ponce, 166 Wn.App. 409, 269 P.3d 408 (2012) 15

State v. R.H.S., 94 Wn.App. 844, 974 P.2d 1253 (1999) 10

State v. Rehak, 67 Wn. App. 157, 834 P.2d 651 (1992) 4

State v. Roberts, 25 Wn.App 830, 611 P.2d 1297 (1997) 6

State v. Stubsjoen, 48 Wn.App. 139, 738 P.2d 306 (1987) 6

State v. Utter, 4 Wash. App. 137, 479 P.2d 946 (1971) 15, 16, 17

State v. We, 138 Wn. App. 716, 158 P.3d 1238 (2007) 21

Washington Supreme Court

American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 802 P.2d 784 (1991) 14

Seattle v. Stalsbroten, 138 Wn.2d 227, 978 P.2d 1059 (1999) 19

State v Koslowski, 166 Wn.2d 409, 209 P.3d 479 (2009) 22

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995) 15

State v. C.J. 148 Wn.2d 672, 63 P.3d 675 (2003) 6

State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989) 17

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002) 5

State v. Deer, 175 Wn.2d 725, 287 P.3d 539 (2010) 13, 15, 16, 17

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004) 20

State v. Foster, 91 Wn.2d 466, 589 P.2d 789 (1979) 18

State v. Gregory, 158 Wn.2d 759, 147 P.3d 759 (2006) 4

State v. Guloy, 104 Wn.2d 412, 705 p.2d 1182 (1985) 22

State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009) 6

State v. Jones, 67 Wn.2d 506, 408 P.2d 247 (1965) 5, 6, 11

State v. Knutson, 121 Wn.2d 766, 854 P.2d 617 7

State v. Lively, 130 Wn.2d 1, 921 P.2d 1035 (1996) 16

State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) 7

State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) 5

State v. Mullen, 171 Wn.2d 881, 259 P.3d 158 (2011) 4

State v. Rice, 118 Wn.2d 876, 828 P.2d 1086 (1986) 7

State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988) 14

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004) 5

State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008) 18

State v. Van Auken, 77 Wn.2d 136, 460 P.2d 277 (1969) 18, 21

State v. Walker, 136 Wn.2d 767, 966 P.2d 883(1998). 14

United States Supreme Court

Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). 5

Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987)... 17

United States Court of Appeals

United States v. Bland, 517 F.3d 930 (7th Cir. 2008) 10

Rules and Statutes

ER 401 7

ER 608 ..... 5, 8

RAP 10(a)(3)..... 14

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred determining, in camera, potential impeachment evidence pertaining to Officer Murphy in a prior unrelated search warrant application, was immaterial and therefore not subject to disclosure in this case.

2. Whether the trial court denied Gardner a right to present a defense by excluding and limiting testimony to relevant and admissible evidence.

3. Whether Gardner made a voluntary tactical decision to testify in his defense after consulting with his attorney and the trial court clarified that even if Gardner chose to testify, the court wasn't ruling on the admissibility or relevancy of Gardner's new proposed defense witness testimony.

B. FACTS

1. Substantive Facts

On July 28th 2012, Whatcom County Sheriff's deputy Ellsworth overheard raised voices coming from a room on the floor of St. Joseph hospital where he was responding to an unrelated matter. RP 18. Ellsworth looked toward the room and observed a woman with her back to the glass interior of the windows, be picked up and thrown to the ground by a patient. RP 19. Upon seeing this, Ellsworth ran over, ordered the patient, who was trying to leave the hospital room, to get back inside his room. RP 20. Ellsworth then called security. RP 20. Ellsworth noted that

the patient, later identified as Kier Gardner, was agitated, highly sensitive, angry and calling everyone names. RP 20.

Gardner had come by ambulance earlier in the evening in handcuffs with swelling on his face and a considerable laceration on the back of his head. RP 70, 33, 81. After talking to ER nurse Shahan, Gardner who came into the hospital angry and agitated, agreed to calm down and his handcuffs were removed. RP 70-71. Gardner initially was reluctant to answer questions but eventually he provided his name and was more forthcoming to hospital staff. RP 72. Nurse Shahan, who treated Gardner, noticed no nausea, no confusion, no vomiting and that Gardner's speech was deliberate and purposeful. RP 81, 97. She did however; note Gardner's mood was up and down while he was at the hospital. RP 75.

Later in the evening, Nurse Shahan noticed Gardner was arguing loudly with a lady friend, later identified as Charity Wells. Shahan warned Gardner to behave or Wells would have to leave his hospital room. RP 73. Fifteen minutes later Nurse Shahan observed Wells hit the interior glass door full force and fall to the ground. Nurse Shahan immediately got Wells out of Gardner's hospital room and called for security. RP 72. Wells told Nurse Shahan she was ok –though, Shahan noticed Wells appeared upset and was crying. Id.

Hospital security officer, David Smit, responded to the incident, along with Deputy Ellsworth. RP 51. Shortly thereafter, officer Murphy arrived and after talking to Deputy Ellsworth, Nurse Shahan and trying to talk to Charity Wells, who was on speaker phone with Gardner's mother, Murphy determined she had probable cause to arrest Gardner for assault in the fourth degree for his assault on Charity Wells. RP 128, 132.

Deputy Ellsworth and hospital security Guard Smit assisted Murphy in effectuating Gardner's arrest without incident. RP 134. After Gardner was handcuffed in his hospital room, Murphy advised him he was under arrest. RP 138. As Murphy tried to read Gardner his rights, Gardner became agitated, yelling "Fuck off, you fat bitch." RP 53, 55, 60, 138. Officer Murphy tried to restart giving Gardner his Miranda warnings to ensure he heard and understood them. RP 63. While Murphy was advising the handcuffed Gardner kicked back with one of his legs hitting Murphy squarely in the face breaking Murphy's glasses and making her head feel like it was exploding. RP 142. Ellsworth and security Guard Smit both observed the assault and immediately restrained Gardner covering his head and his legs to contain his ability to move. RP 145-6. Gardner was thereafter put in four point restraints. RP 146.

Gardner was charged with assault in the third degree for kicking Officer Murphy in the face while she was reading Miranda warnings to

him pursuant to RCW 9A.36.031(1)(g) and assault in the fourth degree for assaulting Charity Wells earlier in the evening, pursuant to RCW 9A.36.041. Following a jury trial, Gardner was convicted as charged. CP 31-41, 28, 31. Gardner timely appeals. CP 42-53.

C. ARGUMENT

1. Gardner had a meaningful opportunity to present his defense notwithstanding the trial court's decision determining, following an in camera review, disclosure of alleged impeachment evidence pertaining to Officer Murphy was not required because it was immaterial to Gardner's guilt.

Gardner contends he was denied due process of law when the trial court determined in-camera that the state was not required to disclose unrelated officer conduct as immaterial impeachment evidence. Br. of App. at 15.

Due Process guarantees disclosure of material information in the possession of the prosecution, including impeachment evidence if determined to be material. State v. Gregory, 158 Wn.2d 759, 147 P.3d 759 (2006). Due process violations are reviewed *de novo*. State v. Mullen, 171 Wn.2d 881, 259 P.3d 158 (2011).

In addition to due process concerns, Gardner has a constitutional right to present evidence in his defense. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), State v. Darden, 145 Wn.2d 612, 620, 41 P.3d

1189 (2002). That right encompasses the right to cross-examine witnesses to show bias, prejudice or interest. Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). That right is not absolute however, and does not guarantee the right to present irrelevant or inadmissible evidence. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004), State v. Maupin, 128 Wn.2d 918, 924-925, 913 P.2d 808 (1996), *see also* ER 608.[1]

Evidence bearing on a witness's credibility must be material and relevant to matters sought to be proved and specific enough to be free from vagueness. State v. Jones, 67 Wn.2d 506, 408 P.2d 247 (1965). A witness however, cannot be impeached on matters collateral to the issues being tried. State v. Allen, 50 Wn.App. 412, 423, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988).

Thus, the exclusion of such evidence lies within the sound discretion of the trial court and such decisions will not be reversed absent an abuse of discretion. State v. C.J. 148 Wn.2d 672, 686, 63 P.3d 675

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[1] ER 608 (b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of rime as provided in rule ER 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or

(2003). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable grounds. Id. It is within a trial court's discretion to refuse to allow cross-examination that will only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Roberts, 25 Wn.App 830, 834, 611 P.2d 1297 (1997). Appellate courts cannot substitute their own reasoning for the trial court's reasoning absent an abuse of discretion. State v. Stubsjoen, 48 Wn.App. 139, 147, 738 P.2d 306 (1987).

A court "necessarily abuses its discretion however, by violating a defendant's constitutional rights." State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009), *citing* State v. Perez, 137 Wn.App. 97, 105, 151 P.3d 249 (2007). Whether the trial court's discretionary decision implicates a defendant's confrontation rights is a question of law subject to de novo review. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010), *relying on,* State v. Iniquez, 167 Wn.2d 273, 217 P.3d 768 (2009).

The trial court did not err when it determined in-camera that potential impeachment evidence was immaterial in this case or limiting cross examination of Officer Murphy to relevant and admissible evidence.

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untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evidence is material and must be disclosed when there is a " ' " reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," " or if the information "probably would have changed the outcome of [the] trial." Id *citing,* State v. Knutson, 121 Wn.2d 766, 854 P.2d 617, *quoting* State v. Rice, 118 Wn.2d 876, 828 P.2d 1086 (1986). To be material, there must be "more than a 'mere possibility' that evidence might have affected the outcome of the trial.' State v. Knutson, 121 Wn.2d at 773, *quoting* State v. Mak, 105 Wn.2d 692, 704-5, 718 P.2d 407 (1986). Materiality encompasses admissibility; "if evidence is neither admissible or likely to lead to admissible evidence[,] it is unlikely that disclosure of the evidence could affect the outcome of a proceeding." Id. Therefore, to be admissible and perhaps material, the evidence at issue must be relevant. To be relevant, the evidence makes the existence of a fact of consequence to the case more likely or less likely to be true than without the evidence. ER 401.

The trial court did not abuse its discretion by declining to order disclosure of officer Murphy's previous misconduct in a search warrant application because this information was immaterial to Gardner's guilt in light of the overwhelming and cumulative evidence presented against Gardner at trial. Furthermore, a review of the transcript reveals that

officer Murphy's prior misconduct was collateral to the issues presented below. ER 608(b) generally prohibits impeachment of a witness' credibility on specific instances of misconduct –though there is an exception for acts relating a witness' reputation for truthfulness. However, even when, as in here, the acts relate to untruthfulness, ER 608(b) prohibits impeachment by extrinsic evidence. Therefore, even if disclosed, Gardner would only be able to at most inquire if Murphy had a reputation for truthfulness or had misrepresented facts in a search warrant application affidavit. More importantly however, whether or not Murphy was previously untruthful in an unrelated incident was not relevant since Murphy's credibility was not a material issue at trial.

The contested issues at trial were whether Gardner assaulted Charity Wells-an event Murphy did not observe but arrested Gardner for based on multiple eye witness accounts and whether, Gardner acted volitionally when he kicked Murphy-not whether Murphy was being truthful that she was kicked. Multiple witnesses observed Gardner kicked Murphy in the face and nobody, including Gardner or Wells contested that Charity Wells was Gardner's fiancé. Thus, Murphy's prior misconduct was irrelevant and immaterial to the issues before the court.

The trial court therefore did not err or violate Gardner's due process rights in finding in cameral that disclosure of Murphy's

misconduct was not warranted. Gardner has not made the requisite showing that had Officer Murphy's prior misconduct been disclosed, Gardner would have been able to impeach her in any kind of meaningful way or that such impeachment would be material to Gardner's guilt given the overwhelming evidence presented below. Gardner makes much to do about the fact the Officer Murphy was the complaining witness. The transcript demonstrates however, notwithstanding this fact, that Murphy's credibility was not material issue below because her testimony was cumulative to the other witnesses who testified that they observed Gardner assault Wells and subsequently, Murphy.

Gardner contends nonetheless the undisclosed evidence was particularly relevant because officer Murphy's testimony was in conflict with both Charity Wells and Gardner's mother regarding how she learned Wells was Gardner's fiancé. Gardner also argues the details of what position Gardner was in when he kicked Murphy in the face was also highly relevant. Br. of App. 19. The state disputes both these contentions.

Nothing in the record demonstrates the conflict in Officer Murphy's testimony from deputy Ellsworth regarding the position Gardner was in when he kicked Murphy was material or relevant particularly when no one contested whether or not Gardner kicked Murphy. Furthermore, whether Murphy learned Wells was Gardner's fiancé from Gardner's mom

or some other source was not particularly relevant either when Wells, Nurse Shannon and Officer Shannon all testified that Wells identified herself as Gardner's fiancé. As in, State v. Garcia, 45 Wn.App. 132 (1986), the failure to disclose Murphy's prior misconduct was not error since her prior untruthfulness in an unrelated warrant application was not relevant or material to the issues at trial. See, United States v. Bland, 517 F.3d 930, 934 (7th Cir.2008). (The court found that while officer misconduct files may be subject to disclosure, the files weren't material given the small role the officer played in the defendant's guilt.) Gardner's argument should be rejected.

Even if the court impermissibly limited cross-examination by failing to order disclosure of Murphy's prior misconduct, such error was harmless beyond a reasonable doubt. State v. R.H.S., 94 Wn.App. 844, 849, 974 P.2d 1253 (1999). To resolve claims of harmless error where there has been a restriction on cross –examination appellate courts consider 'the importance of the witness' testimony, whether the evidence is cumulative, the extent of corroborating and contradictory testimony, the extent of cross examination otherwise permitted and the strength of the state's case. State v. Buss, 76 Wn.App. 780, 789, 887 P.2d 920 (1995), *overruled on other grounds*, State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999). The record reflects Murphy's testimony was not material to

Gardner's conviction for the assault on his fiancé Charity Wells, and was cumulative to other testimony regarding Gardner's assault on Murphy.

2. Gardner was not deprived of his right to present a defense or due process of law when the trial court denied his proposed volitional jury instruction, precluded irrelevant testimony and where Gardner voluntarily chose to testify to support his defense after consulting with his attorney.

Next, Gardner contends the trial court violated his right to due process of law, his right to present a defense and, his right against self-incrimination by declining to give his proposed jury instruction defining a volitional act, precluding him from calling the jail nurse Magana and compelling Gardner to testify. Br. of App. at 22.

a.) The trial court did not abuse its discretion by excluding irrelevant testimony.

While Gardner has a constitutional right to defend against the state's accusations, those rights are not absolute and do not encompass the right to present irrelevant evidence. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010). Evidence is relevant only if it has any tendency to make any fact of consequence to the case more or less likely than without the evidence. A trial court's decision to exclude evidence is reviewed on appeal for an abuse of discretion. State v. Kim, 134 Wn.App. 27, 41, 139 P.3d 354 (2006).

The trial court acted well within its discretion in excluding Whatcom County Jail Nurse Magana. Gardner proposed Magana testify to the medications he was given in the hospital for possible concussion and his treatment in jail for the staples he received at the hospital. Gardner also wanted nurse Magana to testify that he had questioned her about why he was in jail. Br. of App. at 26, RP 173, 183.

The defense however, failed to previously put the state on notice that they wished to call Nurse Magana. See, RP 173. Moreover, the defense offer of proof did not include evidence or testimony that could logically connect the effect of medications given to Gardner in jail or the alleged concussion to his assaultive behavior that would make Nurse Magana's testimony relevant to the issues Gardner wanted to present in his defense. Gardner insisted he was not seeking a diminished capacity defense or going to call an expert witness but nonetheless wished to call Nurse Magana to demonstrate Gardner did not know what he was doing at the time he assaulted Wells or Murphy. RP 174, 183.

Under these circumstances the trial court reasonably determined Nurse Magana's proposed testimony was speculative, predicated in large part, on hearsay from the Gardner's medical records and not logically connected to the issues before the jury. The trial court therefore did not abuse its discretion or err in determining that the condition of Gardner was

in in the jail was irrelevant to Gardner's medical condition/or awareness of what he was doing at the time he assaulted either Wells or Officer Murphy. RP 185. To allow such testimony, the court concluded, would promote allowing the jury to speculate based on a witness not competent to testify to such matters.

b.) Gardner did not present sufficient evidence to warrant the trial court giving a jury instruction that the state was required to prove beyond a reasonable doubt that Gardner acted with volition when he assaulted Officer Murphy.

Next, Gardner argues the trial court erred denying his request to give his proposed jury instruction on volitional control. Br. of App. at 25. Gardner contends his defense was predicated on the basis that he lacked volitional control based on his head trauma and therefore was not aware of what he was doing when he kicked officer Murphy. Id, State v. Deer, 175 Wn.2d 725, 733-734, 287 P.3d 539 (2010).

He asserts therefore, that he was entitled to a jury instruction that instructed the jury that the state had the burden to prove "a certain minimal element of volition to establish criminal liability. In other words, a person must be aware of their actions and voluntarily chose to take that action." when he assaulted Murphy. See, CP 8-10.

While Gardner assigns error to the trial court's failure to give his proposed jury instruction, he fails to brief the issue or otherwise argue his

position, instead arguing he should have been allowed to argue his actions were involuntary, thus excusing him from criminal liability. This Court need not consider this assignment of error in light of Gardner's failure to develop or cite to authority to support his argument that the failure to give the proposed instruction amounts to reversible error. RAP 10(a)(3), American Legion Post No. 32 v. City of Walla Walla, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

Even if this issue is reviewed, relief is not warranted. Due process is generally satisfied if the trial court instructs on each element of the crime and that the state beards the burden to prove each element beyond a reasonable doubt. State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988). The trial court appropriately instructed the jury on each element of the crime in this case and the state's burden. CP 11-27.

A trial court's refusal to give an instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A defendant is entitled to have his theory of the case submitted to the jury under appropriate jury instructions when the theory is supported by substantial evidence. State v. Finley, 97 Wn.App. 129, 982 P.2d 681 (1999). A specific instruction need not be given when a more general instruction adequately explains the law and enables the parties to argue their theories of the case. State v. Ponce, 166 Wn.App. 409, 269 P.3d 408

(2012). A defendant is not entitled to an instruction that inaccurately represents the law or is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

In Utter, the defense sought to argue, similar to this case, that the defendant acted involuntarily when he committed murder and therefore could not be held criminally responsible. Unlike Gardner, Utter presented expert testimony that he acted involuntarily based on a conditioned response as a result of jungle warfare training. On appeal, the court noted the defense theory was similar to a diminished capacity defense related to whether the defendant had the requisite actus reus necessary to hold him responsible for his crime. Id at 141. The Utter court found nonetheless, that because the evidence did not demonstrate Utter was in this "automastic" state at the time of the crime, the trial court did not err declining to give an instruction on volition. Id at 143.

In State v. Deer, 175 Wn.2d 725, 287 P.3d 539 (2012), the court more recently considered whether the state must prove volition as an element in a strict liability sex offense case. Deer asserted that once she produced evidence that she lacked the ability to act volitionally at the time of the offense (because she claimed to be asleep,) the burden should shift to the state to prove beyond a reasonable doubt that she acted with requisite volition. The court rejected this argument holding instead that

Deer was entitled, based on State v. Utter, 4 Wash. App. 137, 479 P.2d 946 (1971), to argue lack of volition or conscious action as an affirmative defense for which the defendant has the burden of proof by a preponderance of the evidence. State v. Deer, 175 Wn.2d at 733.

Deer and Utter suggest Gardner's defense, while not a diminished capacity defense, is nonetheless an affirmative defense. In which case, Gardner would not be entitled to his proposed instruction without substantial competent evidence to support his defense. Gardner argues nonetheless, that the testimony below and proposed testimony of jail nurse Magana should have been sufficient to require the court to instruct the jury that the state had the burden to prove Gardner acted volitionally when he kicked Officer Murphy in the face. But as in Utter, her proposed testimony was not enough to demonstrate Gardner was unaware of what he was doing because of his head wound when he kicked Officer Murphy.

Even if Gardner's defense is not characterized as an affirmative defense, he should still required to provide substantial evidence to support his theory before the trial court could reasonably consider whether the jury should also be instructed that the state had to disprove Gardner's defense. *See*, State v. Lively, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996) when a defense negates an element of the charged offense, due process may require the state to bear the burden of disproving the defense.), but *see*,

State v. Camara, 113 Wn.2d 631, 781 P.2d 483 (1989). (In light of Martin v. Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987), the assignment of the burden of proof on a defense to the defendant is not precluded by the fact that the defense "negates" an element of the crime.)

Similar to Utter, none of the evidence below or proposed defense evidence (offer of proof) competently or logically established that when Gardner kicked Officer Murphy in the face, Gardner was not acting volitionally based on his head laceration or alleged concussion. Moreover, unlike Deer, Gardner was permitted to and could argue his theory of the case notwithstanding the trial court's decision to not give his proposed jury instruction, based on the evidence and jury instructions as a whole. RP 260, 265, 269. ("we heard he had a concussion. We know he had nine stitches.....was he just acting based on the situation without thinking about what he was doing or perhaps without even intending to do what we have heard was allegedly done.") RP 269.

The competent evidence presented below, even if Gardner's proposed defense witness testimony were considered, overwhelmingly demonstrated Gardner acted and spoke deliberately while he was at the hospital notwithstanding his mood swings. The trial court was not therefore required to instruct the jury that the state had the burden of

proving beyond a reasonable doubt that Gardner's assault was volitional based on the evidence presented below.

c.) The trial court did not impermissibly compel Gardner's testimony where Gardner consulted with his attorney and tactically chose to testify even after the court informed his attorney that even if Gardner testified the court could not advise whether Gardner's proposed defense witness' testimony would be admissible.

Next, Gardner asserts the trial court compelled him to testify to support his defense, thereby violating his constitutional right to silence and due process of law. Br. of App. at 27.

The Fifth Amendment to the United State's Constitution and Article 1, Sec. 9 of the Washington State Constitution protect an accused from being compelled to testify at trial. The Washington State Supreme Court has held that these two provisions should be given the same interpretation. State v. Unga, 165 Wn.2d 95, 100, 196 P.3d 645 (2008). The term "compelled' has been held to connote that the accused was forced to testify against his will, and that testimony was exacted under compulsion and over the defendant's objection. State v. Van Auken, 77 Wn.2d 136, 460 P.2d 277 (1969), *see also*, State v. Foster, 91 Wn.2d 466, 473, 589 P.2d 789 (1979).

Defendants in criminal trials are often required to testify in order to prove an affirmative defense or testify to their side of the story to mitigate

the risk of conviction. The dilemma of whether to choose to remain silent and not testify or present a defense historically is not been characterized as violating a defendant's constitutional privilege against self-incrimination. A defendant's voluntary production of testimonial evidence is not protected by the Fifth Amendment. Seattle v. Stalsbroten, 138 Wn.2d 227, 232, 978 P.2d 1059 (1999), (whether, in the context of a DUI investigation, evidence of a suspect's refusal to perform field sobriety tests was "compelled" self –incrimination.)

Gardner contends the trial court compelled his testimony. The record demonstrates otherwise. After Gardner made an offer of proof to demonstrate the relevance of his proposed defense witness testimony, the trial court clarified that none of the proposed testimony, in light of Gardner's decision not to seek a diminished capacity defense based on expert medical testimony, would be relevant without the defendant's testimony. RP 179. While at first blush, the court's comments are concerning, the court retreated the following day after Gardner submitted a revised defense witness list and advised the court that he wished to invoke his Fifth Amendment right not to testify. RP 182.

After again listening to Gardner's revised offer of proof, the trial court clarified that the medical condition of the defendant pre-hospital and post hospital/incident was irrelevant to whether the defendant could form

the requisite intent to assault at the time he kicked Officer Murphy in the face. The jail nurse who had contact with Gardner after he was transported to jail following the incident and the EMT/officer who ordered Gardner be transported to the hospital for treatment of his laceration were, in the court's opinion, were not competent to testify as to whether or not Gardner acted volitionally when he assaulted Officer Murphy. The trial court explained that to allow such testimony would simply be inviting the fact-finders to inappropriately speculate as to Gardner's mental/medical state at the time of the kick. RP 186.

Thereafter, Gardner's attorney made an untimely request to continue the trial to obtain an expert witness and after the trial court denied his request, consulted Gardner who only then, decided to waive his privilege and testify. RP 188, 189. ((Gardner also asserts the trial court abused its discretion denying his mid trial motion for continuance to obtain expert testimony). Br. of App. at 29. The trial court does not abuse its discretion denying a belated motion that was not predicated on newly discovered information or where Gardner made no showing that he attempted in due diligence to secure an expert prior or during trial or that an expert could/would support his defense). State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004). The trial court nonetheless clarified at that time that even if Gardner did testify, he wasn't ruling on the

admissibility/relevancy of Gardner's proposed defense witness testimony or theory. Notwithstanding this clarification, Gardner affirmatively chose to testify, thereby waiving his right to not testify. RP 190-192.

These facts demonstrate Gardner was not-at the point he chose to testify- compelled to testify, but rather made a tactical decision to testify to support his defense theory. Making a tactical decision, in consultation with his attorney, does not demonstrate Gardner was in anyway compelled or forced to testify in a constitutional sense. See, State v. Van Auken, 77 Wn.2d 136, 460 P.2d 277 (1969). (Officer's testimony did not operate to compel the defendant to testify in the constitutional sense of the term. Although the defendants did not want to testify, they decided they were required to in order to put forward their theory of the case. This is not "compelled" testimony in the sense of the 5th Amendment or Washington Constitution Art. 1, Sec. 9). [2]

Even if the trial court could be construed as having erroneously 'compelled' Gardner's testimony, such constitutional error in this case should be construed as harmless. State v. We, 138 Wn. App. 716, 726, 158 P.3d 1238 (2007), *citing* State v. Guloy, 104 Wn.2d 412, 425, 705

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[2] The state Supreme Court has accepted review of an unpublished Opinion in State v. Mendez, *reported at* 174 Wn. App. 1074 (2013), on the issue of whether the trial court compelled the defendant's testimony in the Constitutional sense.

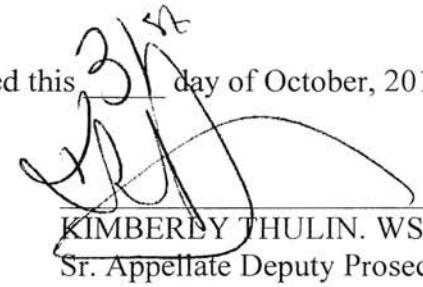
p.2d 1182 (1985). "If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless." State v Koslowski, 166 Wn.2d 409, 431, 209 P.3d 479 (2009).

The uncontroverted evidence in this case overwhelmingly demonstrates Gardner assaulted both Christy Wells and Officer Murphy. Nothing in the record, or even the proposed defense testimony, demonstrates Gardner did not act intentionally, was unconscious or otherwise not in control of his actions when he assaulted either Wells or Murphy. Both his words and actions were deliberate by all witness accounts. Any error of Gardner's constitutional rights alleged in this case, was therefore harmless beyond a reasonable doubt.

D. CONCLUSION

Based on the foregoing, the State respectfully requests this court affirm Gardner's judgment and sentence for assault in the third and fourth degree.

Respectfully submitted this 31st day of October, 2013.



KIMBERLY THULIN. WSBA #21210
Sr. Appellate Deputy Prosecutor
Counsel for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Marla Zink, addressed as follows:

Marla Zink
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98122

TM Stanik
Legal Assistant

10/31/13
Date