

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38101-0-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MISTY VIOLET ALVAREZ,

Appellant.

BRIEF OF RESPONDENT

**JAMES B. SMITH
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Deputy Prosecutor
for Respondent**

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TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. PROCEDURAL HISTORY.....	1
III. STATEMENT OF THE CASE.....	2
IV. ISSUES PRESENTED.....	5
V. SHORT ANSWERS.....	5
VI. ARGUMENT.....	5
I. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON THE DEFINITION OF “DISFIGUREMENT.”	5
II. THERE WAS AMPLE EVIDENCE TO SUPPORT THE APPELLANT’S SECOND DEGREE ASSAULT CONVICTION.	7
VII. CONCLUSION	9

TABLE OF AUTHORITIES

Page

Cases

Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 50 A.2d 799 (1947)..... 6

Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943) 6

Caruso v. Hall, 101 A.D.2d 967, 477 N.Y.S.2d 722 (1984)..... 6

Gillman v. Gillman, 319 So.2d 165, 166 (Fla.Dist.Ct.App. 1975)..... 6

State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1993) 8

State v. Atkinson, 113 Wn.App. 661, 54 P.3d 702 (2002, *review denied* 149 WN.2d 1013 (2003) 5

State v. Castle, 86 Wn.App. 48, 935 P.2d 656 (1997)..... 7

State v. Hill, 48 Wn.App. 344, 739 P.2d 707 (1987, *review denied* 109 Wn.2d 1018 (1987) 6

State v. Hovig, 149 Wn.App. 1, 202 P.3d 318 (2009) 7

Superior Min. Co. v. Industrial Commission, 309 Ill. 339, 141 N.E. 165 (1923)..... 6

Statutes

RCW 9A.52.050..... 1

Other Authorities

Black’s Law Dictionary (7th ed. 1999)..... 6, 7

Webster’s Third New International Dictionary (1993)..... 6

I. INTRODUCTION

The appellant appeals her conviction for assault in the second degree, arguing error in the jury instructions and insufficiency of the evidence. However, the jury instructions properly informed the jury of the relevant legal definition and there was ample evidence to support the jury's verdict. The Court should therefore deny the appellant's appeal and affirm her conviction.

II. PROCEDURAL HISTORY

The appellant was charged by amended information with burglary in the first degree, assault in the second degree, and two counts of bail-jumping while charged with a class A felony. The appellant proceeded to jury trial on July 16, 2008, and was convicted on all counts the following day.

At sentencing, the appellant argued that her convictions for burglary in the first degree and assault in the second degree constituted the same criminal conduct. The State asked the trial court to employ the anti-merger statute, RCW 9A.52.050, and treat the convictions separately. The trial court, the Honorable Judge James Stonier presiding, declined this invitation and found the two crimes to be the same conduct for sentencing

purposes.¹ The trial court then imposed concurrent high-end sentences, with the highest sentence being forty-eight months in prison. The instant appeal timely followed.

III. STATEMENT OF THE CASE

On July 13th, 2007, the appellant broke into the apartment of Brandi Savage and savagely beat her while Ms. Savage's infant daughter slept in the next room. The appellant was angry with Ms. Savage because she was dating the appellant's estranged husband, Jesus Alvarez Rodriguez or "Chewy" as he was also known. RP I 74-88. On the 13th, the appellant went to Ms. Savage's apartment to confront her about the relationship, finding Ms. Savage sitting outside her apartment smoking a cigarette. RP I 78.

When Ms. Savage saw the appellant walking up the stairs towards her, she retreated into her apartment and locked the door with the deadbolt. RP I 80. Ms. Savage was planning to call Chewy, but before she could do so the appellant broke through the door, entered her apartment, and began striking her in the face and head. RP I 80-82. The appellant struck Ms. Savage around ten times, at one point knocking the victim to the ground. When Ms. Savage struggled to her feet, the appellant struck

¹ As a result of this ruling, the appellant's claims on appeal will have no practical effect on her sentence. Of course, this is not to say that the issues asserted are moot; but merely to note that the appellant, even if successful, will see no reduction in her sentence.

her again a couple of time. RP I 82. Despite her injuries, Ms. Savage was eventually able to push the appellant out of her apartment. As the appellant was leaving, she told the victim to leave her husband alone. RP I 82.

As a result of the appellant's vicious attack, Ms. Savage suffered injuries to her face, head, and chest. Ms. Savage testified that she had two black eyes, her head was swollen, and her ear was bruised. These injuries took three weeks to heal. RP I 87. Ms. Savage's sister, Brittany Savage, came to the hospital immediately after the attack and observed her sister's injuries. Brittany Savage described her sister thusly, "she looked terrible. She's bruised and lumpy and she looked like she got beat up." RP I 64. Brittany Savage further stated that the victim's face continued to swell for some time after the 13th, and was not completely healed for a month or so. RP I 65.

Officer Michael Berndt with the Longview Police Department responded to the hospital on July 13th and took several photographs of Ms. Savage's injuries. These photographs were admitted at trial as exhibits 3, 4, and 5. RP I 106-107. Four days later, on July 17th, Officer Berndt re-contacted Ms. Savage and took two more photographs of her injuries. These photographs, admitted at trial as exhibits 6 and 7, showed the progression of the bruising on Ms. Savage's face. RP I 115-116.

The appellant then testified on her own behalf, and denied breaking the door to Ms. Savage's apartment, entering into it, or attacking Ms. Savage inside. She admitted assaulting Ms. Savage, but claimed it was a mutual fight. On cross-examination, the appellant conceded that she had previously denied being in a fight when interviewed by the police. The appellant further admitted that she had lied to the police about the incident to avoid getting in trouble, however she nonetheless maintained that this new version was in fact the truth.² RP II 165-186.

In instructing the jury on assault in the second degree, the trial court defined "substantial bodily harm", instruction number 16, as:

"bodily harm 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."

The trial court also gave the following instruction to the jury, number 17, which defined "disfigurement" as "that which impairs or injures the beauty, symmetry, or appearance of a person; that which renders unsightly, misshapen, or imperfect, or deforms in some manner." The appellant objected unsuccessfully to this instruction.³ In closing argument, defense counsel argued that Ms. Savage's injuries were not substantial

² Unsurprisingly, the jury did not find this testimony credible.

³ The appellant's brief describes the learned trial judge's procedure for jury instructions as "imprudent and frustrating." Appellant's Brief at 7. Appellate counsel's personal opinions about the Cowlitz County bench are irrelevant and unhelpful.

enough to qualify as a second-degree assault. RP II 230-231. However, the jury returned a guilty verdict on this count.

IV. ISSUES PRESENTED

1. Was the trial court's definition of "disfigurement" in instruction seventeen error?
2. Was there insufficient evidence to support the appellant's conviction for assault in the second degree?

V. SHORT ANSWERS

1. No.
2. No.

VI. ARGUMENT

I. The Trial Court Correctly Instructed the Jury on the Definition of "Disfigurement."

The appellant complains that the trial court's definition of disfigurement, instruction number 17, was an incorrect statement of the law. However, the appellant did not propose any other definition of disfigurement at trial and has similarly failed to provide an alternative definition on appeal. Contrary to the appellant's claims, this instruction accurately defined a key term for the jury and was based on undisturbed case law.

In State v. Atkinson, 113 Wn.App. 661, 54 P.3d 702 (2002, *review denied* 149 WN.2d 1013 (2003)), the court approved the giving of an

identical instruction defining disfigurement. The court further noted that this definition was in accord with Black's Law Dictionary (7th ed. 1999) and Webster's Third New International Dictionary (1993), and that it was accurate and served to "supplement and clarify" the statutory language for second degree assault. Atkinson, 113 Wn.App. at 668. The court also rejected a claim the instruction lessened the burden of proof, holding that:

Under the instructions, the State was required to prove that Mr. Atkinson intentionally assaulted Ms. Paul and recklessly caused temporary, but substantial impairment to her appearance or that she was temporarily, but substantially rendered unsightly or deformed in some manner. Under the instructions, Mr. Atkinson was still able to argue his theory of the case, which was that he was only guilty of fourth degree assault, by showing the disfigurement was not substantial.

Id.

Importantly, the Atkinson decision did not invent this definition from whole cloth, but rather drew it from State v. Hill, 48 Wn.App. 344, 347, 739 P.2d 707 (1987, *review denied* 109 Wn.2d 1018 (1987)). Moreover, the Hill court based its holding on a host of cases from other jurisdictions. See Gillman v. Gillman, 319 So.2d 165, 166 (Fla.Dist.Ct.App. 1975); Bethlehem-Sparrows Point Shipyard, Inc. v. Damasiewicz, 187 Md. 474, 50 A.2d 799 (1947); Caruso v. Hall, 101 A.D.2d 967, 477 N.Y.S.2d 722 (1984); Branham v. Denny Roll & Panel Co., 223 N.C. 233, 25 S.E.2d 865 (1943); Superior Min. Co. v. Industrial

Commission, 309 Ill. 339, 141 N.E. 165 (1923). This collection of cases from other jurisdictions, along with Black's Law Dictionary, indicates that this definition is well established within the law.

Instruction number 17 was not, therefore, a misleading definition but rather served to define an important term for the jury. Without this instruction, the jury would be left to speculate as to the meaning of “disfigurement,” leading to the possibility the verdict would be based on personal belief or opinion rather than the law. Given this, it was not error for the trial judge in this case to rely upon these precedents. It must be remembered that “trial courts have considerable discretion in wording jury instructions.” State v. Castle, 86 Wn.App. 48, 62, 935 P.2d 656 (1997). The instruction complained of by the appellant was well within the trial court's discretion, and this Court should reject any assertion otherwise.

II. There Was Ample Evidence to Support the Appellant's Second Degree Assault Conviction.

The appellant argues there was insufficient evidence to support the appellant's conviction for assault in the second degree, apparently on the theory that bruising is never a sufficient injury for this crime. However, this claim has no support in the case law and is without merit. This Court has recently analyzed this issue in State v. Hovig, 149 Wn.App. 1, 202 P.3d 318 (2009). There, the defendant had bitten an infant's face in what

he described as a game of “rabid dog.” These bites caused a large mouth shaped bruise on the infant’s right cheek and large bruising on the left cheek. Hovig, 149 Wn.App. at 5-6. Medical testimony indicated these bruises would likely last for seven to fourteen days. Id. at 6.

This Court held these injuries constituted a temporary but substantial disfigurement, and found there was sufficient evidence to support a conviction for assault in the second degree. Id. at 13. The Court noted that the photographs, combined with the testimony that the injuries would persist for seven to fourteen days, “fit squarely within the statutory definition” of substantial bodily harm. Id. This Court also endorsed the holding of State v. Ashcraft, 71 Wn.App. 444, 859 P.2d 60 (1993), which similarly held that bruising may constitute substantial bodily harm.⁴

Here, the victim was struck ten or more times in the face and head. These blows caused two black eyes, substantial swelling, and a bruised ear. These injuries persisted for between three and four weeks. The actual photographs of the injuries, exhibits 3-7, have been transmitted to this Court for its review. Upon viewing these photos, there can be no doubt there was sufficient evidence to prove the victim suffered substantial bodily injury. The Court should find there was sufficient evidence to support the appellant’s conviction.

⁴ Whether bruising does qualify as substantial bodily harm is properly a question of fact for the jury to decide in each particular case.

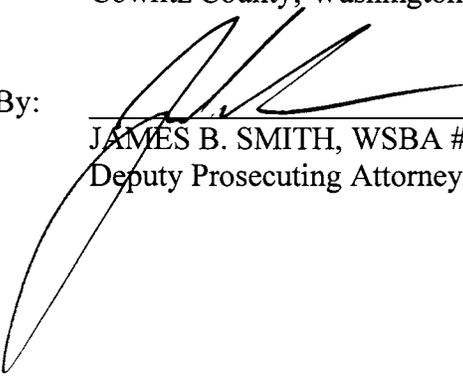
VII. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the appellant's appeal. The trial court correctly instructed the jury and there was sufficient evidence to support the jury's verdict. The State asks this Court to affirm the appellant's conviction for assault in the second degree.

Respectfully submitted this 4th day of June, 2009.

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