

**FILED: November 07, 2012**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,  
Plaintiff-Respondent,

v.

SAMANTHA IRENE WRIGHT,  
Defendant-Appellant.

Tillamook County Circuit Court  
071270

A142417

Mari Garric Trevino, Judge.

Argued and submitted on March 22, 2012.

Stephanie J. Hortsch, Deputy Public Defender, argued the cause for appellant. With her on the brief was Peter Gartlan, Chief Defender, Office of Public Defense Services.

Jennifer Lloyd, Attorney-in-Charge, Criminal Appeals, argued the cause for respondent. On the brief were John R. Kroger, Attorney General, Mary H. Williams, Solicitor General, and Shannon T. Reel, Assistant Attorney General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

NAKAMOTO, J.

Reversed.

1                    NAKAMOTO, J.

2                    In this criminal appeal, defendant challenges her conviction for first-degree  
3 criminal mistreatment, ORS 163.205, for spanking a 16-month-old child and leaving a  
4 bruise on the child's buttock. Defendant assigns error to the trial court's denial of her  
5 motion for a judgment of acquittal, arguing that there was no proof that she caused  
6 "physical injury" to the victim, an element of first-degree criminal mistreatment.  
7 Because we agree with defendant, we reverse.

8                    The facts are undisputed. Defendant admitted to spanking a 16-month-old  
9 child, while she babysat him. The baby cried when she spanked him. The child's mother  
10 picked up the child later that evening and testified that the child looked tired and "his  
11 eyes were all red." Later, when the mother's boyfriend, Coats, was changing the child's  
12 diaper, he noticed black and purple bruising extending from the top of his diaper to the  
13 bottom of his left buttock. The next day, the mother took the child to a doctor, and Coats  
14 called the police. Dr. Betlinski examined the child and described the bruising as  
15 "superficial ecchymosis."<sup>1</sup> He explained that "ecchymosis" is a medical term for bruising  
16 and that it can occur at different levels ranging from just under the skin to deep in the  
17 muscle. He also explained that, in this context, "superficial" means just under the skin  
18 and is the least severe type of bruise. In his opinion, a relatively flat object, possibly a  
19 hand, caused the bruising. He also testified that the bruise on the child was caused by "a

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<sup>1</sup> An "ecchymosis" is a "purplish patch caused by extravasation of blood into the skin, differing from petechiae only in size (larger than 3 mm diameter)." *Stedman's Medical Dictionary* 561 (27th ed 2000).

1 fairly sharp shock to the skin that then gets small capillary blood vessels to suddenly pop  
2 and leak out their blood." During the examination, Betlinski noted that the child was  
3 very active and had excellent range of motion in all of his joints and that he did not  
4 exhibit any evidence of pain. Later that evening, Detective Kettner visited the child and  
5 the mother. He took photographs of the child's bruise, which he described as a purple  
6 and brown bruise above the child's left buttocks and running down to the child's upper  
7 leg. Kettner testified that the child was so full of energy that he ran around the house  
8 making it difficult to get a hold of the child to take photographs of the bruise.

9 Defendant was arrested and charged with first-degree criminal  
10 mistreatment. At trial, the child's mother, Betlinski, and Kettner testified to the facts  
11 above. At the close of the state's case, defendant moved for a judgment of acquittal,  
12 arguing that the evidence was insufficient to prove "physical injury" as required for a  
13 conviction of first-degree criminal mistreatment. ORS 163.205(1)(b)(A).<sup>2</sup> "Physical  
14 injury" is defined as "impairment of physical condition or substantial pain." ORS

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<sup>2</sup> ORS 163.205 provides, in part:

"(1) A person commits the crime of criminal mistreatment in the first degree if:

"\* \* \* \* \*

"(b) The person, in violation of a legal duty to provide care for a dependent person or elderly person, or having assumed the permanent or temporary care, custody or responsibility for the supervision of a dependent person or elderly person, intentionally or knowingly:

"(A) Causes physical injury or injuries to the dependent person or elderly person[.]"

1 161.015(7). The trial court ruled that the prosecution had failed to adduce circumstantial  
2 evidence of substantial pain, but denied the motion because there was sufficient evidence  
3 of impairment of the child's physical condition to submit the case to the jury. The jury  
4 ultimately convicted defendant of first-degree criminal mistreatment.

5           On appeal, defendant contends that there was no evidence that the child  
6 suffered from an impairment of his physical condition to support the trial court's denial of  
7 her motion for a judgment of acquittal. In reviewing a motion for a judgment of  
8 acquittal, we view the evidence in the light most favorable to the state to determine  
9 whether a rational factfinder could find that the state proved each element of the offense  
10 beyond a reasonable doubt. [State v. Hall](#), 327 Or 568, 570, 966 P2d 208 (1998).

11           "Impairment of physical condition" means "harm to the body that results in  
12 a reduction in one's ability to use the body or a bodily organ for less than a protracted  
13 period of time." [State v. Higgins](#), 165 Or App 442, 446-47, 998 P2d 222 (2000). As we  
14 clarified in [State v. Hart](#), 222 Or App 285, 291, 193 P3d 42 (2008), impairment of  
15 physical condition "should be understood to include not only impairment of voluntary use  
16 of a body part, but also of the ordinary *function* of a body part." (Emphasis in original.)  
17 Our case law explains that, absent a diminishment in the ability to use a body part or  
18 disruption of the ordinary function of an organ, there is no impairment of physical  
19 condition.

20           In *Higgins*, the defendant slapped, shook, and scratched the victim, leaving  
21 four to six red scrape marks on the victim's neck and arm. 165 Or App at 444. There

1 was no bleeding, and the victim did not require medical attention. *Id.* We held that,  
2 because there was no evidence that the victim's scratches reduced his ability to use his  
3 body or other bodily organ, there was no impairment of the victim's physical condition.  
4 *Id.* at 448.

5           Likewise, in *State v. Rice*, 48 Or App 115, 117, 616 P2d 538, *rev den*, 289  
6 Or 741 (1980), the defendant broke the rear window of a car, causing flying glass to cut  
7 the victim's cheek. The victim did not realize that she had been cut, she felt no pain, and  
8 the cut was not noticeable after two or three days. The cut left no scar, and the victim did  
9 not receive medical attention. We held that the victim's scratch was so slight that it did  
10 not constitute impairment of physical condition. *Id.* at 118.

11           In contrast to *Higgins* and *Rice*, in cases where there is evidence that the  
12 injury reduces the victim's ability to use any bodily organ, we have concluded that the  
13 victim has suffered an impairment of physical condition. In *State v. Cetto*, 66 Or App  
14 337, 674 P2d 66, *rev den*, 296 Or 712 (1984), we upheld the defendant's assault  
15 conviction because there was evidence that the victim sustained not only a bruise on his  
16 face, but also a swollen and bloody lip when the defendant slapped him. We reaffirmed  
17 that conclusion in *Higgins*, explaining that the *swollen lip* impaired the ordinary function  
18 of the victim's body part, the lips. *Cetto*, 165 Or App at 448.

19           In *Hart*, we emphasized that the injury must diminish the body or bodily  
20 organ from functioning properly. 222 Or App at 291. In that case, we held that a  
21 reasonable factfinder could reasonably find impairment of a physical condition from the

1 victim's half-inch gash on the back of his head, because the gash disrupted the skin's  
2 function to protect the inner body from infection. 222 Or App at 291-92. Likewise, in  
3 [\*State v. Jones\*](#), 229 Or App 734, 738, 212 P3d 1292, *rev den*, 347 Or 446 (2009), we held  
4 that the jury could infer from the evidence of a "heavy scrape" about one and one-half  
5 inches wide and four inches long that the wound could disrupt the ordinary function of  
6 the skin.

7           In light of the case law, there is no evidence in this case that the child's  
8 bruise impaired the voluntary use of a body part or disrupted any bodily organ from  
9 functioning properly. Defendant admitted to spanking the child at least three times on his  
10 left buttock, leaving a sizable bruise. The state did not present evidence that the bruise  
11 impaired the child's voluntary use of a body part. In fact, there was evidence that the  
12 child had full mobility. Betlinski testified that, when he examined the child the next day,  
13 the child had excellent range of motion in all of his joints and did not exhibit any  
14 evidence of pain. Kettner, who investigated the case, also testified that the child was so  
15 full of energy that he ran around the house making it difficult for Kettner to take  
16 photographs of the child's injury. There was no evidence that the child felt pain when he  
17 sat down on his left buttock or that he favored his right side when lying down. Therefore,  
18 we conclude in this case that, where the bruising did not diminish the child's bodily  
19 movement or ability to engage in everyday activities, there was insufficient evidence that  
20 defendant impaired the child's physical condition. *Cf. State v. Glazier*, \_\_ Or App \_\_, \_\_,  
21 \_\_ P3d \_\_ (Oct 24, 2012) (slip op at 4) (evidence of pain arising from the bruised areas

1 on the victim's ribs and legs that made it more difficult for her to engage in normal  
2 activities such as walking up and down stairs and lifting small objects is sufficient to  
3 support the inference that injuries caused impairment of a physical condition).

4           The state counters that it presented evidence that the spanking caused  
5 "small capillary blood vessels to suddenly pop and leak out their blood, which is then  
6 what is the actual bruising." The state concludes that "a rational trier of fact could infer  
7 that 'popped' blood vessels that leak blood constitute impairment of the child's skin[.]"<sup>3</sup>  
8 We disagree. Unlike in *Hart* and *Jones*, where we held that a gash and a scrape disrupted  
9 the skin's ordinary function to prevent infection, in this case, there was no evidence that  
10 the bruising affected the skin's ordinary function. Indisputably, the skin did not break,  
11 which is evidence from which a jury can infer impairment of the skin's ability to ward off  
12 infection. *See Hart*, 222 Or App at 291-92 ("one of the functions of the skin is to protect  
13 the inner body from infection," and a factfinder could infer that a half-inch gash disrupts  
14 that function). Moreover, although Betlinski testified that the bruising occurred when  
15 blood vessels popped and leaked blood just below the skin's surface, he did not say  
16 whether that disrupted the skin's function or any other organ's function. Despite our view

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<sup>3</sup> The state also argues that a rational trier of fact could infer that the child suffered substantial pain during the spanking because the child appeared very tired and had red eyes, possibly from crying, when mother picked him up from defendant's home. We decline to address that argument because the trial court ruled that there was no evidence of substantial pain, allowing only the "impaired physical condition" theory to go to the jury. *See Hart*, 222 Or App at 288 (similarly declining to address the argument that the record contained evidence that the victim suffered substantial pain when the trial court found otherwise).

1 of the facts in the state's favor, there was no evidence to support a determination that the  
2 bruise was an impairment of the victim's physical condition and, consequently, a  
3 "physical injury" for purposes of the criminal mistreatment statute. Accordingly, the trial  
4 court erred in denying defendant's motion for judgment of acquittal.

5                   Reversed.