

660867-6

660867-6

660867-6
NO. ~~66087-6-1~~

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

STATE OF WASHINGTON,

Respondent,

v.

JERRY A. PERKINS,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 17 AM 10:51

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES 1

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

III. ARGUMENT4

 A. THE VICTIM’S TESTIMONY SHOWS THAT THE DEFENDANT
 BROKE HIS NOSE, WHICH CONSTITUTES SUBSTANTIAL
 BODILY HARM.....4

 B. WHEN A VICTIM IS STRUCK MULTIPLE TIMES OVER A
 SHORT PERIOD OF TIME, THE JURY NEED NOT AGREE
 UNANIMOUSLY ON WHICH BLOW CONSTITUTED THE
 CHARGED ASSAULT.....6

 C. THE JURY INSTRUCTIONS DID NOT CREATE ANY
 “MANDATORY PRESUMPTION,” SINCE THEY CORRECTLY
 SAID THAT INTENT WILL SUBSTITUTE FOR RECKLESSNESS
 ONLY IF THOSE MENTAL STATES RELATE TO THE SAME
 PARTICULAR RESULT.....9

 D. THE DEFENDANT’S CHALLENGES TO THE PERSISTENT
 OFFENDER STATUTE HAVE ALREADY BEEN REJECTED. 12

IV. CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>In re Andress</u> , 147 Wn.2d 602, 56 P.3d 981 (2002)	8
<u>State v. Allen</u> , 116 Wn. App. 454, 66 P.3d 653 (2003)	5
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <u>cert. denied</u> , 501 U.S. 1237 (1991)	7, 8
<u>State v. Frazier</u> , 82 Wn. App. 576, 918 P.2d 964 (1996)	12
<u>State v. Handran</u> , 113 Wn.2d 11, 775 P.2d 453 (1989)	7, 8
<u>State v. Hayward</u> , 152 Wn. App. 632, 217 P.3d 354 (2009) 9, 10, 11	
<u>State v. Holzknecht</u> , 157 Wn. App. 754, 238 P.3d 1233 (2010), <u>review denied</u> , 170 Wn.2d 1029 (2011)	11
<u>State v. Keend</u> , 140 Wn. App. 858, 166 P.3d 1268 (2007), <u>review</u> <u>denied</u> , 163 Wn.2d 1041 (2008)	12
<u>State v. McKague</u> , 159 Wn. App. 489, 246 P.2d 558 (Div. II) (lead opinion), <u>aff'd on other grounds</u> , 172 Wn.2d 802, 262 P.3d 1225 (2011)	13
<u>State v. Reyes-Brooks</u> , ___ Wn. App. ___, ___ P.3d ___, 2011 WL 6016155 (2011) (Div. I)	13
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	5
<u>State v. Siebert</u> , 168 Wn.2d 306, 230 P.3d 142 (2010)	11
<u>State v. Summers</u> , 107 Wn. App. 373, 28 P.3d 780, 43 P.3d 526 (2001)	6
<u>State v. Thiefault</u> , 160 Wn.2d 409, 158 P.3d 580 (2007)	12
<u>State v. Williams</u> , 156 Wn. App. 482, 234 P.3d 1173 (Div. III), <u>review denied</u> , 170 Wn.2d 1011 (2010)	13

FEDERAL CASES

<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)	5
---	---

WASHINGTON STATUTES

RCW 9A.04.110(4)(b)	6
RCW 9A.36.021(1)(a)	5

COURT RULES

RAP 2.5(a)(2)	4
RAP 2.5(a)(3)	6, 9

OTHER AUTHORITIES

WPIC 10.03	10
------------------	----

I. ISSUES

(1) The victim testified that the defendant hit him in the nose and broke it. Medical testimony corroborated that the victim's nose was broken. By statute, the fracture of any bodily part constitutes "substantial bodily harm." Could a reasonable jury conclude that the defendant's assault inflicted substantial bodily harm?

(2) In an effort to collect a debt, several people struck, kicked, and stabbed the victim over a short period of time. Was the jury required to agree unanimously on which blow constituted the charged assault?

(3) The jury was instructed that if an element of a crime involved recklessness *as to a particular result*, the element would be established if the defendant acted intentionally *as to that result*. Did this instruction require the jury to conclude that the defendant recklessly inflicted substantial bodily harm if he acted with the intent to achieve *a different result*?

(4) Should this court re-examine State Supreme Court decisions and its own recent holdings that the Persistent Offender Accountability Act violates neither the right to jury trial nor equal protection rights?

II. STATEMENT OF THE CASE

John Hedgcoth was a friend of the defendant, Jerry Perkins. Shawn Godwin was another friend. Alexander Hinojosa (“Primo”) was a former neighbor, from whom Mr. Hedgcoth had once bought cocaine. Mr. Hedgcoth owed the defendant \$60 or \$100. As of November, 2010, he had owed this money for four or five months. 2/23-24 RP 39-44.

On November 7, Mr. Hedgcoth completed a plumbing repair job. He was paid around \$380 in cash. He headed to McDonald’s to buy food for his grandchildren. On the way there, he encountered Mr. Hinojosa. Mr. Hedgcoth mentioned that he had money. Mr. Hinojosa invited him to stop by after he got done. 2/23-2/24 RP 44-48.

After leaving McDonald’s, Mr. Hedgcoth drove to Mr. Hinojosa’s house. He parked, went up to the door, and knocked. Mr. Hinojosa opened the door. As Mr. Hedgcoth stepped inside, Mr. Godwin hit him in the back of the head. Mr. Hedgcoth went head first into the couch and lost consciousness for a minute. 2/23-24 RP 48-50.

When Mr. Hedgcoth came to, the defendant demanded his money. Mr. Hedgcoth gave him \$60 “or something like that.” The

defendant hit him in the nose. Mr. Hedgcoth's nose was broken in two places. His blood was shooting across the floor. 2/23 RP 52-53. Mr. Hedgcoth's nose had previously been broken as a result of plastic surgery. 2/23-24 RP 60.

At some point, Mr. Hedgcoth was kicked by Mr. Godwin and Mr. Hinojosa. He was also stabbed in the arm. Mr. Hedgcoth believed that the defendant stabbed him, but he was not sure. "When you got feet kicking you in the face and stomping on your face, you don't see much." 2/23-24 RP 52.

Eventually, Mr. Hinojosa told "a girl" to "haul [Mr. Hedgcoth] down the road." As Mr. Hedgcoth was leaving, he saw his wallet on the floor. His money was gone. He did not know who had taken it. He went to his van. The girl drove him to the first stop sign and got out. He drove himself to the hospital. 2/23 RP 55.

At the hospital, a CAT scan confirmed that the bone in Mr. Hedgcoth's nose was broken. There is no treatment for this condition, other than drugs or ice to relieve the pain. Mr. Hedgcoth also had an incision over his right shoulder and the top of his left hand. He left the hospital before the doctor had completed all desired medical procedures. 2/23-24 RP 5-7. He testified that he

didn't like hospitals and was also worried about his grandchildren.
2/23-24 RP 59.

The defendant was charged with first degree robbery and second degree assault. Originally, the assault was based on both assault with a deadly weapon and infliction of substantial bodily harm. CP 34. At the conclusion of the State's case, however, the prosecutor agreed to withdraw the weapon allegation. 2/23-24 RP 75. The jury was instructed solely on the theory of an assault that inflicted substantial bodily harm. CP 56, inst. no. 13. The jury found the defendant guilty of second degree assault but not guilty of robbery. CP 23-24. Because the defendant has two prior convictions for second degree assault (plus 11 other felonies), the court sentenced him as a persistent offender to life imprisonment. CP 4-6.

III. ARGUMENT

A. THE VICTIM'S TESTIMONY SHOWS THAT THE DEFENDANT BROKE HIS NOSE, WHICH CONSTITUTES SUBSTANTIAL BODILY HARM.

The defendant's appeal raises five issues. Not a single one of these was raised in the trial court. He first argues that the evidence was insufficient to support his conviction. This issue can be raised for the first time on appeal. RAP 2.5(a)(2).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. 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. A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)
(citations omitted).

This standard "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "It is for the jury – not the appellate court – to determine the credibility of witnesses and to resolve conflicts in the evidence." State v. Allen, 116 Wn. App. 454, 466, 66 P.3d 653 (2003).

To prove the defendant guilty of second degree assault, the State was required to prove that he inflicted substantial bodily harm. CP 56, inst. no. 13; RCW 9A.36.021(1)(a).

"Substantial bodily harm:" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or

impairment of any bodily part or organ, or which causes a fracture of any bodily part.

RCW 9A.04.110(4)(b).

Here, the victim testified that the defendant punched him in the nose. As a result, his nose was “broke in two spots.” His blood was “shooting across” the living room floor. 2//23- 2/24 RP 53. A CAT scan confirmed that the defendant’s nose was broken. Id. at 6. A “fracture of any bodily part” constitutes “substantial bodily harm.” The victim’s testimony, if believed by the jury, established that the defendant’s assault caused the fracture. “Credibility determinations are for the trier of fact and are not subject to review.” State v. Summers, 107 Wn. App. 373, 28 P.3d 780, 43 P.3d 526 (2001). The evidence supports the jury’s determination that the defendant inflicted substantial bodily harm.

B. WHEN A VICTIM IS STRUCK MULTIPLE TIMES OVER A SHORT PERIOD OF TIME, THE JURY NEED NOT AGREE UNANIMOUSLY ON WHICH BLOW CONSTITUTED THE CHARGED ASSAULT.

The defendant next contends that the jurors should have been instructed that they had to unanimously agree on which physical act constituted the assault. This issue can be considered if it establishes “manifest error affecting a constitutional right.” RAP 2.5(a)(3).

The governing rules governing jury unanimity are well established:

Where the State presents evidence of several distinct acts, any one of which could be the basis for a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. However, this rule applies only where the State presents evidence of several distinct acts. It does not apply where the evidence indicates a continuing course of conduct. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner.

State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citations omitted).

In two cases, the Supreme Court has applied this rule to assaults that included multiple physical acts. Handran; State v. Crane, 116 Wn.2d 315, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991). In Handran, the defendant was charged with first burglary, based on the commission of an assault during the burglary. The victim testified that the defendant both kissed her and hit her. The defendant argued that the jury had to unanimously agree on one of these acts. The Supreme Court disagreed:

[The defendant's] alleged criminal conduct occurred in one place during a short period of time between the same aggressor and victim. Under a commonsense evaluation of these facts, the actions evidence a continuing course of conduct to secure sexual

relations with [the victim], whether she consented or not, rather than several distinct acts.

Handran, 113 Wn.2d at 17.

In Crane, the defendant was charged with felony murder, with second degree assault as the underlying felony.¹ There was evidence that the defendant may have assaulted the victim in different ways over a two-hour period. The court held that the assaultive acts during this “short period of time” would constitute “continuous conduct.” Consequently, the jury was not required to be unanimous as to each incident of assault. It only needed to agree unanimously that the conduct occurred. Crane, 116 Wn.2d at 330.

The present case is similar. The victim was struck, hit, and stabbed by a group of people at a single location during a short period of time. 2/23 RP 53-55. Viewed in a common sense manner, this represents a single course of conduct intended to secure a single objective – collecting a debt. The jury is not required to agree unanimously on which blow constituted the

¹ The murder statute in effect at the time was later interpreted as precluding this charging theory. In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002). This holding does not affect the court’s analysis of the unanimity issue.

charged assault. Since the evidence shows a continuous course of conduct, the requirement of jury unanimity was satisfied.

C. THE JURY INSTRUCTIONS DID NOT CREATE ANY “MANDATORY PRESUMPTION,” SINCE THEY CORRECTLY SAID THAT INTENT WILL SUBSTITUTE FOR RECKLESSNESS ONLY IF THOSE MENTAL STATES RELATE TO THE SAME PARTICULAR RESULT.

Next, the defendant claims that the jury instructions established a “mandatory presumption.” No objection to the pertinent instructions was raised in the trial court. 2/23-24 RP 78-80. Again, however, the issue can be considered if it constitutes a “manifest error affecting a constitutional right.” RAP 2.5(a)(3).

The defendant argues that the instructions in this case are “similar” to those condemned by Division Two in State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009). They are not. To the contrary, the instructions here contain the precise language that Division Two considered necessary to cure the problem.

Hayward was, like the present case, a prosecution for second degree assault. The jury was instructed that, to convict the defendant, it had to find that the defendant intentionally assaulted the victim and thereby recklessly inflicted substantial bodily harm. Id. at 639-40 ¶ 15. The jury was then instructed: “Recklessness also is established if a person acts intentionally.” Id. at 640 ¶ 19.

The court held that these instructions “impermissibly allowed the jury to find [the defendant] recklessly inflicted substantial bodily harm if it found that [the defendant] intentionally assaulted [the victim].” *Id.* at 645 ¶ 31.

In contrast, the instructions in the present case did not say that recklessness was established if a person acted intentionally. Rather, they said:

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

CP 58, inst no. 15 (emphasis added). This language was taken from the 2008 amendments to WPIC 10.03. The instructions in Hayward had used the language of the prior version of that instruction. Hayward, 152 Wn. App. at 644 ¶ 29. The court pointed to the 2008 amendment as demonstrating the flaw in the prior instructions. *Id.* at 645 ¶ 34.

Under the instructions in the present case, intent established recklessness only if the two related to the same “particular result.” With regard to the elements of second degree assault, the “particular result” was “recklessly inflict[ing] substantial bodily harm.” CP 56, inst no. 13. If the defendant intended to inflict

substantial bodily harm on the victim, that would also establish that he recklessly inflicted such harm. If, on the other hand, he intended something else – such as merely to assault the victim – that would not be sufficient to establish that he recklessly inflicted substantial bodily harm. The instructions used in the present case are free from the problem identified in Hayward.

The analysis in Hayward is controversial. The Supreme Court rejected the argument that similar instructions were defective in State v. Siebert, 168 Wn.2d 306, 316-17 ¶¶ 21-23, 230 P.3d 142 (2010). Although Siebert was a plurality opinion, only one justice dissented on this point. Id. at 331-33 ¶¶ 54-58 (Sanders, J., dissenting). Relying on Siebert, this Division has expressed its disagreement with Hayward. State v. Holzkecht, 157 Wn. App. 754, 765 ¶ 25, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029 (2011). This court held that the older version of the pattern instruction “correctly informed the jury of the applicable law, including the rule that a mental state is established by proof of a more serious mental state.” Id. at 766 ¶ 27. Division Two itself had reached the same result in a prior case. State v. Keend, 140 Wn. App. 858, 863-68 ¶¶ 4-16, 166 P.3d 1268 (2007), review

denied, 163 Wn.2d 1041 (2008); see Hayward, 152 Wn. App. at 645 ¶¶33-34 (disapproving Keend).

This dispute, however, does not need to be resolved in the present case. Unlike the instructions in any of these cases, the instructions here allowed intent to substitute for recklessness only if they both related to “a particular result.” Far from being manifest constitutional error, these instructions were correct.

D. THE DEFENDANT’S CHALLENGES TO THE PERSISTENT OFFENDER STATUTE HAVE ALREADY BEEN REJECTED.

Finally, the defendant raises two constitutional challenges to the persistent offender finding. First, he claims that there is a constitutional right to a jury determination of prior convictions. The Washington Supreme Court has held that there is no such right. State v. Thieffault, 160 Wn.2d 409, 418-20 ¶¶ 14-17, 158 P.3d 580 (2007). Absent binding federal authority to the contrary, this court must follow the Washington Supreme Court’s interpretation of federal law. State v. Frazier, 82 Wn. App. 576, 591 n. 15, 918 P.2d 964 (1996).

Second, the defendant claims that denial of a jury trial on the existence of prior convictions violated his equal protection rights. All three divisions of this court have rejected identical arguments.

State v. Reyes-Brooks, ___ Wn. App. ___, ___ P.3d ___, 2011 WL 6016155 ¶¶ 25-26 (2011) (Div. I); State v. McKague, 159 Wn. App. 489, 517-19 ¶¶ 50-56, 246 P.2d 558 (Div. II) (lead opinion), aff'd on other grounds, 172 Wn.2d 802, 262 P.3d 1225 (2011); see 159 Wn. App. at 524 ¶ 70 (Armstrong, J.) (concurring with lead opinion on this issue);² State v. Williams, 156 Wn. App. 482, 496-98 ¶¶ 26-34, 234 P.3d 1173 (Div. III), review denied, 170 Wn.2d 1011 (2010). There is no reason for this court to re-examine its recent holdings on this point.

² The defendant's brief cites the dissenting opinion in McKague. That dissent was based on the right to trial by jury, not on any equal protection analysis. McKague, 159 Wn. App. at 529-31 ¶¶ 81-85 (Quinn-Brintnall, J., dissenting). In concluding that this right was violated, the dissenting judge asserted that she was "not require[d] ... to apply higher court holdings which violate the constitution." Id. at 534 ¶ 92. When the Supreme Court reviewed other issues in this case, it reiterated that "the right to jury determinations does not extend to the fact of prior convictions for sentencing purposes." 172 Wn.2d at 804 n. 1.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 13, 2012.

MARK K. ROE
Snohomish County Prosecuting Attorney
By:



SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent