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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDRES SEBASTIAN FERRER, Appellant.	No. 47687-8-II UNPUBLISHED OPINION ON REMAND

SUTTON, J. — In our previous unpublished opinion, we affirmed Andres Sebastian Ferrer's convictions for second degree assault and felony harassment and remanded to the trial court to strike a sentencing condition. *State v. Ferrer*, noted at 195 Wn. App. 1044 (2016), 2016 WL 4371644. We declined to consider a jury instruction issue that Ferrer raised in his Statement of Additional Grounds for Review[1] (SAG). Our Supreme Court granted review "only as to the jury instruction regarding disfigurement," denied all remaining issues, and remanded the matter with instructions that we "address the issue on the merits." *State v. Ferrer*, 187 Wn.2d 1009, 388 P.3d 500 (2017).

In his SAG, Ferrer asserts that the trial court erred by failing to give a jury instruction defining the term "substantial" to supplement and clarify the jury instruction defining "disfigurement." He contends that without a separate definition of "substantial," the jury

[1] RAP 10.10.

instruction defining disfigurement "set[] the bar incredibly low for injury inflicted" and potentially allowed the jury to consider "*any* superficial mark left of any kind as evidence of a felony." SAG at 10. We agree that the trial court erred when it failed to give a jury instruction defining "substantial" to supplement and clarify its meaning in relation to the "disfigurement" instruction, but we hold that this error was harmless. Because the error was harmless, we again affirm.

FACTS

I. BACKGROUND

The background facts for this case are set out in our prior opinion. This case stems from Ferrer's assault of his estranged wife Kristina Ferrer. *Ferrer*, 2016 WL 4371644 at *1-2. During the assault, Ferrer repeatedly punched Kristina[2] "about the head and face." *Ferrer*, 2016 WL 4371644 at *1.

The State charged Ferrer with one count of second degree assault by strangulation or suffocation and/or by reckless infliction of substantial bodily harm and with one count of felony harassment. CP at 10-12; *Ferrer*, 2016 WL 4371644 at *2. At trial, Ferrer admitted to having "punched [Kristina] a number of times." *Ferrer*, 2016 WL 4371644 at *2.

Kristina and other State witnesses testified that Kristina suffered bruising on the side of her head, her ear, her neck, and her shoulder. Her head was "swollen," her ear was bleeding, and she suffered headaches. 2 Report of Proceedings (RP) at 317. Her left hand or wrist was also swollen and painful. The bruising increased over time and did not start to fade for three to four weeks.

[2] Because Ferrer and Kristina share the same last name, we refer to Kristina by her first name for clarity. We intend no disrespect.

The bruising was serious enough that she was unable to go to work because she was required to work with patients.

One law enforcement witness testified that the bruising was very obvious and startling, that the bruising was "really unusual," and that she had rarely seen marks so "severe" after this type of assault. 3 RP at 515. Another law enforcement officer testified that the bruising on Kristina's neck was "very obvious." 3 RP at 501. And a different officer testified that he had investigated "[d]ozens" of strangulation cases and had never before seen marks like this. 3 RP at 533. During this testimony, the trial court admitted numerous photographs of Kristina's injuries taken at the time of the assault and several days after the assault.

Kristina further testified that she also suffered constant headaches for a couple of months following the assault and that she observed vision changes, which she characterized as "seeing stars" periodically for "[a] couple weeks." 2 RP at 321-22. She also testified that when the swelling in her mouth subsided, she lost a dental crown.

II. JURY INSTRUCTIONS

The to convict instruction for the second degree assault charge provided, in part,

> To convict the defendant of the crime of Assault in the Second Degree as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about March 22, 2014, the defendant:
>
> (a) intentionally assaulted Kristina Ferrer and thereby recklessly inflicted *substantial bodily harm*; or
>
> (b) assaulted Kristina Ferrer by strangulation; and
>
> (2) That this act occurred in the State of Washington.

CP at 44 (Jury Instruction 7) (emphasis added).

The trial court also instructed the jury,

> 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*; or assaults another by strangulation.

CP at 43 (Jury Instruction 6) (emphasis added).

The trial court then defined the terms "substantial bodily harm" and "disfigurement,"

> 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.

CP at 46 (Jury Instruction 9) (emphasis added).[3]

> "Disfigurement" means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.

CP at 47 (Jury Instruction 10). There was no instruction defining the term "substantial," and neither party requested such an instruction.

Ferrer did, however, object when the State initially proposed the instruction defining disfigurement. He argued that (1) the instruction, which he asserted was not a pattern jury instruction, was unnecessary because the term disfigurement was within the common understanding of the jury, (2) the instruction was too broad and was potentially confusing, and (3) the instruction "may actually lower the burden of . . . proof." 4 RP at 707.

The State responded that the instruction defining disfigurement accurately stated the law and that Division Three of this court held that this instruction was proper in *State v. Atkinson*, 113 Wn. App. 661, 54 P.3d 702 (2002). The State argued that although the term disfigurement might

[3] Ferrer did not object to this instruction.

be commonly understood, "it can mean a lot of different things to a lot of different people." 4 RP at 707. The State asserted that the instruction was necessary in this case because the basis for the substantial bodily harm here was, in part, based on bruising, and the jury may not necessarily understand that bruising could qualify as disfigurement. The trial court agreed and gave the instruction.

The trial court also instructed the jury on the lesser offense of fourth degree assault. The to convict instruction for fourth degree assault required the jury to find that Ferrer had assaulted Kristina—it did not require the jury to find any injury.

The jury found Ferrer guilty of both charges. By special verdict, the jury also unanimously found that Ferrer had inflicted substantial bodily harm. Also by special verdict, the jury stated that it had not been unanimous as to whether Ferrer assaulted Kristina by strangulation. Ferrer appealed.

III. APPEAL AND REMAND

As noted above, in his SAG, Ferrer asserts that the trial court erred by failing to give a jury instruction defining the term "substantial" to supplement and clarify the jury instruction defining "disfigurement." He contends that without a separate definition of "substantial," the jury instruction defining disfigurement "set[ ] the bar incredibly low for injury inflicted" and potentially allowed the jury to consider "*any* superficial mark left of any kind as evidence of a felony." SAG at 10. In our unpublished opinion affirming his convictions, we held that this instructional issue was not preserved. *Ferrer*, 2016 WL 4371644 at *6.

Ferrer petitioned for review with our Supreme Court and raised new issues in his supplemental petition for review. Our Supreme Court granted review "only as to the jury

instruction regarding disfigurement," denied the remaining issues, and remanded the case back to this court with instructions that we "address the issue on the merits." *Ferrer*, 187 Wn.2d 1009 (Order, Feb. 8, 2017).

We acknowledge that Ferrer raised numerous additional arguments for the first time in his supplemental petition for review and that he has also briefed several new arguments in his supplemental brief to this court.[4] Because the Supreme Court does not generally review issues not raised before the appellate court and the Supreme Court's remand order does not direct us to address the issues raised for the first time in the supplemental petition for review, we address only the issue raised in Ferrer's SAG related to the jury instruction issue. *See Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) *(*citing *State v. Halstien*, 122 Wn.2d 109, 130, 857 P.2d 270 (1993)); *State v. Clark*, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994) (Supreme Court generally declines to review issues not raised before a lower appellate court), *reversed on other grounds by State v. Catlett*, 133 Wn.2d 355, 361, 945 P.2d 700 (1997).

ANALYSIS

I. LEGAL PRINCIPLES

We review challenges to jury instructions de novo, within the context of the jury instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). If the legal definition of a term differs from the common understanding of the word, the term is considered a technical term. *State v. Brown*, 132 Wn.2d 529, 611, 940 P.2d 546 (1997); *State v. O'Donnell*,

[4] Because Ferrer raised the jury instruction issue in his SAG, we accepted supplemental briefing from both parties on the jury instruction issue.

142 Wn. App. 314, 325, 174 P.3d 1205 (2007). The failure to define a technical term is not a constitutional error. *State v. Stearns*, 119 Wn.2d 247, 250, 830 P.2d 355 (1992).

II. "SUBSTANTIAL" IS A TECHNICAL TERM

To determine if the trial court erred by failing to define "substantial" to supplement and clarify the instruction defining the term "disfigurement," we must first determine whether the term "substantial" is a technical term in the context of a second degree assault charge. *State v. McKague*, suggests that "substantial" is a technical term in this context. 172 Wn.2d 802, 262 P.3d 1225 (2011).

In *McKague*, our Supreme Court considered a challenge to the sufficiency of the evidence to convict McKague of second degree assault. 172 Wn.2d at 805. In so doing, it considered the definition of "substantial" as used in relation to the element "substantial bodily harm." *McKague*, 172 Wn.2d at 805.

The court held that the dictionary definition of "substantial" applied by the Court of Appeals, which included "'something having good substance or actual existence,' would make practically any demonstrable impairment or disfigurement a 'substantial' injury regardless of how minor," and concluded that a different definition of "substantial" applied. *McKague*, 172 Wn.2d at 806 (quoting *State v. McKague*, 159 Wn. App. 489, 503, n.7, 246 P.3d 558 (2011) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2280 (2002). The court further held that the term "substantial," as used in relation to the element substantial bodily harm, "signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence." *McKague*, 172 Wn.2d at 806. Although our Supreme Court refused to limit the term "substantial" to any particular dictionary definition, by rejecting the definition

adopted by the Court of Appeals, the Supreme Court demonstrated that not all definitions of "substantial" apply in this context.

Our Supreme Court's conclusion in *McKague* suggests that the common understanding of "substantial," represented by the dictionary definition, is too broad in the context of a second degree assault charge, and the court's holding supports the conclusion that there is a technical definition of the term that must be presented to the jury. Because a dictionary definition reflects a common understanding of a term, it is also possible that the jurors could have had an overbroad understanding of what "substantial" meant in this context. Because each juror's individual understanding of the term could differ, without an instruction defining the term "substantial," the jury would need "to find a common denominator among each member's individual understanding of [the] term[] and to determine on its own just what was [the term's] meaning." *State v. Allen*, 101 Wn.2d 355, 362, 678 P.2d 798 (1984). And "[t]here is no way to ascertain whether [the jurors] used the proper . . . definition[]." *Allen*, 101 Wn.2d at 362.

We hold that in the context of the charge of second degree assault, the term "substantial," in relation to the element "substantial disfigurement," is a technical term. Thus, the trial court erred by failing to provide the jury with a definition of "substantial" to supplement and clarify the definition of "disfigurement." We next examine whether this error was harmless.

III. HARMLESS ERROR ANALYSIS

A trial court's failure to instruct on a term's definition may be harmless error. *State v. Flora*, 160 Wn. App. 549, 554, 249 P.3d 188 (2011). "'A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.'" *Flora*, 160 Wn. App. at 554 (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Having reviewed the photographs of Kristina's injuries that were admitted into evidence and also having reviewed the testimony describing her injuries, we hold that the only conclusion a rational jury could have reached was that the injuries were a temporary but substantial disfigurement given the severity of the bruising.

Serious bruising may be sufficient indication of substantial bodily harm to find second degree assault. *McKauge*, 159 Wn. App. at 502; *State v. Hovig*, 149 Wn. App. 1, 13, 202 P.2d 318 (2009); *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). Here, the exhibits show extensive, dark bruising around Kristina's neck and jaw area. And the law enforcement witnesses testified that the bruising was very obvious and startling and that it was "really unusual." 3 RP at 515. In fact, two law enforcement officers who had extensive experience with similar assaults described the bruising as some of the most severe bruising they had seen following an assault of this nature. Given the severity of the bruising, we hold that, even assuming that "substantial" is a technical term that must be defined in the court's instructions to the jury, the absence of such an instruction in no way affected the final outcome of this case.

Accordingly, we affirm the conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

, A.C.J.

LEE, A.C.J.

Johanson, J.

JOHANSON, J.