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Washington State
Court of Appeals
Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH ANTONE HANSEN, Appellant.	No. 52649-2-II UNPUBLISHED OPINION

SUTTON, J. — Kenneth A. Hansen appeals his conviction for third degree assault after he spat upon a police officer while being arrested for trespass. Hansen argues that (1) the trial court erred by instructing the jury that an assault is "an intentional touching or spitting upon [] another person" because this constituted an improper judicial comment on the evidence, and (2) this jury instruction relieved the State of its burden of proof and violated due process.

We hold that (1) the jury instruction defining an assault was an accurate statement of the law and did not contain an improper judicial comment on the evidence, and (2) the jury instruction defining an assault did not relieve the State of its burden of proof, and thus, it did not violate due process. We affirm Hansen's conviction.

FACTS

Officer Kendrick Suvada contacted Hansen at a private field. Officer Suvada notified Hansen he was trespassing and gave him 24 hours to remove himself from the property.

The next day, Officer Suvada returned, and Hansen was still on the property. Officer Suvada arrested him for trespassing. As they were walking to Officer Suvada's police vehicle, Hansen was yelling and swearing at him. Officer Suvada unlocked the driver's side front door of the vehicle. As he was doing so, Hansen turned to Officer Suvada and spat. The spit hit Officer Suvada on the face, as well as the inside of the driver's side door of the police vehicle. Officer Suvada saw Hansen spit, as did Officer Suvada's partner, Officer Adam Millard.

The State charged Hansen with third degree assault—intentionally assaulting a law enforcement officer. At trial, Officers Suvada and Millard testified to the above facts.

The State proposed the following jury instruction:

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

Clerk's Papers (CP) at 40. The State cited to Washington Pattern Jury Instruction 35.50 (modified),[1] as well as two published cases and one unpublished case. The trial court gave the State's proposed jury instruction, and Hansen did not object. The jury found Hansen guilty of third degree assault.

Hansen appeals his conviction.

[1] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (4th ed. 2016).

ANALYSIS

I. LEGAL PRINCIPLES

We review jury instructions de novo. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). Read as a whole, the jury instructions "'must make the relevant legal standard manifestly apparent to the average juror.'" *State v. Kyllo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009) (quoting *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). "Jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Article IV, section 16 of the Washington State Constitution prohibits trial judges from commenting on the evidence at trial. *State v. Deal*, 128 Wn.2d 693, 703, 911 P.2d 996 (1996). Instead, the court's instructions "'shall declare the law.'" *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015) (quoting WASH. CONST. art. 4, § 16). An impermissible comment on the evidence is one that conveys the judge's attitude on the merits of the case or permits the jury to infer whether the judge believed or disbelieved certain testimony. *Deal*, 128 Wn.2d at 703. But a jury instruction that does no more than accurately state the law is not an impermissible comment on the evidence. *State v. Sandoval*, 8 Wn. App. 2d 267, 277, 438 P.3d 165 (2019).

II. JUDICIAL COMMENT

Hansen was charged with third degree assault, and the State bore the burden of proving that Hansen "[a]ssault[ed] a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault" under circumstances not amounting to first or second degree assault. RCW 9A.36.031(1)(g).

Washington courts have recognized that spitting can constitute an assault. *State v. Jackson*, 145 Wn. App. 814, 821, 187 P.3d 321 (2008); *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130 (1978).[2]

Here, the jury instruction defined in relevant part that an "assault is an intentional touching or spitting upon [] another person that is harmful or offensive." CP at 56. Hansen argues that by adding the word "spitting" to the instruction, the trial court improperly commented on the evidence, violating article IV, section 16 of the Washington State Constitution. But as a matter of law, spitting upon another person can constitute an assault so long as it is intentional and offensive. *Jackson*, 145 Wn. App. at 821; *Humphries*, 21 Wn. App. at 409.

Nothing in the language of this jury instruction suggested that the judge personally believed Hansen's spitting was an assault, that his spitting was intentional, or that his spitting was offensive. Nor did the jury instruction convey the judge's attitude on the merits of the case or permit the jury to infer the judge's belief or disbelief of testimony, or convey the judge's opinion on the weight, credibility, or sufficiency of the evidence. Instead, the jury instruction accurately stated the law and permitted the jury to determine whether Hansen's spitting upon Officer Suvada was intentional

[2] *Jackson* is a Division I case. In that case, the court relied on support from other cases, which held that spitting can constitute a "touching," in holding that ejaculation onto another person constitutes a touching. *Jackson*, 145 Wn. App. at 819-21. "[F]or over three centuries, the common law has considered the projection of one's bodily fluid onto another a touching sufficient to support a criminal conviction." *Jackson*, 145 Wn. App. at 821.

Similarly, in *Humphries*, another Division I case, the court stated that "[s]pitting may constitute a battery." 21 Wn. App. at 409. The defendant spat on a police officer's face during the course of an argument. *Humphries*, 21 Wn. App. at 406.

and offensive. We hold that the jury instruction defining an assault was an accurate statement of the law and did not contain an improper judicial comment on the evidence.

III. DUE PROCESS

Hansen argues that the jury instruction defining an assault as "an intentional touching or spitting upon [] another person that is harmful or offensive" relieved the State of its burden to prove an intentional touching, and thus, it violated due process. We disagree and hold that the jury instruction accurately stated the law and did not relieve the State of its burden of proof, and thus, it did not violate due process.

Due process requires that the State prove every element of the crime charged beyond a reasonable doubt. WASH. CONST. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. W.R.*, 181 Wn.2d 757, 761-62, 336 P.3d 1134 (2014).

We review jury instructions as a whole to see if the instructions properly inform the jury of the applicable law, are not misleading, and allow the parties to argue their theories of the case. *State v. Embry*, 171 Wn. App. 714, 756, 287 P.3d 648 (2012). We review the adequacy of jury instructions de novo. *Embry*, 171 Wn. App. at 756.

As stated above, an assault is an intentional and offensive touching, and the law is well-established that a spitting is a touching. *See Jackson*, 145 Wn. App. at 821; *Humphries*, 21 Wn. App. at 409. The court's jury instruction defined an assault as "an intentional touching or spitting upon [] another person that is harmful or offensive." CP at 56. Thus, the jury instruction accurately informed the jury of the applicable law. The jury instruction required the State to prove that Hansen intentionally spat on Officer Suvada. The jury could not have returned a guilty verdict if the State did not meet its burden of proving Hansen had intentionally spat upon Officer Suvada.

Because the jury instruction accurately stated the law, we hold that the instruction did not relieve the State of its burden of proof, and therefore, it did not violate due process.

CONCLUSION

We affirm Hansen's 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:

, C.J.

LEE, C.J.

Worswick J

WORSWICK, J.