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A. Assignments of Error

Assignments of Error

1. The trial court erred when it denied the defendant's motion in limini which would have prevented the state's expert witness from testifying that the injury to SHG was not consistent with normal wiping during a diaper change.
2. The trial court erred when it denied the defendant's motion in limini which would have prevented the state's expert witness from testifying that the injury to SHG was inconsistent with an accidental injury.
3. The defendant's right to trial by jury guaranteed by Wash. Const. Art. 1, sec. 21 and sec. 22 and by the Sixth and Seventh Amendments was violated when the trial court allowed the state's expert witness to testify that the injury in this case was not consistent with normal wiping during a diaper change.
4. The defendant's right to trial by jury guaranteed by Wash. Const. Art. 1, sec. 21 and sec. 22 and by the Sixth and Seventh Amendments was violated when the trial court allowed the state's expert witness to testify that the injury in this case was inconsistent with an accidental injury.
5. The trial court erred when it refused to give defendant's proposed instruction, which would have included the standard, bracketed language based on WPIC 35.50 as set forth below:

An assault is an intentional touching of another person [with unlawful force] that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

6. The defendant was denied due process of law in violation of the Fourteenth Amendment based on the insufficiency of the evidence to convict him of Assault of a Child in the Second Degree.

Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it denied the defendant's motion in limine to prohibit an expert witness from testifying that the injury to SHG was not consistent with normal wiping during a diaper change and that the injury was inconsistent with an accidental injury? The defense to the assault charge was that the injury to a four month old child's vaginal area was done accidentally during a diaper change. (Assignments of Error 1 and 2.)
2. Whether the defendant was prejudiced in violation of his state and federal constitutional rights to a jury trial when the state's expert witness was allowed to testify to impermissible opinions that the injury to SHG was not consistent with normal wiping during a diaper change and that the injury was inconsistent with an accidental injury? ” (Assignments of Error 3 and 4.)
3. Whether the trial court erred when it refused to give the defendant's

proposed instruction based on WPIC 35.50 which included the language “with unlawful force” and that was based on evidence that was presented during the trial regarding the use of accidental force that caused injuries to SHG? (Assignment of Error 5.)

4. Whether the prosecutor met its burden of proof beyond a reasonable doubt by providing sufficient evidence to allow the jury to convict the defendant of the crime of Assault of a Child in the Second Degree?

(Assignment of Error 6.)

B. Statement of the Case

Statement of Procedure

Robert Paul Gilbert was charged by information on February 2, 2010 with Assault of a child in the Second Degree contrary to RCW 9A.36.130(1)(a). CP 1. An amended information was filed on May 25, 2010 that added special allegations of aggravating circumstances of a particularly vulnerable victim and of violation of a position or trust contrary to RCW 9.94A.535(3)(b) and (n) respectively. CP 20.

After trial a jury returned a guilty verdict on June 1, 2010. CP 87. Additionally, the jury returned special verdicts finding that the crime was committed against a family or household member and that Mr. Gilbert violated his position of trust as well as finding that the victim was particularly vulnerable or incapable of resistance due her age of four

months at the time of the crime. CP 88-90.

The defendant's standard range was 41 to 54 months with an offender score of two. RP 358. The trial court imposed an exceptional sentence of 102 months imprisonment and to 18 months of community custody to reach a maximum sentence of 120 months. RP 383; CP 100-01. After judgment and sentence was imposed on June 4, 2010, Mr. Gilbert appealed on the same day. CP 111.

Statement of Testimony

Latricia Nixon testified that she was the grandmother of SHG. RP 87. On January 13, 2010 she baby sat SHG at her home for about four hours until 4:00 p.m. She changed her diaper and did not notice anything unusual. RP 93. Robert Gilbert then picked her up. Id.

Jessica Nixon testified that she was the mother of SHG who was born on August 26, 2009. RP 98. Robert Gilbert was the father. RP 97. In January 2010 she, Robert and SHG lived in Bremerton, Washington. On January 13th after Robert brought SHG home she laid down to rest while Robert cooked dinner and took care of SHG. RP 100.

Later, Robert came into the bedroom and advised her that SHG's diaper needed changing and returned to the living room.¹ Robert then

¹ Jessica testified that the couple lived in a mobile home that was made into two units. The bedroom was open into the living room. RP 102.

returned to the bedroom and announced that SHG was bleeding. RP 104. Because they could not stop the bleeding they took SHG to Group Heath urgent care. id. From there they were taken by ambulance to Harrison Hospital. From there they were taken to Mary Bridge Hospital in Tacoma because of bleeding and because of a small laceration about one to two centimeters in the vaginal area. id. RP 111, 113, 114.

Brenda Behrens testified that she was a social worker at Harrison Hospital's emergency room as well as a licensed independent clinical social worker. RP 169. She interviewed Mr. Gilbert. He advised her that SHG had "poopy diapers" when he went to change her. He removed the diaper, cleaned her bottom and left for a few seconds to get a clean diaper. When he put the new diaper under the baby he noticed there was blood in the clean diaper. He then notified SHG's mother. RP 170.

Mr. Gilbert told Behrens, "If anything happened, it was my fault, not Jessica's. I was the one who changed the diaper." RP 171-2.

Ginger May Rayburn testified that she was a licensed social worker at "Tacoma General, Mary Bridge" who did child abuse reporting and assessments. RP 118. On January 13, 2010 she talked to Robert Gilbert. He advised her that his wife was sleeping and he was multi-tasking. He went to get some diaper wipes and a new diaper to change the baby's diaper. She testified that Gilbert said: "And then when he came back in, he

noticed that there was blood on the diaper.” RP 121. She testified: “His impression was that he was doing too many things at once. And he thought he might have accidentally injured her.” id.

Michael Rodrigue testified that he was a detective with the Kitsap County Sheriff’s Office. RP 123. He interviewed Robert Gilbert at Mary Bridge Hospital. He asked Gilbert how the injury might have been caused. Rodrigue testified that Gilbert told him: “Initially, he wasn’t sure. He thought it might have been from when he was trying to clean her. She had had a bowel movement, and he was trying to clean the feces from her. And he thought – the only thing he could think of if maybe he wiped a little too hard.” RP 127.

Rodrigue further testified that Mr. Gilbert told him: “He said that if she was injured, it had to have been him. He couldn’t figure out any other way that the injury could have been sustained.”² RP 128. Gilbert told the officer the method he used to change SHG’s diapers. He used the dirty diaper to do the initial wipe because feces were present. Then he used baby swipes to do the final clean-up. Finally, he put the new diaper on. It

² Gilbert was asked about SHG’s grandparents. “He said that if – that he did not believe that they could have caused the injury; that if she was injured, it would have had to have been his fault.” RP 129.

was after he used the baby wipes that he observed blood.³ RP 130.

Gilbert did not remember putting his finger (s) in SHG's vagina: "It was kind of swift swiping motion from the top down; and that he did not recall his finger entering her or causing a tear." id. Also, it was revealed to Officer Rodrigue that the lights were down in the living room because Jessica Nixon was sleeping. RP 133.

Randal M. Holland, M.D. testified that he practiced at Mary Bridge's Children's Hospital in Tacoma as a pediatric general surgeon. RP 210-2. He had been a surgeon for the past seventeen years. RP 202. His preliminary examination indicated the need for surgery. He testified: "There was a tear in the posterior wall of the vagina extending from the perineum, the skin between the anus and the vagina, that extended inward into the – deeper into the vagina." RP 204.

Further examination on the night of January 14, 2010 revealed:

"There's a tear of the posterior vaginal wall extending from the perineal skin through the – our term is the vaginal

³ Later, Mr. Gilbert again described the incident. According to Officer Rodrigue Mr. Gilbert said at that time:

"...he has used the dirty diaper to do the initial wiping. Then he used the baby wipes to finish cleaning the baby. He mentioned that he had grabbed her feet and kind of lifted her up in the air. And it was a swiping motion from – I guess from the vaginal area downward toward her back." RP 132.

introitus, the superficial portion of the vagina. And that extended up and through the hymenal ring to the deeper part of the vagina. And that's in an inferior-superior fashion. And then as far as the depth, it went back through the vaginal wall towards the rectum but did not get into the rectum." id.

On a grading scale of one to four, the severity of the injury was ranked between two and three. RP 210.

On cross-examination the doctor testified that the distance was approximately half an inch or one centimeter from the introitus⁴ to the hymenal ring. RP 215. Also, Dr. Holland testified that based on what he observed he could not tell what caused SHG's injuries. RP 217.

On re-direct examination he testified that although he could not tell what object caused S.G.'s injuries he could tell that it was caused by "...a significant force applied by an object to make this occur." RP 218.

Michelle Breland was a pediatric nurse practitioner, practicing in the nursing field for 18 years since 1992 and also licensed in this state as a registered nurse. She was employed at Mary Bridge Children's Hospital in the Child Abuse Intervention Department focusing primarily on sex abuse. RP 221, 223.

She conducted an evaluation of SHG. She met with SHG on

⁴ The introitus was described as "...that initial area just within from the skin, moving in towards the vagina. And that's a relatively shallow area from there to the hymenal ring." RP 215.

January 15th and 28th and on the day of trial on May 27, 2010. RP 230. Medical records revealed “...she had a laceration through her vagina and hymen and perineum and the subsequent healing of that injury,” RP 229. Exhibit 15 was a photograph she took on January 15th. It showed SHG’s anus, her labia majora, labia minora, hymen and urethra. It also showed the area of injury that had been repaired with five sutures that were visible.

Her examination on the day of the trial revealed that the stitches were gone. The hymen had been torn and would not grow back together. RP 234. She testified that the injury was “consistent with some sort of penetration” RP 236. She testified that “a blunt force penetrating injury” caused ripping and tearing of the tissue. id. The amount of force was described as “significant force.” id. The injury extended through the hymen into the vagina. RP 237.

Nurse Breland testified that the based on her training and experience the injury was not consistent with normal wiping during a diaper change. id. In her opinion any wiping would occur on the outside of the hymen. “It wouldn’t go inside.” RP 238. She then testified that the injuries were inconsistent with an accidental injury. id.

Robert Paul Gilbert testified that he lived with Jessica Nixon, the mother of SHG and with SHG. RP 248-9. On January 13, 2010 he took SHG over to her grandparents house so they could spend time with her. RP

249. Jessica took a nap when they returned home with SHG after about a four hour visit. Mr. Gilbert began cooking dinner. RP 251. SHG was lying on the floor in front of the television. id. The lights were off except for the kitchen. While he was cooking he occasionally checked on SHG. RP 252.

At one point SHG smelled “poopy.” RP 252. Mr. Gilbert changed her diaper in the living room. id SHG was lying on a towel. Mr. Gilbert unhooked the diaper Then he took his right hand and held her up by her feet. He wiped “as much of the poop off of her” that he could with his left hand. He rolled the diaper up. He went to the other room and took a new diaper and put it underneath SHG and put it on. RP 254.

Mr. Gilbert returned to the kitchen while he was bouncing SHG up and down to get her to stop crying. He then noticed a drop of blood on the floor. Then another drop appeared. RP 255. He examined SHG and saw “a little bit of blood on the side of the diaper.” id. He took SHG back to the mat and opened the diaper to “see where the blood was coming from.” RP 256. Once Mr. Gilbert determined that the blood was coming from SHG’s private area he took her into the bedroom to show Jessica. They could not get the bleeding to stop so they took her to Urgent Care. id.

He concluded his testimony by denying that he put his finger or any other object inside his daughter’s vaginal area. RP 258. She did not cry out during the diaper change. RP 259. He testified he did not act intentionally

id. He described the incident as “An accident.” RP 260. On cross-examination he assumed that he was the person who caused the injury.

C. Argument

I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE DEFENDANT’S MOTION IN LIMINIE.

The defendant filed a motion in limine regarding medical expert testimony. CP 28. The conclusion of Michelle Breland’s expert’s report stated: “This injury is indicative of penetrating trauma and would not have been caused accidentally or during routine diaper change.” RP 76. The defense objected to the use of the second half of that sentence and stated its objection to: “...that would not have been caused accidentally or during... routine diaper change.” RP 153. Breland was the only person giving an expert opinion on how the injury to the victim was caused. RP 75.

The defendant argued that the defense was a denial defense “...but the defense really is that this was an accidental injury.”⁵ RP 154. The defense argued during the motions in limine: “And it would be tantamount to saying, No, this gentleman is guilty, because it was intentional.” id. For

⁵ The defense argued specifically: “If truly the defense is it’s not an intentional act, it’s an accidental act. It’s an unintended consequence of some intentional acts, no doubt, but the injury itself, the allegation itself, the conduct itself, leading to an accidental injury.” RP 154.

instance, “...we get into that type of opinion testimony that really does get into the question of whether the person is actually guilty or not, that – to answer that question takes that issue out of the jury’s decision-making process.” RP 157-8.

The state argued that it would elicit the expert testimony as: “...that this type of injury is not consistent with an accident or a normal diaper changing.” RP 159. The state further argued “...that the expert should phrase it in terms of this is not consistent with an accidental injury.” RP 160. *State v. Hudson*, 150 Wn.2d 646, 208 P.3d 1236 (Div. II 2009) was quoted: “An expert opinion is not objectionable merely because it embraces an ultimate issue to be decided by the trier of fact.” *id.* ER 704 (See appendix for ER 702-704.)

The defense concluded: “But the way the phrasing of the words is very important in any kind of case. So a statement that says this is consistent with an intentional act or intentional insertion is different in quality of testimony than one that says this is inconsistent with accidental.” RP 164. “So it’s – the issue is the jury determining guilt. It’s a jury trial issue. Has that testimony taken the right of a jury’s determination of guilt out of the equation? That’s the problem.” RP 165.

The trial court noted that “...the State is not seeking to admit testimony from the expert that injury was not due to an accident and that it

was not a result of a normal diaper change. Again, those sorts of statements would be declaratory if they went directly to the actual causation in this case.”⁶ RP 195.

The trial court denied the defendant’s motion in limine and ruled: “Due to the nature of the injury in this instance, the medical experts can opine that the injury is inconsistent with an accidental injury. They cannot say that it was not an accident. But they can speak to whether it was consistent with an accident.”⁷ RP 196.

Nurse practitioner Michelle Breland then testified during the trial- without being asked whether she had an opinion or not: “Q. And based on your training and experience, is this injury consistent with normal wiping during a diaper change? A. No.” RP 237. And then she was subsequently asked: “Q. Based on your training and experience, is this injury

⁶ It should be noted that the trial court also stated: “And the opinion is not based solely upon the credibility of witnesses and what those witnesses imparted to the experts. Again, the doctor’s (sic) opinion that the injury is consistent with non-accidental trauma is not based upon their opinion of witnesses’ credibility but from the inferences drawn from physical evidence that is adduced from the examination.” RP 195-6.

⁷ The court noted specifically note 2 in *State v. Hudson* where the court stated: “The dissent asserts that the SANE’s opined only that the evidence was consistent with non- consensual sex. We agree with the dissent that if this were the case, the testimony would probably have been proper under *Montgomery*.”

inconsistent with an accidental injury? A. Yes.”⁸ II RP 238 (see appendix.) Compare *State v Montgomery*, 163 Wn.2d 577, 593, 183 P.3d 267 (2008): “”...one permissible and perhaps preferred way for the opinion to be offered is for the trial attorney to ask the witness if the witness has an opinion on the subject and instruct the witness to answer “Yes, I have an opinion” or “No, I do not have an opinion.”“

The standard of review addressing a ruling on a motion in limine is an abuse of discretion standard. Karl B. Tegland, 5 *Washington Practice* 38 (5th ed. 2007) (citing *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 549 P.2d 483 (1976). According to *State ex., rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) an abuse of discretion occurs when the court’s discretion is manifestly unreasonable or exercised on untenable grounds, or for untenable reasons.

State v. Hudson

⁸ The next question was “Q. Why is that? A. For a couple of reasons. One, when I think of accident, [SHG] didn’t do this to herself. There was no accidental way that she did this to herself. Secondly, you know, it’s penetration into a very - you know, here is - here is kind of a finger for scale- into a very small area that - with significant force that is just not going to happen through accidental means. It’s not going to slip into the vagina. It just isn’t- there’s too much protection there. And again, you know, the finger is pretty big in comparison to the area that we’re looking at. So I just don’t see how it could be accidental. That just doesn’t make sense to me. MS. SCHNEPF: Thank you. No further questions, Your Honor.” II RP 239.

State v. Hudson, supra, involved the same trial court judge as in the case at bench: Honorable Leila Mills. In *Hudson* the Court of Appeals held that the trial court abused its discretion when it allowed two expert witnesses to testify that the victim's injuries were caused by nonconsensual sex. *id.* at 647. The court held: "The trial court abused its discretion in admitting the SANE witnesses' opinion that Whitcher's injuries were caused by nonconsensual sex." *id.* at 655.

The following appears in *Hudson*:

"When the State asked Culbertson, "Are the injuries that you observed in these photographs consistent with Krystal Whitcher's report of nonconsensual sex?" Hudson objected, arguing that the question called for opinion testimony that invaded the jury's province. RP at 257. The trial court overruled the objection relying on *State v. Jones*, 59 Wn.App. 744, 801 P.2d 263 (1990). Culbertson testified that her opinion "as to the nature and cause of [Whitcher's] injuries" was that they were "extensive injury related to nonconsensual sex...."

id. at 651.

In *Hudson* a SANE nurse testified to an opinion as to the defendant's guilt directly and by inference. The court observed; "Here, the SANE experts explicitly testified that Whitcher's injuries were caused by nonconsensual sex, i.e., rape...these opinions amounted to statements that he was guilty of rape." *id.* at 653. See also, *State v. Black*, 109 Wn.2d 336, 349, 745 P.2d 12 (1987) ("...expert psychologist testified that the alleged

victim suffered from “rape trauma syndrome,” which the Supreme court held “carrie[d] with it an implied opinion that the alleged victim is telling the truth and was, in fact, raped.”) *Hudson*, at 653.

There should be no difference here merely because the prosecutor’s question was based on the use of the word “inconsistent” compared to the use of the word “consistent” in *Hudson*.

State v. Jones

In *State v. Jones*, 59 Wn.App. 744, 801 P.2d 263 (Div. I 1990), *review denied*, 116 Wn.2d 1021 (1991) the defendant was convicted of manslaughter of a baby. He claimed that the death was caused accidentally. Two physicians testified for the State that in their opinion the death was caused by ““a non-accidental blunt injury”” that was sustained by some sort of inflicted manner whether it be an object, including a hand or fist.” *State v. Jones*, 59 Wn.App. at 747-48. The conviction was affirmed on appeal because the expert testimony was based on inferences from physical evidence discovered during an autopsy. *id.* at 654.

Based on the above criteria and the lessons of *Jones* and *Hudson*, the trial court abused its discretion in the case at bench. In *Jones* the expert testimony came from two medical doctors. In *Jones* the physicians testified that “...Jones’ story regarding the swing was inconsistent with the

physical evidence....” id. at 750. Not that the Jones’ version was inconsistent with an accidental force. In *Hudson* the expert opinion came from two SANE nurses. Here, like *Hudson*, the expert testimony came from a nurse. II RP 238. And like *Hudson*, the nurse’s testimony was not based on any medical or other specialized knowledge that could be easily comprehended “by the average lay person.” *Hudson* at 655.

Nurse Brealnd did not limit her testimony to an inference from physical evidence as in *Jones*. Instead, as in *Hudson*, she testified to the essence of the defense and the only disputed issue. According to *State v. Montgomery, supra* at 594: without the proper inquiry of an expert witness as outlined there, it was reversible error to state opinions that “went to the core issue and the only disputed element.”⁹

Factors to Consider

The test for whether expert testimony constitutes an impermissible opinion about an accused’s guilt depends on the total circumstances of each case. Factors to consider according to *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) include; (1) type of witnesses, (2) nature of

⁹ In *Montgomery* the court expressed disapproval of “explicit expressions of personal belief such as “I felt very strongly that...” and “we believe.” id. at 594. Nurse Breland concluded her testimony with the following comment: “So I just don’t see how it could be accidental. That just doesn’t make sense to me.” II RP 238.

the testimony, (3) charges, (4) defense, (5) other evidence in the case. (citing *City of Seattle v. Heatley*, 70 Wn.App. 573, 579, 854 P.2d 658 (1993)).

Applying those factors to the case at bench shows that the expert opinion in this case should have been excluded by the trial court.

(1) Here the expert witness was not a medical doctor. Rather, Michelle Breland was a pediatric nurse practitioner as well as a registered nurse. II RP 221, 224-25. She had been employed as an expert for the prosecution on over 48 prior occasions. She was retained by the defense on just two prior occasions. RP 226. She was an expert witness hired and paid for by the State in this case. II RP 226-7.

(2) The nature of her testimony was an opinion directed to the defense and the legal theory presented by the defendant. The first opinion was directed to the amount of force used and stated that the injury was not consistent with “normal” wiping during a diaper change. RP 237. The second opinion was that the injury was inconsistent with an accidental injury. RP 238. It was not an opinion by medical doctors based on physical evidence as in *Jones*. There was a marked absence of any reference to physical evidence in Breland’s opinion about this being inconsistent with an accidental injury. (see note 8, supra at p.13-14.)

(3) The charges were Assault of a child in the second degree with

aggravating factors based on the child's age of four months. An element of the charge was that the defendant acted intentionally. Instrs. 7, 8,13. CP 74,75 and 80.

(4) The defense was accidental touching or accidental application of lawful force. Essentially the defense was that Mr. Gilbert did not act intentionally. RP 154. Gilbert testified that he did not act intentionally. RP 259.

(5) Other evidence in the case consisted of Dr. Holland's testimony that based on what he observed he could not tell what caused SHG's injuries.¹⁰ RP 217. Mr. Gilbert testified and told others that his actions were accidental. II RP 260.

The trial court erred when it stated "In this case, the opinion of the witnesses are based upon physical evidence." RP 195. The trial court abused its discretion when it allowed Nurse Breland to testify that the injuries to SHG were inconsistent with an accidental injury where Breland's only reference to physical evidence was the apparent size of one of her own fingers and reference to SHG's vagina as "a very small area." RP 238.

¹⁰ On re-direct examination he testified that although he could not tell what object caused SHG's injuries he could tell that it was caused by "...a significant force applied by an object to make this occur." RP 218.

II. THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO A JURY DETERMINATION OF GUILT OR INNOCENCE WHEN THE TRIAL COURT ALLOWED THE STATE'S EXPERT TO TESTIFY TO HER OPINION.

The arguments set forth above in section I are incorporated herein by reference as if set forth in full. These arguments support the defendant's assertion that his constitutional right to a determination of guilt by the jury was violated during this trial when Nurse Breland testified to her opinions. RP 237-238. Under Washington Constitution art. 1, sec. 21 and sec 22 the jury's function is held "inviolable". See also United States Constitutional Amendments VI and VII.

It was expressed in *State v. Montgomery*:

"The right to have factual questions decided by the jury is critical to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). To the jury is consigned under the constitution "the ultimate power to weigh the evidence and determine the facts." *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971. In virtually every jury trial, the jury itself is instructed that "[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court." 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 102, at 9 (2d ed. 1994)(WPIC)."¹¹

State v. Montgomery, 163 Wn.2d at 590.

¹¹ The trial court used the updated version of WPIC 1.02 which states: "It is your duty to decide the facts in this case based upon the evidence presented to you during this trial." 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 13 (3rd ed. 2008).

There is a substantial likelihood that Nurse Breland's improper opinion that SHG's injury was inconsistent with accidental injury influenced the jury's verdict and the defendant was thereby prejudiced.

RP 238, CP 87. According to *State v. Demery*:

“Admitting impermissible opinion testimony regarding the defendant's guilt may be reversible error because admitting such evidence “violates [the defendant's] constitutional right to a jury trial, including the independent determination of facts by the jury.” *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985), *overruled on other grounds by Heatley*, 70 Wn.App. 573; *see also Dubria v. Smith*, 224 F.3d 995, 1001-02 (9th Cir. 2000)... *cert. denied*, 531 U.S. 1148 (2001).”

Demery, 144 Wn.2d at 759.

Nurse Breland also testified that in her opinion the injury to SHG was not consistent with “normal” wiping during a diaper change. RP 237. Compare *State v. Haga*, 8 Wn.App. 481, 507 P.2d 159 (Div. I 1973), where the appellate court reversed the defendant's convictions for the first degree murder of his wife and infant daughter. There an ambulance driver was allowed to testify over objection that based on his experience he found that the demeanor of the defendant was unusual with regard to displaying any signs of grief. The defendant was observed at his residence where the victims were discovered. See also, *State v. Carlin*, 40 Wn.App. 698, 700P.2d 323 (Div. I 1985) (violation of defendant's constitutional right to jury trial where police trainer testified in a juvenile proceeding that a

police dog followed a “fresh guilt scent.”. Error was found to be harmless.)

III. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE DEFENDANT’S PROPOSED WPIC 35.50 INSTRUCTION.

The trial court erred when it refused to give defendant’s proposed instruction, which would have stated:

An assault is an intentional touching of another person [with unlawful force] that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

WPIC 35.50; 11 *Washington Practice* 547 (3rd ed. 2008). (compare trial court’s instruction that omitted the language “with unlawful force.” CP 80. (see appendix for the court’s instructions).

At the time of exceptions to the instructions the defense argued:

“There’s a comma that would be there and then with the words, “with unlawful force,” comma, “that is harmful or offensive, regardless of whether,” etc. The notes to the jury instructions include, “to include the phrase with unlawful force, if there’s a claim of self-defense or other use of force.” And I believe that based on the facts of this case the conduct that Mr. Gilbert had with the child in changing the diaper was lawful force. And the question is – and so I think that that should be allowed.” RP 270.

The defense further argued in support of its proposed instruction;

“ ...We’re saying that there was not intentional conduct. It was accidental but that the touching that occurred was lawful. So with that in mind, I believe that that particular phrase should be included in this instruction to make sure that the jury is not confused about the question of whether

lawful or unlawful force is required. So is has to be unlawful force. And so a complete instruction to the jury, in this case, based on the facts of this case, would require unlawful force to be included in that phrase, in that definition.” RP 272.

The use of force contemplated by the defense was when Mr. Gilbert raised SHG’s feet and then wiped her bottom. The defense noted; “And that is a use of force.” RP 274.

The trial court denied this proposed instruction. The court stated its reasoning:

“So far as the claim of lawful use of force, I don’t believe that there has been a claim made by the Defense through the testimony and the evidence of the case that there was a lawful use of force. There is a lack of evidence to suggest that the Defense is suggesting any use of force that led to the injury. The evidence, from what I understand, that the Defense claim is that there’s no connection between any force or injury. That link has simply not been made. And under the WPIC and the definitions and explanations , the jurors are not to be left speculating as to what might constitute lawful conduct. And I believe that if I were to include this bracketed section, that is exactly what we would be asking the jurors to do; and that would be to speculate on what is the lawful use of force. So I don’t believe that there is a record that would support such an instruction. I’m going to disallow adding lawful use of force in the section 35.50....” RP 276-77.

The standard for review of instructions is set forth in *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998):

“The standard for review applied to this appeal depends on whether the trial court’s refusal to grant the jury instruction was based upon a matter of law or of

fact. A trial court's refusal to give instructions to a jury, if based on a factual dispute is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn. 2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d. 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based on a ruling of law is reviewed de novo. id. "

(See *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004)("Legal questions, including alleged errors of law in a trial court's jury instructions, are reviewed de novo.")

The trial court erred because there was a link between the force employed by Mr. Gilbert to change the diaper and SHG's injuries. The *Note on Use* to WPIC 35.50 states in part: "Include the phrase "with unlawful force" if there is a claim of self defense or other lawful use of force." 11 *Washington Practice* 548. The comments to WPIC 35.50 state in part:

"The definition of "assault" includes the requirement that it be committed with unlawful force.[citations omitted and discussed below]...If there is a claim of self defense or other lawful use of force, the instruction on that defense will define the term "lawful." If there is no such evidence, the jury should not be left to speculate on what might constitute "lawful" conduct."

11 *Washington Practice* 550.

The prosecutor was allowed to elicit an expert's opinion that the injury was not consistent with normal wiping during a diaper change. RP

237.

The defense produced sufficient evidence of lawful force to warrant inclusion of this phrase in the court's instructions. Numerous witnesses for the state repeated what Mr. Gilbert told them caused the injuries within a short time after the incident. For instance, Mr. Gilbert told Ginger May Rayburn of Tacoma General that he was doing too many things at once. "And he thought he might have accidentally injured her." I RP 121.

Mr. Gilbert told Officer Rodrigue "...the only thing he could think of if maybe he wiped a little too hard." RP 127. Also he told Rodrigue: "And it was a swiping motion from...the vaginal area downward toward her back." RP 132.

The trial court's ruling took the defense of "accidental" force away from the defendant. According to *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 11052 (1997):

"Each side is entitled to have the jury instructed on its theory of the case if there is evidence to support that theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to so instruct is reversible error. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2 265 (1983). Williams introduced sufficient evidence to entitle her to a duress instruction."

State v. Smith

The use of "Unlawful force" is an integral part of the common law

definitions of assault in the second degree. These definitions were approved in *State v. Smith* 159 Wn.2d 778, 781-2, 154 P.3d 873 (2007). Smith's theory of the case was that she acted in self-defense, that she did not intend to shoot a .25 caliber handgun in the direction of three victims sitting inside a motor vehicle that was leaving her residence and that the gun discharged accidentally and just "went off." Her convictions on three counts of second degree assault with a deadly weapon while armed with a deadly weapon were affirmed by both the Court of Appeals, 124 Wn.App. 417 (2004) and by the Supreme Court.

The three approved definitions of assault that were included in the trial court's instructions in *Smith* state:

"An assault is an intentional touching, striking, cutting, or shooting of another person, *with unlawful force*, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching, striking, cutting or shooting is offensive, if the touching, striking, cutting or shooting would offend an ordinary person who is not unduly sensitive.

An assault is also an act, *with unlawful force*, done with intent to inflict bodily injury upon another, tending, but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.

An assault is also an act, *with unlawful force*, done with the intent to create in another apprehension, and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily

injury even though the actor did not actually intend to inflict bodily injury.”

State v. Smith, 159 Wn.2d at 781-2 (italics mine for emphasis.) (common law definitions of assault do not establish alternative means of committing the crime, but instead “...merely elaborate upon and clarify the terms “assault or “assaults,” which are used throughout chapter RCW 9A.36.” *id.* at 786. According to the holding in *Smith* these definitions of assault set forth above merely define an element of the crime. *id.* at 787. All these definitions use the phrase “unlawful force” in a case where the defense was an accidental shooting.

State v. Krup

Another case cited in the comments to WPIC 35.50 under the **Unlawful use of force** section is *State v. Krup*, 36 Wn.App. 454, 676 P.2d 507 (1984). For example, in that case Krup was accused and convicted of assault in the second degree when he argued with the proprietor of a store. When the proprietor asked him to leave, he allegedly pointed a pocketknife at her and then stabbed the knife into a counter top as he was leaving.

The common law definition of assault that was used in that case referred to WPIC 35.50 and stated:

“An assault is an intentional act, *with unlawful force*, which creates in another a reasonable apprehension

of fear of bodily injury even though the actor did not actually intend to inflict bodily injury.”

Krup at 456, n. 1. (italics mine) (compare former definition of assault contained in WPIC 35.50 cited in *Krup*: “[An assault is [also] an intentional [touching] or [striking] or [cutting] or [shooting] of the person of body of another, [regardless of whether any actual physical harm is done to the other person]]” *id* at 459-60 n. 10.

Additionally, there may be trials- such as the case at bench- where there is evidence of a defense to the charge of assault, such as accidental touching, and there is no corresponding instruction on that use of force.

IV. THE DEFENDANT WAS DENIED DUE PROCESS OF LAW BASED ON THE INSUFFICIENCY OF THE EVIDENCE.

According to *State v. Bingham*, 105 Wn.2d 820, 873, 719 P.2d 109 (1986):

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).”

See also, *State v. Rempl*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) and

State v. Hughes, 106 Wn.2d 176, *supra*. It was stated in *Jackson v.*

Virginia:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

443 U.S. at 316, 99 S.Ct. at 2787 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 2d 368 (1970)).

There was not substantial evidence that Mr. Gilbert acted intentionally. The jury was instructed: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.” Instr. 8, CP 75; WPIC 10.01; 11 *Washington Practice* 203; RCW 9A.08.010(1)(a).

One factor was that SHG’s mother was asleep in the couple’s bedroom that opened into the living room where SHG was lying on the floor during the diaper change. I RP 102. It is inferable that Mr. Gilbert would not intentionally commit a crime with his wife in such close proximity. The defense argued during closing arguments: “Again, the fact that she was in the next room sheds some doubt about the intentional act that is required under this law.” II RP 326.

SHG’s mother testified that she heard SHG- who usually did not like her diaper changed -crying her “normal changing-her-diaper cry.” RP 101. It is therefore inferable that SHG’s crying during diaper changes did

not increase during this occasion.

The defense also argued during closing arguments that Mr. Gilbert did not act intentionally because he took all the physical evidence with him when they took SHG to Urgent Care. Nurse Rayburn was given SHG's baby blanket, the diaper that the baby had been in before being changed and the diaper with blood on it. I RP 122; exhibits 4, 5, 13 and 14. RP 135. It was argued: "If a person acted with intent to harm...they are not going to be providing evidence that would seal the fact of the person who did it, themselves." II RP 323.

There was no motive for Mr. Gilbert to commit the crime he was convicted of. It was argued to the jury: "There's no evidence of motive." RP 327.

Finally, Mr. Gilbert, who was the only testifying witness that was present, asserted that he did not act with an intent to commit a crime. II RP 259. Rather, he testified that although he was the person who caused the injuries, he acted accidentally. II RP 259-60, 265.

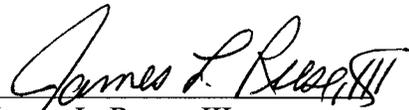
Even though a reviewing court looks at the evidence in a light most favorable to the non-moving party, the testimony favorable to the moving party cannot be discounted. No rational trier of fact could find proof beyond a reasonable doubt that Mr. Gilbert intentionally assaulted SHG.

D. Conclusion

This court should reverse the defendant's conviction and remand the case for a new trial and/or for entry of an order of dismissal.

Dated this 28th day of November 2010.

Respectfully Submitted,



James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Appellant

State v. Gilbert - 5/27/10

1 it would be significant.

2 Q. Can you tell from the documents that you
3 reviewed how far an object or whatever was used to
4 penetrate would have had to have gone into the vagina to
5 create that injury?

6 A. You know, it would be hard to say exactly how
7 far. The injury itself extended through the hymen, which
8 is this tissue, into the vagina. So the penetration would
9 have been, again, through the hymen and into the vagina.
10 But I don't know how far into the vagina.

11 Q. And based on your training and experience, is
12 this injury consistent with normal wiping during a diaper
13 change?

14 A. No.

15 Q. Why is that?

16 A. Is it all right if I use the photos?

17 Q. Please.

18 A. When -- you know, again, changing a diaper --

19 Q. If you could hold it up.

20 A. -- you would expect wiping --

21 THE COURT: You can stand, if you'd like.

22 THE WITNESS: So you would expect wiping all
23 around the area. You would expect wiping sort of -- even
24 maybe between the labia and down to the hymen. But the
25 hymen, it's protects the vagina. It closes off the vagina

BRELAND - Direct (by Ms. Schnepf)

1 so stool and debris does not get into the vagina. So any
2 sort of just wiping would be on the outside of that area.
3 It wouldn't go inside. And there wouldn't be stool or
4 anything in the vagina. It would all be on the outside.
5 And, you know, you would wipe in a -- on the outer part.

6 BY MS. SCHNEPF

7 Q. Based on your training and experience, is this
8 injury inconsistent with an accidental injury?

9 A. Can you repeat that?

10 Q. Based on your training and experience, is this
11 injury inconsistent with an accidental injury?

12 A. Yes.

13 Q. Why is that?

14 A. For a couple reasons. One, when I think of
15 accident, Shannon didn't do this to herself. There was no
16 accidental way that she did this to herself. Secondly,
17 you know, it's penetration into a very -- you know, here
18 is -- here is kind of a finger for scale -- into a very
19 small area that -- with significant force that is just not
20 going to happen through an accidental means. It's not
21 going to slip into the vagina. It just isn't -- there's
22 too much protection there. And again, you know, the
23 finger is pretty big in comparison to the area that we're
24 looking at. So I just don't see how it could be
25 accidental. That just doesn't make sense to me.

RCW 9A.36.130
Assault of a child in the second degree.

(1) A person eighteen years of age or older is guilty of the crime of assault of a child in the second degree if the child is under the age of thirteen and the person:

- (a) Commits the crime of assault in the second degree, as defined in RCW 9A.36.021, against a child; or
- (b) Intentionally assaults the child and causes bodily harm that is greater than transient physical pain or minor temporary marks, and the person has previously engaged in a pattern or practice either of (i) assaulting the child which has resulted in bodily harm that is greater than transient pain or minor temporary marks, or (ii) causing the child physical pain or agony that is equivalent to that produced by torture.

(2) Assault of a child in the second degree is a class B felony.

[1992 c 145 § 2.]

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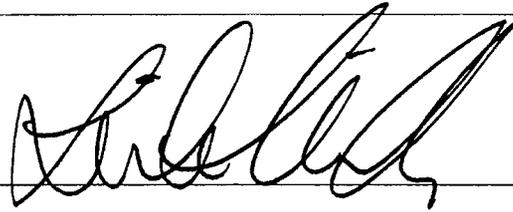
IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
) No. 10-1-00136-9
 Plaintiff,)
)
 v.)
)
 ROBERT PAUL GILBERT,)
)
 Defendant.)

COURT'S INSTRUCTIONS TO THE JURY

DATED

June 1, 2010



, JUDGE

ORIGINAL

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party

introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2.

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3 .

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4.

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 5.

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION No. 6.

A person commits the crime of assault of a child in the second degree if the person is eighteen years of age or older and the child is under the age of thirteen and the person commits the crime of assault in the second degree against the child.

INSTRUCTION No. 7.

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Objective / purpose

INSTRUCTION NO. 8.

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 9.

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

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

INSTRUCTION NO. 10

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

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

INSTRUCTION NO. 11

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

INSTRUCTION NO. 12

Bodily harm means physical pain or injury, illness, or an impairment of physical condition.

INSTRUCTION NO. 13

An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

INSTRUCTION NO. 14.

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

- (1) That on or about January 13, 2010 through January 14, 2010, the defendant committed the crime of assault in the second degree against SHG;
- (2) That the defendant was eighteen years of age or older and SHG was under the age of thirteen; and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 15

A victim is “particularly vulnerable” if he or she is more vulnerable to the commission of the crime than the typical victim of Assault of a child in the second degree. The victim’s vulnerability must also be a substantial factor in the commission of the crime.

INSTRUCTION NO. 16.

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstances.

There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between the defendant and the victim or someone who entrusted the victim to the defendant.

INSTRUCTION NO. 17

For purposes of this case, “family or household members” means persons who have a biological or legal parent-child relationship, including stepparents and stepchildren, and grandparents and grandchildren.

INSTRUCTION NO. 18.

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given any exhibits admitted in evidence, these instructions, and one verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

You will also be given three special verdict forms for the crime of Assault of a Child in the Second Degree charged in Count I. If you find the defendant not guilty of Assault of a Child in the Second Degree, do not use the special verdict forms. If you find the defendant guilty of Assault of a Child in the Second Degree, you will then use the special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

WPIC 35.50

ASSAULT—DEFINITION

[An assault is an intentional [touching] [or] [striking] [or] [cutting] [or] [shooting] of another person[, with unlawful force,] that is harmful or offensive [regardless of whether any physical injury is done to the person]. [A [touching] [or] [striking] [or] [cutting] [or] [shooting] is offensive if the [touching] [or] [striking] [or] cutting] [or] [shooting] would offend an ordinary person who is not unduly sensitive.]]

[An assault is [also] an act[, with unlawful force,] done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. [It is not necessary that bodily injury be inflicted.]]

[An assault is [also] an act[, with unlawful force,] done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

[An act is not an assault, if it is done with the consent of the person alleged to be assaulted.]

NOTE ON USE

Use this general definition with any instruction that refers to assault.

Use the first bracketed definition in cases involving a battery whether accompanied or unaccompanied by an apprehension or fear of bodily injury on the part of the victim. Use the bracketed sentence of this paragraph, if it is necessary to define "offensive" for the jury. See Comment.

Use the second bracketed definition in cases involving an attempt to inflict bodily injury but not resulting in a battery. The inner bracketed sentence should be used if there is a factual issue as to the extent of the act committed, i.e., whether it constituted mere preparation or had progressed far enough to constitute an attempt, or if there is a factual

CONSTITUTION OF WASHINGTON

ARTICLE 1, ss 21 Trial by Jury

The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

CONSTITUTION OF WASHINGTON

ARTICLE 1, ss. 22 Rights of the Accused

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases:

Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT [VII]

Right to trial by jury

In suits at common law, where the value in controbersy shall exceed twenty dollars, the right of trial by jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) **Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[Amended effective September 1, 1992.]

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) **Calling by Court.** The court may, on its own motion where necessary in the interests of justice or on

motion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by Court.** The court may interrogate witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence.

(c) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

[Amended effective September 1, 1992.]

TITLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

[Amended effective September 1, 1992; September 1, 2004.]

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[Amended effective September 1, 1992.]

RULE 704. OPINION ON ULTIMATE ISSUE

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.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

[Amended effective September 1, 1992.]

RULE 706. COURT APPOINTED EXPERTS

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
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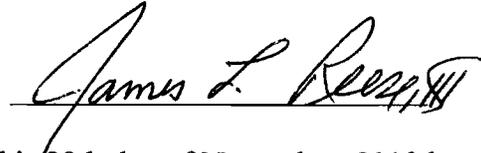
PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

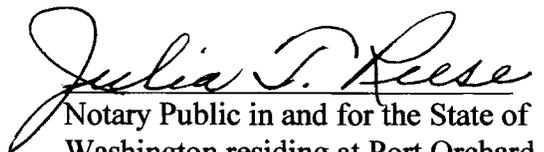
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 29th of November, 2010, he hand delivered for filing the original and one(1) copy of Appellant's Brief in State of Washington v. Robert Paul Gilbert, No. 40825-2-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366; and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same, at his last known address, to Appellant, Robert Paul Gilbert, DOC #905335, Coyote Ridge Correction Center, P. O. Box 769, Connell, WA 99326



Signed and Attested to before me this 29th day of November, 2010 by James L. Reese, III.



Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 4/4/13