

NO. 40825-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GILBERT,

Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
MARCH 15 11:28:45  
BY  DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 10-1-00136-9

BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

James Reese  
612 Sidney Ave.  
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED March 14, 2011, Port Orchard, WA   
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... iii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT .....12

A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE’S EXPERT TO TESTIFY THE S.H.G.’S INJURIES WERE INCONSISTENT WITH WHAT ONE WOULD EXPECT WITH NORMAL WIPING DURING A DIAPER CHANGE AND WERE INCONSISTENT WITH AN ACCIDENTAL INJURY, BECAUSE UNDER WASHINGTON LAW AN EXPERT MAY PROPERLY RENDER AN OPINION ABOUT WHETHER A PARTICULAR INJURY IS “INCONSISTENT” WITH CERTAIN POSSIBLE EXPLANATIONS.....12

B. THE TRIAL PROPERLY DECLINED TO INCLUDE THE PHRASE “UNLAWFUL USE OF FORCE” IN ITS INSTRUCTION TO THE JURY DEFINING ASSAULT BECAUSE: (1) THAT PHRASE WAS INAPPLICABLE TO THE PRESENT CASE AS THERE WAS NO CLAIM OF A LAWFUL USE OF FORCE PURSUANT TO RCW 9A.16.020; (2) THE DEFENDANT’S CLAIM OF “ACCIDENT” WENT TO THE ISSUE OF WHETHER THE ASSAULT WAS “INTENTIONAL,” NOT TO WHETHER THE FORCE USED WAS LAWFUL; AND (3) THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE STATE WAS REQUIRED TO PROVE INTENT AND THIS INSTRUCTION ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE. ....23

C. THE DEFENDANT'S CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT HE ACTED INTENTIONALLY MUST FAIL BECAUSE: (1) UNDER WASHINGTON LAW CRIMINAL INTENT MAY BE INFERRED FROM CONDUCT AND CIRCUMSTANTIAL EVIDENCE; AND (2) VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT S.H.G.'S INJURIES (WHICH INCLUDED DEEP TEARS TO HER VAGINAL TISSUE AND WHICH REQUIRED SIGNIFICANT FORCE TO INFLICT) WERE NOT CAUSED BY AN ACCIDENTAL TOUCHING, BUT RATHER WERE CAUSED BY AN INTENTIONAL TOUCHING.....28

IV. CONCLUSION.....31

## TABLE OF AUTHORITIES

### CASES

<i>Bunnell v. Barr</i> , 68 Wn. 2d 771, 415 P.2d 640 (1966).....	29
<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	14-16
<i>State v. Arthur</i> , 42 Wn. App. 120, 708 P.2d 1230 (1985).....	24, 27
<i>State v. Atsbeha</i> , 142 Wn. 2d 904, 16 P.3d 626 (2001).....	13
<i>State v. Baird</i> , 83 Wn. App. 477, 922 P.2d 157 (1996).....	13-15
<i>State v. Bencivenga</i> , 137 Wn. 2d 703, 974 P.2d 832 (1999).....	29
<i>State v. Black</i> , 109 Wn. 2d 336, 745 P.2d 12 (1987).....	17
<i>State v. Castellanos</i> , 132 Wn. 2d 94, 935 P.2d 1353 (1997).....	13
<i>State v. Clausing</i> , 147 Wn. 2d 620, 56 P.3d 550 (2002).....	24
<i>State v. Delmarter</i> , 94 Wn. 2d 634, 618 P.2d 99 (1980).....	29
<i>State v. Demery</i> , 144 Wn. 2d 753, 30 P.3d 1278 (2001).....	13
<i>State v. Fitzgerald</i> , 39 Wn. App. 652, 694 P.2d 1117 (1985).....	17
<i>State v. Frost</i> , 160 Wn. 2d 765, 161 P.3d 361 (2007).....	13

<i>State v. Hardy,</i> 44 Wn. App. 477, 722 P.2d 872 (1986).....	24, 27
<i>State v. Hudson,</i> 150 Wn. App. 646, 208 P.3d 1236 (2009).....	18, 20-22
<i>State v. Jones,</i> 59 Wn. App. 744, 801 P.2d 263 (1990).....	16-18, 20-22
<i>State v. Joy,</i> 121 Wn. 2d 333, 851 P.2d 654 (1993).....	28
<i>State v. Kirkman,</i> 159 Wn. 2d 918, 155 P.3d 125 (2007).....	19
<i>State v. Lane,</i> 125 Wn. 2d 825, 889 P.2d 929 (1995).....	13
<i>State v. Montgomery,</i> 163 Wn. 2d 577, 183 P.3d 267 (2008).....	18-22
<i>State v. Myers,</i> 133 Wn. 2d 26, 941 P.2d 1102 (1997).....	29
<i>State v. Salinas,</i> 119 Wn. 2d 192, 829 P.2d 1068 (1992).....	29
<i>State v. Toennis,</i> 52 Wn. App. 176, 758 P.2d 539.....	17
<i>State v. Yates,</i> 161 Wn. 2d 714, 168 P.3d 359 (2007).....	13
<i>State v. Young,</i> 62 Wn. App. 895, 802 P.2d 829, 817 P.2d 412 (1991).....	17

## STATUTES

RCW 9A.16.020 .....	25-26
---------------------	-------

## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in allowing the State's expert to testify the S.H.G.'s injuries were inconsistent with what one would expect with normal wiping during a diaper change and were inconsistent with an accidental injury, when under Washington law an expert may properly render an opinion about whether a particular injury is "inconsistent" with certain possible explanations?

2. Whether the trial erred in declining to include the phrase "unlawful use of force" in its instruction to the jury defining assault when: (1) that phrase was inapplicable to the present case as there was no claim of a lawful use of force pursuant to RCW 9A.16.020; (2) the Defendant's claim of "accident" went to the issue of whether the assault was "intentional," not to whether the force used was lawful; and (3) the trial court properly instructed the jury that the State was required to prove intent and this instruction allowed the Defendant to argue his theory of the case?

3. Whether the Defendant's claim that the evidence was insufficient to show that he acted intentionally must fail when: (1) under Washington law criminal intent may be inferred from conduct and circumstantial evidence; and (2) viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that S.H.G.'s

injuries (which included deep tears to her vaginal tissue and which required significant force to inflict) were not caused by an accidental touching, but rather were caused by an intentional touching?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Robert Gilbert was charged by amended information filed in Kitsap County Superior Court with one count of assault of a child in the second degree with special allegations that the victim was particularly vulnerable and that the Defendant violates a position of trust in committing the offense. CP 19. A jury ultimately found the Defendant guilty of the charged offense and found that the special allegations had been proven. CP 87-90. At sentencing the trial court imposed an exceptional sentence of 102 months (the standard range was 41 to 54 months). CP 100. This appeal followed.

### **B. FACTS**

The Defendant is the boyfriend of Jessica Nixon and the couple have a female child in common with the initials S.H.G. RP 87-88, 97. In January of 2010 S.H.G. was four months old and was living with the Defendant and Ms. Nixon at a residence in Bremerton Washington. RP 89, 97-98.

Latricia Nixon, S.H.G.'s grandmother, would occasionally baby-sit S.H.G. RP 87.

On January 13, 2010, Jessica Nixon and the Defendant took S.H.G.

over to Latricia Nixon's house, and Latricia Nixon babysat S.H.G. for approximately four hours in the afternoon. RP 92, 99. Latricia Nixon changed S.H.G.'s diaper three times that afternoon and did not notice anything unusual. RP 92-93.

The Defendant later came and picked S.H.G. up from Latricia Nixon's residence. RP 93. When the Defendant and S.H.G. returned home, Jessica Nixon was cleaning house and eventually went to take a nap, leaving the Defendant to take care of S.H.G. RP 100.

Some time later, the Defendant came in to where Jessica Nixon was napping and told her that S.H.G. was bleeding. RP 104. The two tried to stop the bleeding by using a wet washcloth, but when they couldn't stop the bleeding they took S.H.G. to an urgent care facility. RP 104. From there S.H.G. was taken by ambulance to Harrison Hospital. RP 104.

At Harrison Hospital, Dr. Christopher Becker treated S.H.G. RP 110-11. Dr. Becker saw that S.H.G. had a laceration to her vaginal area. RP 113. After the doctor saw S.H.G.'s injuries S.H.G. was transferred to Mary Bridge in Tacoma. RP 112.

At Mary Bridge, a social worker named Ginger Rayburn spoke to the Defendant about the injuries, and the Defendant told her that he had been changing S.H.G.'s diaper and had gone to get a new diaper and some wipes

and when he came back he noticed that there was blood on S.H.G.'s diaper. RP 121. The Defendant also told Ms. Rayburn that he was doing too many things at once and thought he might have accidentally injured S.H.G. RP 121.

At the hospital the Defendant similarly told Latricia Nixon that he had been changing S.H.G.'s diaper and had gone to get another diaper, and when he came back he found that S.H.G. was bleeding so he woke up his wife and the two took S.H.G. to a doctor. RP 93-94.

Detective Mike Rodrigue from the Kitsap County Sheriff's Office also spoke to the Defendant at the hospital in Tacoma. RP 123-25. The Defendant told Detective Rodrigue that while he was changing S.H.G.'s diaper he saw blood coming from her vaginal area. RP 127. The Defendant said he wasn't sure how the injury might have occurred and that the only thing he could think of was that maybe he had "wiped" her a little bit too hard. RP 127. The Defendant also said that Ms. Nixon was in bed at that time, and that if S.H.G. had been injured then it would have had to been his fault. RP 128-29.

Detective Rodrigue also spoke to the Defendant the next day and asked him again about S.H.G.'s injury and asked if anything had been inserted into S.H.G.'s vagina. RP 131-32. The Defendant explained that he didn't think that he put his finger in there and explained that he had wiped S.H.G. using a swift wiping motion as he was trying to change the diaper

quickly, and the Defendant again that he must have been the one who caused the injury. RP 132-34.<sup>1</sup>

Motion in Limine Regarding the State's Proposed Expert Testimony

At trial, defense counsel filed a short motion regarding the State's proposed expert medical testimony. CP 28. During argument on the motion defense counsel asked the court to prohibit testimony that the S.H.G.'s injuries were indicative of trauma that would not have been caused accidentally or during a routine diaper change. RP 153. Defense counsel explained that he had no objection to the State's expert stating that the injuries were indicative of penetrating trauma, but he did object to the witness stating that the injury would not have been caused accidentally or during a routine diaper change. RP 153. The State argued that pursuant to *State v Jones* and *State v Hudson* the witness could properly testify that the injury was not consistent with an accidental injury. RP 159-60.

The trial court denied the defense motion and explained that her decision was based on "three cases, *Montgomery*, *Jones*, and *Hudson*." RP 194. The trial court first distinguished *Hudson* by noting that in that case the State's expert stated that the injury had been caused by non-consensual sex.

---

<sup>1</sup> The Defendant also told Brenda Behrens, a social worker in the Harrison Hospital emergency room, that "If anything happened, it was my fault, not Jessica's. I was the one who changed her diaper." RP 169-72.

RP 194. Thus, there had been a “declaratory statement as to the actual causation.” RP 194. The trial court then explained that in the present case the State was seeking to introduce evidence that the injury was not consistent with an accidental injury and not consistent with a normal diaper change. RP 194. The trial court then went on to state that,

In this instance, what the State seeks to admit is very similar to the testimony that was allowed in the Jones case. In that case – in that case, the Court noted that the witness’ testimony was based on inferences from physical evidence. In this case, the opinion of the witnesses are based upon the physical evidence.

RP 195. The Court further noted that,

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. And that, I believe, brings it into the purview of the *Montgomery* case and would be properly phrased in that fashion.

Again, these experts may be touching on the ultimate issue, but that in itself does not make this testimony inadmissible. In this instance, the opinion will be helpful to the trier of fact and concerns matters beyond the common knowledge of the average layperson.

...

Again, I do want to draw your attention to the *Hudson* case. And specifically, I believe my decision is supported by the reference. And it’s particularly a footnote, Footnote 2, where it reads, “The dissent asserts that the SANEs 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*.”

And so with those limitations, I am not granting the motion in limine regarding the medical expert testimony.

RP 196-97.

The State then presented testimony from Dr. Randall Holland a pediatric general surgeon. RP 201-02. Dr. Holland treated S.H.G. and found that she had a tear in the posterior wall of the vagina extending from the perineum deeper into the vagina. RP 204. Dr. Holland did not assess the complete depth of the tear in the emergency room because he could tell at a glance that the injury would require surgical intervention, and thus he chose to wait to make a complete examination until S.H.G. was asleep in the operating room. RP 204.

In the operating room Dr. Holland found that the tear extended up through the hymenal ring to the deeper part of the vagina. RP 204. In addition, the tear “exposed deep tissue.” RP 208. Dr. Holland then explained that to repair this injury he first reconstructed the hymenal ring. RP 210-11. He then used sutures to repair the “deep tissues, including the muscular tissues” and then again used sutures to repair the skin and mucosa. RP 211. Dr. Holland explained that three layers of sutures were required to repair the injury. RP 211.

Dr. Holland also explained that although he had been a pediatric surgeon for 17 years, he had only seen one other tear like this in a similarly aged child that had required surgical repair. RP 216-17. Dr. Holland acknowledged on cross-examination that he could not tell what exactly had caused the injury, but he later explained that although he couldn't identify the exact mechanism,

I know it is a significant force applied to this area. It's a very forgiving and mobile area of tissue that it takes a lot of force to injure. And so I can't tell what specific object, but I know it's a significant force applied by an object to make this occur.

RP 217-18. Furthermore, on re-cross examination, defense counsel asked Dr. Holland if he had an opinion about where the force that had caused the injury was directed, and Dr. Holland responded,

I would say most likely a penetrating force longitudinally from the outside of the vagina inward towards the cervix.

RP 219.

The State also called Michelle Breland, a pediatric nurse practitioner, to testify. RP 220-21. Ms. Breland has worked in the Child Abuse Intervention Department at Mary Bridge since 1992; first as a registered nurse for five years, and then as a nurse practitioner since 1997. She holds a masters degree from the University of Washington's pediatric nurse

practitioner's program and is licensed as a nurse practitioner with prescriptive authority and is also licensed as a registered nurse. RP 224-25. Ms. Breland also explained that she has testified approximately 50 times as an expert witness and has performed several thousand medical evaluations for children with abuse concerns. RP 225-27.

Ms. Breland treated S.H.G. and reviewed her entire medical file related to the incident, including photographs of S.H.G.'s injuries. RP 228. Ms. Breland testified that S.H.G.'s injury was consistent with some sort of penetration that caused the tissue to tear apart and that the injury was something that she would characterize as a "blunt force penetrating injury." RP 236. She further explained that,

These tissue edges, they should be together. This hymen should be together, and there's been something forcefully penetrating to cause that ripping and tearing of the tissue.

RP 236. When asked how much force would be necessary to cause an injury like S.H.G.'s injury, Ms. Breland responded that it would take "significant force" and that "Again, you know, you're causing tissue to tear and pretty deeply in a pretty significant amount of tissue. So I don't know how to answer how much. But it would be significant." RP 236-37.

The State then asked Ms. Breland, "based on your training and experience is this injury consistent with normal wiping during a diaper

change?” RP 237. Me Breland answered “No.” The State also asked Ms Breland if the injury was “inconsistent with an accidental injury” and Ms. Breland answered that it was. RP 238.

The Defendant also testified at trial and claimed that he did not intentionally put his finger or any other object into his daughter’s vagina. RP 258. The Defendant, however, acknowledged that he must have been responsible for the injury, but that he did not do it intentionally and that it was an “accident.” RP 259-60.

At the close of evidence the parties discussed jury instructions with the trial court. RP 266-67. The only proposed instruction that was not agreed upon was the State’s proposed instruction based on WPIC 35.50 (the definition of assault), which read in a part that,

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.

RP 269, CP 53. The State’s proposed instruction omitted the phrase “with unlawful force.” CP 53. Defense counsel asked that the instruction include the phrase “with unlawful force” should have been included so that the instruction would read as follows,

“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.”

RP 270. Defense counsel argued that the comments to WPIC 35.50 stated that the “unlawful force” language should be included “if there’s a claim of self-defense or other lawful use of force.” RP 270. Defense counsel then argued that facts showed that the Defendant’s act of changing the diaper was “lawful force,” so the language should be included. RP 270. Defense counsel also noted that the defense position was that this had been an accident and that there was not intentional conduct, thus the touching that occurred was lawful. RP 271-72.

The State pointed out that the WPIC comments explained that the “unlawful force” language should not be used unless there is an accompanying instruction that defines the term “lawful,” because failure to do so might create a situation where the jury would be left to speculate as to what conduct is considered lawful. RP 272-73. The State further explained that there was no definition for self-defense or the other similar defenses that applied to the present case, and further noted that the defense would still be allowed to argue their theory of the case even without the use of the phrase “unlawful force.” RP 273.

The trial court ultimately denied the defense request to include the phrase “with unlawful force,” and gave the State’s proposed instruction. RP 276-77, CP 80.

### III. ARGUMENT

**A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE STATE'S EXPERT TO TESTIFY THE S.H.G.'S INJURIES WERE INCONSISTENT WITH WHAT ONE WOULD EXPECT WITH NORMAL WIPING DURING A DIAPER CHANGE AND WERE INCONSISTENT WITH AN ACCIDENTAL INJURY, BECAUSE UNDER WASHINGTON LAW AN EXPERT MAY PROPERLY RENDER AN OPINION ABOUT WHETHER A PARTICULAR INJURY IS "INCONSISTENT" WITH CERTAIN POSSIBLE EXPLANATIONS.**

The Defendant argues that the trial court abused its discretion in denying his motion to limit the scope of the State's expert witness and thereby allowed the expert to improperly state her opinion that the victim's injuries were inconsistent with what one would expect with normal wiping during a diaper change and were inconsistent with an accidental injury. App.'s Br. at 11, 20. This claim is without merit because the trial court did not abuse its discretion, as it is proper under Washington law for an expert to offer an opinion as to whether a particular injury is consistent or inconsistent with various potential causes.

Under ER 702, the court may permit "a witness qualified as an expert" to provide an opinion regarding "scientific, technical, or other specialized knowledge" if such testimony "will assist the trier of fact." A trial court's admission of expert testimony is reviewed for an abuse of discretion.

*State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007). An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *State v. Frost*, 160 Wn.2d 765, 771, 161 P.3d 361 (2007); *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001).

It is well settled that a witness may not offer a personal opinion as to the truthfulness of another witness or the guilt of the defendant. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). This is so because “the constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995).

But while it is improper to express an opinion as to another witness's truthfulness, it is not improper to make arguments or offer testimony that might bear on a witness's credibility. Thus, expert opinion testimony which addresses an ultimate issue to be decided by the trier of fact, may not be excluded for that reason alone if the opinion is based upon inferences from the physical evidence and the expert's experience. *State v. Baird*, 83 Wn. App. 477, 485-86, 922 P.2d 157 (1996)

In *Baird* (a prosecution for first degree assault) the defendant was alleged to have beaten his wife unconscious and the surgically disfigured her

face. *Baird*, 83 Wn. App. at 479. All four of the victim's eyelids had been sliced through, but her eyeballs were only minimally damaged. *Id* at 480. The Defendant's defense was that he did not intend to inflict great bodily harm and that he was impaired by years of drinking and a personality disorder. *Id* at 484. The State presented testimony from the doctor who treated the victim, and he testified that he could not imagine the victim's injuries occurring unless someone deliberately cut her eyelids while carefully avoiding injuries to the eyeballs. *Id* at 480-81. Another doctor also testified that the injuries could not have been caused simply by slashing at the eyes with a knife. *Id* at 481. On appeal the defendant argued that the doctors should not have been allowed to testify that the injuries appeared to have been inflicted deliberately, and the defendant further argued that the doctors in effect improperly testified about his state of mind at the time of the assault, which was the ultimate question before the jury. *Id* at 485. The court, however, rejected this claim and held that,

Under the circumstances of this case, the doctors' statements that the cuts to Susan Baird were deliberate were permissible opinions. The doctors did not tell the jury what result to reach. Their opinions did not rely upon a judgment about the defendant's credibility, but rested upon their experience and training and treatment of Susan's injuries. The fact that the opinions support the jury's conclusion that Baird was guilty does not make them improper opinions on guilt. See [*Seattle v.*] *Heatley*, 70 Wn. App. at 579, 854 P.2d 658.

Nor were their statements improper for lack of foundation. Both doctors had performed surgery and, based upon their

training and experience, were qualified to testify whether the cuts could have been made accidentally without injury to the eyes. Specific forensic training is not a prerequisite to such opinion evidence; indeed, an expert was not required to testify that surgical removal of Susan's nose and the symmetrical cuts through all four of her eyelids, without damage to the eyeballs, were deliberate. *See Heatley*, 70 Wn. App. at 580, 854 P.2d 658 (if a lay witness could express an opinion about an issue, there is no logic to limiting the admissibility of an expert's opinion on that issue).

Furthermore, nothing in the record suggests the doctors' opinions were more prejudicial than probative. The fact that the opinions implied guilt is the source of their materiality and relevance. *See Heatley*, 70 Wn. App. at 579, 582, 854 P.2d 658. The trial court did not abuse its discretion in admitting the doctors' opinions.

*Baird*, 83 Wn. App. at 485-86.

As noted above, the Baird court repeatedly cited to the opinion in *Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993). In *Heatley*, a prosecution for DWI and negligent driving, the Court of Appeals held that the prosecution properly elicited testimony from the arresting officer that the defendant “was obviously intoxicated and ... could not drive a motor vehicle in a safe manner.” The Court specifically held that

Officer Evenson's testimony contained no direct opinion on *Heatley's* guilt or on the credibility of a witness. The fact that an opinion encompassing ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. “[I]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material.” *Wilber*, 55 Wn. App. at 298 n. 1, 777 P.2d 36. More important, Evenson's

opinion was based solely on his experience and his observation of Heatley's physical appearance and performance on the field sobriety tests. The evidentiary foundation "directly and logically" supported the officer's conclusion. *Allen*, 50 Wn. App. at 418, 749 P.2d 702; *see also Sanders*, 66 Wn. App. at 388, 832 P.2d 1326. Under these circumstances, the testimony did not constitute an opinion on guilt.

*Heatley*, 70 Wn. App. at 579-80.

Likewise, in a case similar to the present case, the court held that the it was not error to allow a medical expert to give his opinion that the fatal head injuries suffered by a four-month-old child were, in the doctors' words, "a non-accidental blunt injury" and "sustained by some sort of inflicted manner, whether it be an object, including a hand or a fist or some other object." *State v. Jones*, 59 Wn. App. 744, 747-48, 801 P.2d 263 (1990), *review denied*, 116 Wn.2d 1021, 811 P.2d 219 (1991). In *Jones*, one of the physicians explained in detail why the child's injuries were inconsistent with the defendant's version. *Jones*, 59 Wn. App. at 747. Finding the testimony admissible under ER 702 and 704, the *Jones* court said, "Here the evidence was helpful to the jury: under the facts and circumstances presented, the doctors were better qualified than jurors to adjudge the cause of death and whether the fatal blow was accidental or inflicted." *Jones*, 59 Wn. App. at 751.

The *Jones* court also pointed out that although previous courts had rejected testimony that a victim had been molested or that a victim fit the profile of someone suffering from “rape trauma syndrome,” those cases were distinguishable because in both, the experts testified directly on their opinions of the veracity of the victim. *Jones*, 59 Wn. App. at 748-49, citing *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), and *State v. Fitzgerald*, 39 Wn. App. 652, 694 P.2d 1117 (1985). In *Jones*, however, the doctors’ opinion that the injury was inflicted, rather than accidental, was not based on their opinion of a witness’ credibility but on inferences drawn from the physical evidence found at an autopsy. *Jones*, 59 Wn. App. at 749. Thus, the court concluded that the trial court was within its discretion in admitting the evidence. *Jones*, 59 Wn. App. at 751.

Other Washington courts have allowed medical experts to explain that a victim’s injuries demonstrate that a child’s injuries were not accidental or that the injuries were consistent with sexual abuse. *See, e.g., State v. Young*, 62 Wn. App. 895, 907, 802 P.2d 829, 817 P.2d 412 (1991) (Court rejected defendant’s claim that examining physician’s testimony that condition of victim’s genitalia was consistent with sexual abuse was unfairly prejudicial and went to ultimate issue); *State v. Toennis*, 52 Wn. App. 176, 185, 758 P.2d 539 (holding that a “qualified physician may testify that within reasonable probabilities, a particular injury or group of injuries to a child is not

accidental or is not consistent with the defendant's explanation, but is instead consistent with physical abuse by a person of mature strength”), *review denied*, 111 Wn.2d 1026 (1988).

Furthermore, in the present case the trial court stated that the State’s proposed testimony was proper pursuant to three cases: *State v. Jones* (mentioned above), and *State v Montgomery* and *State v. Hudson*.

In *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008), several of the State’s witnesses expressed opinions that they “believed” and “felt very strongly” that the defendant intended to manufacture methamphetamine based on the defendant’s purchase of pseudoephedrine and the manner in which it was purchased. *Montgomery*, 163 Wn.2d at 592-94. The Supreme Court noted that in normal conversation people often use phrases such as “I believe,” but the Court explained that such phrases are likely to draw objections at trial because witnesses are generally not permitted to speculate or express their personal beliefs about the defendant's guilt or innocence. *Montgomery*, 163 Wn.2d at 592. The Court then went on to state that,

It is unnecessary for a witness to express belief that certain facts or findings lead to a conclusion of guilt. To avoid inviting witnesses to express their personal beliefs, one permissible and perhaps preferred way is for trial counsel to phrase the question “is it consistent with” instead of “do you believe.” For example, experts are often asked if a history given is “consistent” with clinical findings or if certain assumptions are “consistent” with a conclusion. This court

approved this form of question in [*State v.*] *Kirkman*, [159 Wn.2d 918, 937, 155 P.3d 125 (2007)].

*Montgomery*, 163 Wn.2d at 592-93. The *Montgomery* Court then outlined the acceptable procedure for offering expert opinions in similar cases. Specifically, the Court then explained that,

Applying the principles outlined above, if a detective were qualified as an expert in methamphetamine manufacturing, the following colloquy could have occurred:

Prosecutor: Detective, based upon your background and experience, do you have an opinion as to whether the chemicals possessed by Mr. Montgomery and the manner in which they were obtained is consistent or inconsistent with intent to manufacture methamphetamine? Please answer, “Yes I have an opinion,” or “No, I do not have an opinion.”

Detective: Yes, I have an opinion.

Prosecutor: What is that opinion?

Detective: The chemicals possessed and the manner in which they were obtained was consistent with intent to manufacture methamphetamine.

Prosecutor: Would you explain to the jury the bases for your opinion?

This approach permits the defense to timely state objections and the court to rule on the admissibility of evidence. It permits the detective to explain why the evidence is consistent with intent to manufacture without expressing an opinion as to the guilt or innocence of the accused. Finally, it permits the jury to perform its proper function.

*Montgomery*, 163 Wn.2d at 594, footnote 8.

In *State v. Hudson*, 150 Wn. App. 646, 208 P.3d 1236 (2009), the other case cited by the trial court below, the Court of Appeals also examined what types of statements by an expert witness were allowed. In *Hudson*, two SANE nurses testified and one stated that the victim had suffered “extensive injury related to nonconsensual sex” and the other testified that “this was a very traumatic nonconsensual . . . penetration.” *Hudson*, 150 Wn. App. at 651. In a split opinion, the two-judge majority found that the opinion testimony was improper as the SANE nurses “*explicitly* testified that [the victim’s] injuries were caused by nonconsensual sex, i.e., rape.” *Hudson*, 150 Wn. App. at 653 (emphasis in original). The *Hudson* majority, however, also specifically stated that,

The dissent asserts that the SANEs opined only that the evidence was consistent with nonconsensual sex. Dissent at 1241. We agree with the dissent that if this were the case, the testimony would probably have been proper under *Montgomery*, 163 Wn.2d at 592-93, 183 P.3d 267. However, the testimony was far more direct. Culbertson testified that “the nature and cause of [the victim’s] injuries” was that “they’re extensive injury related to nonconsensual sex.” RP at 311. Sullivan testified that “this was a very traumatic nonconsensual . . . penetration.” RP at 485. These are overt and unambiguous opinions that [the victim] was raped.

*Hudson*, 150 Wn. App. at 653, footnote 2.

In the present case the trial court carefully followed the rulings from *Mongomery*, *Jones*, and *Hudson* and held that,

[T]he 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. And that, I believe, brings it into the purview of the *Montgomery* case and would be properly phrased in that fashion.

...

Again, I do want to draw your attention to the *Hudson* case. And specifically, I believe my decision is supported by the reference. And it's particularly a footnote, Footnote 2, where it reads, "The dissent asserts that the SANEs 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*."

RP 196-97.

Furthermore, at trial in the present case Ms. Breland testified that based on her training and experience S.H.G.'s injury was not consistent with normal wiping during a diaper change and was also inconsistent with an accidental injury. RP 237-38. This testimony was consistent with the holdings of *Jones* and *Montgomery* and the other cases mentioned above. In addition, this testimony was distinguishable from the testimony in *Hudson* where the SANE nurses had explicitly said that the injuries were caused by nonconsensual sex. Here, however, Ms. Breland's testimony was that S.H.G.'s injuries were not consistent with normal wiping during a diaper change and were also inconsistent with an accidental injury. Thus, by carefully limiting Ms. Breland's testimony to the issue of whether or not the

injuries were “consistent” with certain possible causes, the trial court’s ruling and the admission of the testimony properly followed the holding of not only *Jones and Montgomery*, but also of *Hudson*.

In light of all of the cases mentioned above, the trial court did not abuse its discretion by permitting Ms. Breland to give her expert opinion that S.H.G.’s injuries were inconsistent with normal wiping during a diaper change and inconsistent with an accidental injury. Although Ms. Breland’s testimony may have contradicted the Defendant’s claim that the injury was an accident, Ms. Breland did not testify directly that she believed that the Defendant was guilty, nor did she explicitly testify that were caused by certain types of actions. Instead, her testimony was properly limited to her opinion that S.H.G.’s injuries were inconsistent with normal wiping or an accidental injury, and her opinions were not based on statements from the victim or some other individual, but rather were based on the actual nature of S.H.G.’s physical injuries. Given these facts, her testimony was not improper and the trial court did not abuse its discretion in admitting this testimony.

**B. THE TRIAL PROPERLY DECLINED TO INCLUDE THE PHRASE “UNLAWFUL USE OF FORCE” IN ITS INSTRUCTION TO THE JURY DEFINING ASSAULT BECAUSE: (1) THAT PHRASE WAS INAPPLICABLE TO THE PRESENT CASE AS THERE WAS NO CLAIM OF A LAWFUL USE OF FORCE PURSUANT TO RCW 9A.16.020; (2) THE DEFENDANT’S CLAIM OF “ACCIDENT” WENT TO THE ISSUE OF WHETHER THE ASSAULT WAS “INTENTIONAL,” NOT TO WHETHER THE FORCE USED WAS LAWFUL; AND (3) THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT THE STATE WAS REQUIRED TO PROVE INTENT AND THIS INSTRUCTION ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.**

Gilbert next claims that that the trial court erred by instructing the jury that an assault is defined as an “intentional touching of another person that is harmful or offensive” without including the optional language that the touching was done with “unlawful force.” App.’s Br. at 22. This claim is without merit because the language regarding “unlawful force” was not applicable to the present case as there was no claim of self defense, defense of another, or other lawful use of force. Rather, the defense in the present case was that the harmful touching was an accident, and this claim went to the issue of whether the harmful touching was “intentional,” not to the issue of whether the touching was a lawful use of force. The trial court, therefore, committed no error as its instructions properly required the State to prove an intentional assault, accurately stated the law, and allowed the defense to argue

its theory of the case.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

The Washington Supreme Court Committee On Jury Instructions has explained in the “Notes on Use” for WPIC 35.50 that although the definition of assault generally includes the requirement that it be committed with unlawful force, courts in other contexts have criticized jury instructions that used the term “unlawful” without defining it. *See*, Washington Supreme Court Committee On Jury Instructions, WPIC 35.50 “Notes of Use”, *citing State v. Hardy*, 44 Wn. App. 477, 722 P.2d 872 (1986); *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985)(where the court held that the term “unlawful” as used in the aggressor instructions was overly broad because it could include accidental acts). The Committee therefore goes on to state that “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.” Washington Supreme Court Committee On Jury Instructions, WPIC 35.50 “Notes of Use.”

In the present case it is clear that the defense pursued by the Defendant was that he did not “intentionally” assault S.H.G. Rather, he consistently claimed that it was an “accident.” The trial court’s instructions to the jury properly allowed the Defendant to pursue and argue this defense theory, as the instructions required an “intentional” assault.<sup>2</sup> CP 80. If the jury truly believed that the Defendant accidentally tore S.H.G.’s vaginal tissue, then the instructions would have precluded a finding of guilt.

Furthermore, the Defendant’s claim of an “accident” was not related to the term “unlawful act” as it is used in WPIC 35.50. Rather, the phrase “unlawful act” relates specifically to several defenses that explain when force may be lawfully used. For instance, RCW 9A.16.020 provides that the use of force is not unlawful when it is: (1) used by a public officer in the performance of a legal duty; (2) used by a person arresting one who has committed a felony and delivering him or her to a public officer; (3) used in self defense, defense of another, or in defense of property; (4) used by a person to detain someone who enters or remains unlawfully in a building or on real property; (5) used by a carrier of passengers in expelling a passenger who refuses to obey a lawful and reasonable regulation; or (6) used by a person to prevent a mentally ill, mentally incompetent, or mentally disabled

---

<sup>2</sup> In closing argument, for instance, defense counsel consistently argues that the State had failed to prove an “intentional” assault because the evidence showed only that the Defendant

person from committing an act dangerous to any person, or to restrain such person until it is possible to obtain legal authority for the restraint or custody of the person. The statute, of course, does not state that an “accidental” use of force is somehow a “lawful” use of force.

In addition, there are a number of WPICs (based on RCW 9A.16.020) that define instances where the use of force is “lawful.” WPIC 17.02, for example, explains that force is lawful when used in self defense, defense of others, or defense of property. *See also*, WPIC 17.01 (use of force lawful when used by a public officer in the performance of a legal duty); WPIC 17.03 (use of force lawful when used to detain someone who unlawfully enters or remains in a building or on real property. The State is unaware of any WPIC that states that force is lawful if it is used accidentally, nor did the Defendant propose any such instruction.

In short, the trial court’s instruction stated that “an assault is an intentional touching of another person that is harmful or offensive.” CP 80. The Defendant’s argument that the jury instruction should have also stated that the intentional touching must be “with unlawful force” is without merit.

Furthermore, as noted by the WPIC Committee, Washington courts in other contexts had have criticized jury instructions that used the term

---

had “accidentally” caused the injury. See RP 321-24, 328-32

“unlawful” without defining it. *See*, WPIC 35.50 Notes on Use, *citing State v. Hardy*, 44 Wn. App. 477, 722 P.2d 872 (1986) (aggressor instruction for second degree murder); *State v. Arthur*, 42 Wn. App. 120, 708 P.2d 1230 (1985) (aggressor instruction for second degree assault). Specifically, in *Arthur*, the court found that the use of language regarding an “unlawful act” was overly broad and vague since without some further definition or guidance a jury might be left to conclude that an accidental act could be enough to qualify a person as an aggressor, when the law requires that an aggressor instruction be directed to intentional acts. *Arthur*, 42 Wn. App. at 124.

Thus the *Arthur* holding demonstrates that using the phrase “unlawful act” does nothing to clarify whether the act in question must be intentional as opposed to accidental; in fact, the use of the term “unlawful” could potentially exacerbate the problem. *Arthur*, therefore, further shows that the Defendant’s argument in the present case misses the mark, since using the phrase “with unlawful force” in the present case would not have shed any light on the issue of whether an accidental act can constitute an assault. Rather, as outlined above, the issue of whether an accidental act can constitute an assault is properly addressed by the requirement that the State prove that the assault was an “intentional” touching in order to prove an assault. As the trial court properly instructed the jury that the State was required to show an “intentional” touching, there was no error.

**C. THE DEFENDANT'S CLAIM THAT THE EVIDENCE WAS INSUFFICIENT TO SHOW THAT HE ACTED INTENTIONALLY MUST FAIL BECAUSE: (1) UNDER WASHINGTON LAW CRIMINAL INTENT MAY BE INFERRED FROM CONDUCT AND CIRCUMSTANTIAL EVIDENCE; AND (2) VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT S.H.G.'S INJURIES (WHICH INCLUDED DEEP TEARS TO HER VAGINAL TISSUE AND WHICH REQUIRED SIGNIFICANT FORCE TO INFLICT) WERE NOT CAUSED BY AN ACCIDENTAL TOUCHING, BUT RATHER WERE CAUSED BY AN INTENTIONAL TOUCHING.**

Gilbert next claims that there was insufficient evidence that he acted intentionally. App.'s Br. at 29. This claim is without merit because, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences from the evidence in favor of the State, a rational trier of fact could have found beyond a reasonable doubt that the Defendant intentionally assaulted S.H.G.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the

State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

Furthermore, in determining the sufficiency of the evidence, criminal intent may be inferred from conduct, and circumstantial evidence is not to be considered any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *Myers*, 133 Wn.2d at 38. A fact finder is permitted to draw inferences from circumstantial evidence so long as these inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of conflicting evidence is not an adequate reason for granting a new trial when the verdict of the jury is otherwise supported by substantial evidence. *Bunnell v. Barr*, 68 Wn.2d 771, 777, 415 P.2d 640 (1966).

Here, the State presented evidence that the Defendant was the only person carrying for S.H.G. at the time of her injury and the Defendant admitted this fact to several people and admitted it on the stand. Furthermore, the physical nature of S.H.G.'s injury showed that it had to have been caused by a significant force as the force caused a deep tearing S.H.G.'s tissue in area that was a "very forgiving and mobile area of tissue that it takes

a lot of force to injure.” RP 208-11, 217-18. In addition the injury was severe enough that it required surgery to repair the injury. RP 208-11, 217-18. From these facts (as well as from Ms. Breland’s testimony that the injury was inconsistent with normal wiping during a diaper change and inconsistent with an accidental injury), a reasonable jury could infer that the Defendant intentionally assaulted S.H.G., as the jury was permitted to infer criminal intent from the Defendant’s conduct and the circumstantial evidence.

Moreover, the mere fact that the Defendant claimed that injury was an accident does not preclude a jury from reaching the opposite conclusion. The jury is permitted to discount theories it deems to be unreasonable.

As outlined above, the jury's verdict in the present case was reasonable and was based upon substantial evidence, as criminal intent may be inferred from conduct. Furthermore, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Given the nature of S.H.G.’s injuries, the jury could properly infer that the Defendant intentionally assaulted S.H.G. Therefore, sufficient evidence supports the jury's verdict in this case.

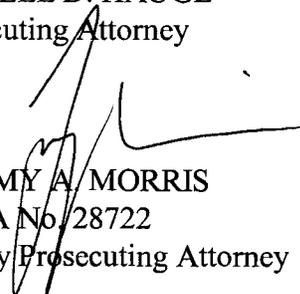
**IV. CONCLUSION**

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED March 14, 2011.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

G:\APPEALS\GILBERT, ROBERT 05DA 10-25\APPEAL DOCS\GILBERT COA BRIEF.DOC