

FILED  
COURT OF APPEALS  
DIVISION II

 ORIGINAL

08 DEC -5 AM 11:44

No. 37440-4-II

STATE OF WASHINGTON

BY CA DEPUTY COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

TYSHON SWAIN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable , Judges S. Brooke Taylor and Ken Williams  
Cause No. 07-1-00183-1

---

BRIEF OF RESPONDENT

---

CAROL L. CASE  
Deputy Prosecuting Attorney  
Attorney for Respondent  
WSBA # 17052

11m 12/14/08.

**TABLE OF CONTENTS**

A. APPELLANT’S ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 2

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT..... 3

E. CONCLUSION..... 11

## TABLE OF AUTHORITIES

### Federal Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S.ct.1068, 25 L.Ed.2d 368 (1970).....	8
<i>Neder v. United States</i> . 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).....	4,5

### Washington Cases

<i>Gerberg v. Crosby</i> , 52 Wn.2d 793, 795, 329 P.2d 184 (1958).....	10
<i>Seattle v. Heatley</i> , 70 Wn.App. 573, 579, 854 P.2d 658 (1993), <i>review denied</i> , 123 Wn.2d 1011, 869 P.2d 1085 (1994).....	10
<i>State v. Blair</i> , 117 Wn.2d 479, 491, 816 P.2d 718 (1991) .....	8
<i>State v. Brown</i> , 147 Wn.2d 330, 341, 58 P.3d. 889 (2002).....	4, 5
<i>State v. Carlin</i> 70 Wn.App. 698, 703, 700 P.2d 323 (1985). .....	8
<i>State v. Ciskie</i> , 110 Wn.2d 263, 280, 751 P.2d 1165 (1988).....	6
<i>State v. Contreras</i> , 57 Wn.App. 471, 473. 788 P.2d 1114 .....	8
<i>State v. Cruz</i> , 77 Wn.App. 811, 814-15, 894 P.2d 573 (1995).....	9
<i>State v. Goble</i> , 131 Wn.App. 194, 126 P.3d 821 (2005) .....	3
<i>State v. Guloy</i> , 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), <i>cert denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).....	5, 8
<i>State v. Huynh</i> , 49 Wn.App. 192, 198, 742 P.2d 160 (1987), <i>review denied</i> , 109 Wn.2d 1024 (1988) .....	7

<i>State v. Jones</i> , 71 Wn.App. 798, 812 863 P.2d 85 (1993), <i>review denied</i> , 124 Wn.2d 1018, 881 P.2d 254 (1994).....	8
<i>State v. Kirkman</i> , 159 Wn.2d 918, 927, 155 P.3d 125 (2007) .....	6
<i>State v. Stephens</i> , 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)], <i>cert denied</i> , 475 U.S. 1020 (1986).....	5
<i>State v. Thomas</i> , 150 Wn.2d 821, 844, 83 P.3d 970 (2004) .....	3
<i>State v. Traweck</i> , 43 Wn.App. 99, 107-08, 715 P.2d 1148, <i>review denied</i> 106 Wn.2d 1007 (1986) .....	8
<i>State v. Wilber</i> , 55 Wn.App. 294, 298, 777 P.2d 36 (1989).....	6

### **Constitutional Provisions**

U.S. Const. Amend VI.....	6
Wash. Const. Article I, § 21.....	6

### **Statutes**

RCW 9A.36.021.....	3
--------------------	---

### **Rules**

RAP 10.3(b) .....	2
Washington Evidence Rule 704.....	9

**A. APPELLANT'S ASSIGNMENTS OF ERROR**

1. Defendant claims that the trial court erred by providing an erroneous definition of recklessness.
2. Defendant claims that the trial court erred by giving Instruction No. 11, which reads as follows:

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 the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.  
Instruction No. 11, Supp CP

3. Defendant claims that the trial court's instruction defining recklessness contained an improper mandatory presumption.
4. Defendant claims that the court's instruction defining recklessness impermissibly relieved the state of its burden to establish each element of proof beyond a reasonable doubt.
5. Defendant claims that Dr. Garlick invaded the province of the jury by expressing an explicit opinion on the defendant's guilt.
6. Defendant claims that Dr. Garlick's opinion testimony on an ultimate issue violated his constitutional right to a jury trial.

7. Defendant claims that Dr. Garlick should not have been permitted to testify that choking causes a substantial impairment of a bodily function.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court's Instruction No. 11 misstated the law and relieved the State of its burden of proof. Assignment of Error Nos. 1, 2, 4.
2. Whether the trial court's Instruction No. 11 defining recklessness created an unconstitutional mandatory presumption. Assignment of Error No. 3.
3. Whether Dr. Garlick's opinion invaded the province of the jury and violated the defendant's constitutional right to a jury trial. Assignment of Error Nos. 5, 6, 7.

**C. STATEMENT OF THE CASE**

Pursuant to RAP 10.3(b), the State accepts defendant's recitation of the procedural and substantive facts set forth in his opening brief at pages 3 through 6 with the following correction:

Defendant cites RP (2-13-08) 65-55 on page 3 of his opening brief for the proposition that the defendant called Ms. Owen to pick him up because his truck was stuck. The actual pages for the cite are RP (2-13-08) 64-65.

**D. ARGUMENT**

**I. INSTRUCTION NO. 11 NEITHER CREATED A MANDATORY PRESUMPTION NOR RELIEVED THE STATE OF ITS BURDEN OF PROVING AN ELEMENT OF THE OFFENSE.**

Defendant claims that Instruction No. 11, Supp. CP. did not place any limitation on the intentional or knowing acts that could establish the recklessness required by RCW 9A.36.021 and cites *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005) where similar language in an instruction defining “knowledge” was found to require reversal. In *Goble*, the trial court’s “knowledge” instruction informed the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” *State v. Goble*, 131 Wn.App. at 202. That language was found to be ambiguous.

It is the State’s position that *Goble* was primarily decided because the jury expressed actual confusion over the knowledge instruction. This court should distinguish the instant case. Unlike *Goble*, the jury here evidenced no confusion over Instruction No. 11. Thus, there is no evidence that Instruction No. 11 impacted the deliberations in any way and if there was any error it was harmless.

Moreover, not every omission or misstatement in a jury instruction relieves the State of its burden. *State v. Thomas*, 150 Wn.2d 821, 844, 83

P.3d 970 (2004). A jury instruction, that is claimed to be erroneous, which omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Neder v. United States*. 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). “[A]n instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Neder*, 527 U.S. at 9. The *Neder* test for determining harmless error (where the claimed error is of constitutional magnitude) is “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Id.* at 15. When applied to omissions or misstatements of elements in jury instructions, “the error is harmless if that element is supported by uncontroverted evidence.” *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d. 889 (2002).

In the instant case, the assault charge at issue contains two mental states; intent and recklessness. Instruction 6 defines Assault in the Second Degree, Instruction 7 sets out the intent element in paragraph number 1, and the reckless element in paragraph number 2, Instruction 9 defines the mental state of intent, and instruction 11 defines the mental state of recklessness.

Read together, these instructions do not conflate the intentional and reckless elements, which are set out as separate elements in the to-convict instruction and separate mental states instructions. As instructed here, the jury could only have convicted the defendant if it found beyond a reasonable doubt that he intentionally assaulted Ms. Owen and in doing so

recklessly inflicted substantial bodily harm. Instruction No. 11 did not relieve the State of its burden of proving every element of Assault in the Second Degree.

Moreover, this alleged error in the jury instructions is harmless beyond a reasonable doubt. A constitutional error is harmless if the reviewing court is convinced beyond a reasonable doubt that the same result would have been reached in the absence of the error. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 182 (1985), cert denied, 475 U.S. 1020, 106 S.Ct. 11208, 89 L.Ed.2d 321 (1986) [*citing State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)], cert denied, 475 U.S. 1020 (1986). Constitutional error is presumed prejudicial and the State must prove that the error was harmless. *Stephens*, 93 Wn. 26 at 190-91. When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if uncontroverted evidence proves that element beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) [*citing Neder v. United States*, 527 U.S. 1, 18-19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)].

The uncontroverted evidence in the instant case clearly established that the defendant intentionally assaulted Ms. Owen and in doing so, inflicted substantial bodily harm; she lost consciousness, she was unable to breath, she was unable to talk. Uncontroverted evidence supported the defendant's assault conviction beyond a reasonable doubt. Accordingly any error in instructing the jury was harmless beyond a reasonable doubt and the conviction must be affirmed.

**II. THE DEFENDANT’S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS NOT INFRINGED UPON WHEN DR. GARLICK STATED HIS OPINION THAT CHOKING CAUSES SUBSTANTIAL BODILY INJURY.**

A trial court’s decision to admit expert testimony is reviewed for an abuse of discretion. *State v. Ciskie*, 110 Wn.2d 263, 280, 751 P.2d 1165 (1988).

The State does not dispute the fact that under both the United States Constitution and the Washington State Constitution, the defendant is entitled to a jury trial. U.S. Const. Amend VI, Wash. Const. Article I, § 21.

Defendant, citing *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007), claims that opinion testimony on an ultimate issue presents a manifest constitutional error if it is a “nearly explicit” or “almost explicit” statement by the witness that the witness believes the accused is guilty.

Testimony deemed to be an opinion as to a defendant’s guilt must relate to the defendant. *State v. Wilber*, 55 Wn.App. 294, 298, 777 P.2d 36 (1989).

Dr. Garlick never mentioned the defendant in any of his testimony. RP (2-14-08) 18-41. However, Dr. Garlic did testify as to the effects choking would have on a person being choked and the physical evidence

that would be visible on a person who had been choked. RP (2-14-08) 18-21. In addition, Dr. Garlic testified to the physical signs of choking he observed on Ms. Owen's neck. RP (2-14-08) 26-27. Based on Dr. Garlic's explanation of what happens to the respiratory (air supply cut off) and circulatory system( blood supply to the brain cut off) of a person who has been choked, RP (2-14-08) 18-19, he could certainly testify to the fact that Ms. Owen suffered a substantial impairment of a bodily function RP (2-14-08) 28. Ms. Owen reported to Dr. Garlic that she had been choked and nearly lost consciousness. RP (2-14-08) 26. Ms. Owen testified on direct examination that the defendant choked her with his hands, that she could not breathe or talk at the time he was choking her and that her vision went black. RP (2-13-08) 71-72. Losing the ability to talk, breath, and remain consciousness is clearly a substantial impairment of a bodily function; the jury could certainly come to that conclusion on its own. At no point did Dr. Garlic testify that Ms. Owen suffered substantial bodily harm as defendant would have this court believe in his opening brief at page 15.

Erroneous admission of expert testimony under ER 702 is not of constitutional magnitude. *State v. Huynh*, 49 Wn.App. 192, 198, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988). Thus error is

not prejudicial unless, within reasonable probabilities, it materially affected the outcome of the trial. *Huynh*, 49 Wn.App. at 198.

Had Dr. Garlic's testimony been an impermissible opinion on the defendant's guilt, the error would have been one of constitutional magnitude. *State v. Carlin* 70 Wn.App. 698, 703, 700 P.2d 323 (1985). Because Dr. Garlic did not state an opinion on the defendant's guilt, there is no error of any magnitude.

However, if this court finds error, the State asked the court to find that any error was harmless.

When error is claimed, the court typically determines if there is a substantial likelihood that any error affected the verdict. *State v. Contreras*, 57 Wn.App. 471, 473, 788 P.2d 1114 (1990) [*quoting State v. Traweck*, 43 Wn.App. 99, 107-08, 715 P.2d 1148, *review denied* 106 Wn.2d 1007 (1986)], *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991) [*citing In re Winship*, 397 U.S. 358, 90 S.ct.1068, 25 L.Ed.2d 368 (1970)]. When error affects a separate constitutional right, it is subject to the stricter standard of constitutional harmless error. *Id.* Constitutional error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Jones*, 71 Wn.App. 798, 812 863 P.2d 85 (1993), *review denied*, 124 Wn.2d 1018, 881 P.2d 254 (1994); *State v. Guloy*, 104 Wn.2d 412,

426, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed. 2d 321 (1986).

The evidence in the instant case was overwhelming that the defendant choked Ms. Owen to the point she nearly lost consciousness, could not breathe, and could not talk. Dr. Garlic saw the bruising on Ms. Owen's neck, which was consistent with being choked. Deputy Ley took pictures of the bruising on Ms. Owen's neck. Error, if there was any, is harmless. Furthermore, the account Ms. Owen gave about the defendant's truck being in the ditch on the evening of March 10, 2007 was consistent with law enforcement finding the truck in the ditch two days before Ms. Owen reported this incident to the police and consistent with Ms. Paden's and Ms. Dove's testimony as to what they observed on Siebert Road on March 10, 2007. (RP (2-14-08) 83-103.

Washington Evidence Rule 704, Opinion on Ultimate Issue states:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

“Whether testimony constitutes an impermissible opinion about the defendant's guilt depends upon the circumstances of each case.” *State v. Cruz*, 77 Wn.App. 811, 814-15, 894 P.2d 573 (1995). Factors to consider

include the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence presented.

*Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011, 869 P.2d 1085 (1994). Opinions based solely upon inferences from the physical evidence and the expert's experience, and not based upon the defendant's credibility, may properly be admitted. *Seattle v. Heatley* 70 Wn.App. at 579. The decision to admit opinion testimony is within the discretion of the trial court. *Seattle v. Heatley*, 70 Wn.App. at 579, 585.

A qualified expert is competent to express an opinion on a proper subject even though he thereby expresses an opinion on the ultimate fact to be found by the trier of fact. . . . *Gerberg v. Crosby*, 52 Wn.2d 793, 795, 329 P.2d 184 (1958).

Under the circumstances of the instant case, Dr. Garlick's statement that Ms. Owen suffered a substantial impairment of a bodily function, RP (2-14-08) 28, was a permissible opinion. Dr. Garlick did not tell the jury what result to reach. Dr. Garlick's opinion did not rely on a judgment about the defendant's credibility, but rested upon his experience, training, information received from Ms. Owen and observations of Ms. Owen. The fact that Dr. Garlick's opinion supports the jury's conclusion

that the defendant was guilty does not make it an improper opinion on guilt.

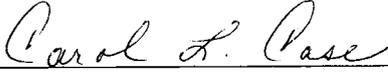
The trial court did not abuse its discretion in admitting Dr. Garlick's opinion.

**E. CONCLUSION**

Based on the foregoing, the State respectfully asks this Court to affirm the defendant's conviction for Assault in the Second Degree.

DATED this 3rd day of December, 2008 at Port Angeles,  
Washington.

Respectfully submitted,

  
\_\_\_\_\_  
Carol L. Case, WABA # 17052  
Deputy Prosecuting Attorney  
Attorney for Respondent

FILED  
COURT OF APPEALS  
DIVISION II

08 DEC -5 AM 11:46

STATE OF WASHINGTON

NO. 37440-4-IBY cm  
DEPUTY

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

STATE OF WASHINGTON,  
  
Respondent,  
  
vs.  
  
TYSHON SWAIN,  
  
Appellant.

AFFIDAVIT OF SERVICE BY MAIL

U

STATE OF WASHINGTON )  
: ss.  
County of Clallam )

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 4th day of December, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the *Brief of Respondent*, addressed as follows:

MR. DAVID C. PONZOHA, CLERK  
COURT OF APPEALS, DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

TYSHON SWAIN, DOC#796138  
STAFFORD CREEK CORRECTION CENTER  
191 CONSTANTINE WAY  
ABERDEEN, WA 98520

BACKLUND & MISTRY  
203 EAST FOURTH AVENUE, SUITE 404  
OLYMPIA, WA 98501

Doreen Hamrick  
Doreen Hamrick

SUBSCRIBED AND SWORN TO before me this 4th day of December, 2008

Ann Marie Monger  
(PRINTED NAME:) Ann Marie Monger  
NOTARY PUBLIC in and for the State of  
Residing at Port Angeles, Washington  
My commission expires: 10/21/2012

