IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, v. ROBERT PAUL GILBERT, Defendant/Appellant.	No. 40825-2-II UNPUBLISHED OPINION

Worswick, J. — Robert Gilbert concedes that he injured his four-month-old daughter by tearing the tissue of her posterior vaginal wall and through her hymenal ring. Gilbert claims that he did not intend to injure her, but that he accidentally injured her while changing a messy diaper. A jury found him guilty of second degree assault of a child with aggravating circumstances of domestic violence, violation of a position of trust, and a particularly vulnerable victim. Gilbert appeals, arguing (1) the trial court abused its discretion in denying his motion in limine and deprived him of his right to a jury determination of guilt or innocence by allowing the State's medical expert to testify that his daughter's injuries were inconsistent with a normal diaper change and inconsistent with an accidental injury, (2) the trial court improperly defined assault in its jury instructions, and (3) the evidence is insufficient to support his conviction. We affirm.

FACTS

Gilbert and his girl friend, Jessica Nixon,[1] lived together for several years before their daughter, S.H.G., was born on August 26, 2009. The three of them shared a Bremerton apartment. Both Gilbert and Nixon are developmentally disabled and received support from a public health nurse to help them care for S.H.G. Gilbert and Nixon also received support from Nixon's parents, who occasionally baby-sat S.H.G.[2]

On January 13, 2010, Nixon's parents baby-sat S.H.G. for a few hours in the afternoon while Gilbert and Nixon submitted job applications. That afternoon, although Nixon's mother noticed that S.H.G. cried more than usual, she changed S.H.G.'s diaper three times and did not notice anything abnormal. Around 4:00 pm, Gilbert picked up S.H.G. from her grandparents' house. After Gilbert and S.H.G. returned home, Nixon decided to take a nap while Gilbert cared for S.H.G. and made dinner for the family. Because their apartment does not have a door separating the bedroom from the living area, Gilbert turned off all of the lights in the apartment except for the kitchen light so that Nixon could rest. The only other light in the apartment came from the living room television that Gilbert and S.H.G. were watching.

While cooking dinner, Gilbert noticed that S.H.G. needed her diaper changed. He changed her diaper on the living room floor. In changing S.H.G.'s diaper, Gilbert did not observe anything unusual and he lifted her by her feet, wiped as much feces as possible off of her with the

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[1] The record contains conflicting testimony on Gilbert and Nixon's relationship, sometimes referring to them as boyfriend and girl friend and other times referring to them as husband and wife. We refer to Nixon as Gilbert's girl friend.

[2] More often than not, Nixon's parents asked if they could baby-sit S.H.G. because they wanted to spend time with her.

dirty diaper, wiped her from front to back with a baby wipe, and put a clean diaper on her. S.H.G. cried her "normal changing-her-diaper cry" while Gilbert changed her. Report of Proceedings (RP) at 101. Gilbert testified that he then took S.H.G. to the kitchen with him while he continued cooking dinner. He further testified that, although S.H.G. continued to cry, it was normal for her to cry before her evening feeding. Gilbert testified that as he bounced S.H.G. up and down to soothe her, he noticed a drop of blood fall to the floor, and then saw a bit of blood on the side of S.H.G.'s diaper.

Gilbert returned to the living room changing area to check S.H.G. and realized that she was bleeding in her "private area." RP at 256. Gilbert then took S.H.G. into the bedroom and told Nixon that S.H.G. was bleeding. Both Gilbert and Nixon tried to clean S.H.G. and stop her bleeding with a washcloth. Because they could not stop her bleeding, Gilbert and Nixon took S.H.G. to the urgent care clinic at her pediatrician's office. The urgent care clinic sent S.H.G. and Nixon to the emergency room at Harrison Hospital by ambulance. S.H.G.'s treating physician at Harrison transferred her by ambulance to Mary Bridge Children's Hospital (Mary Bridge) in Tacoma because thorough exams of vaginal injuries are normally conducted under anesthesia and because he thought she should be treated by specialists.

While Nixon and S.H.G. traveled to Mary Bridge by ambulance, Gilbert returned home and picked up S.H.G.'s dirty diaper, her bloody diaper, and her changing blanket and took them to Mary Bridge. S.H.G.'s dirty diaper did not contain any blood. Shortly after arriving at Mary Bridge, Gilbert spoke with Mary Bridge social worker Ginger Rayburn and told her that he was doing a lot of different things while he changed S.H.G.'s diaper, that he noticed blood on her

diaper, and thought he might have accidentally injured her. Later in the night, Gilbert spoke to Kitsap County Sheriff's Office Detective Michael Rodrigue. Gilbert told Detective Rodrigue that he discovered some blood coming from S.H.G.'s vaginal area while he was changing her diaper and that he must have caused her injury, maybe by wiping a little too hard.

Mary Bridge pediatric general surgeon, Dr. Randall Holland, treated S.H.G. in the early morning hours of January 14 after the emergency room doctor called him for an evaluation. Dr. Holland's initial examination of S.H.G. confirmed that she needed surgical repair of her injury, so he waited until she was under anesthesia to perform a full exam. His full examination of S.H.G. showed a tear of her posterior vaginal wall that extended up through the deep tissue of her hymenal ring. S.H.G. was not injured beyond her hymenal ring, which is about one centimeter inside the vagina. Nonetheless, S.H.G.'s injuries were significant, with Dr. Holland evaluating them as between a two and a three on a scale of one to four, with four being the most severe. Dr. Holland repaired S.H.G.'s injuries with three layers of sutures—one layer at S.H.G.'s hymenal ring, another to reconstruct deep tissue, and another to repair muscular tissue.[3]

The next day, Gilbert voluntarily talked with Detective Rodrigue at the police station. Detective Rodrigue specifically asked Gilbert if he inserted anything into S.H.G.'s vagina and Gilbert said that he did not think he "put his finger in there" and that he was uncomfortable touching S.H.G. "around her privates." RP at 132. Gilbert reiterated that he hurried in changing S.H.G.'s diaper because he was worried about burning dinner and that the apartment was fairly dark when S.H.G. was injured because Nixon was napping. Gilbert also told Detective Rodrigue

[3] S.H.G. had no significant problems with the repair and it healed properly.

that, while he was changing S.H.G., he left briefly to get a clean diaper, and that he noticed a dark spot of blood on the changing towel when he returned.

Also on January 15, a Mary Bridge pediatric nurse practitioner in the child abuse intervention department, Michelle Breland, reviewed S.H.G.'s medical record, met with Nixon, and examined and photographed S.H.G.[4]

The State later charged Gilbert by information with second degree assault of a child with a domestic violence aggravating factor. In the days before trial, the State amended its information to include aggravating factors for abuse of position of trust and a particularly vulnerable victim. Also shortly before trial, Gilbert moved in limine to limit medical expert opinion testimony that S.H.G.'s injury was caused intentionally and not by accident. The trial court ruled that expert opinions that embrace an ultimate issue for the fact finder are admissible and that the State could present medical expert opinion testimony based on the physical evidence that the injury was inconsistent with an accidental injury and inconsistent with a normal diaper change. The trial court based its decision on its analysis of three cases *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); *State v. Jones*, 59 Wn. App. 744, 750, 801 P.2d 263 (1990); and *State v. Hudson*, 150 Wn. App. 646, 653, 208 P.3d 1236 (2009). In its analysis of these cases, the trial court stated:

> [T]he medical experts can opine that the injury is inconsistent with an accident[ ] [under *Montgomery*] . . . .
>
> [T]hese 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.
>
> [I]t's important for the [p]rosecutor to advise the experts that there can be

[4] Breland also examined S.H.G. twice during S.H.G.'s recovery.

> no testimony, no suggestion or inference that [Gilbert] committed the offense. It's important that the jury is still left to decide if, in fact, Gilbert inflicted the injury.

RP at 196.

At trial, Dr. Holland testified that he could not tell specifically what caused S.H.G.'s injuries but that he could tell that the injury was caused by "significant force." RP at 218. Nurse Practitioner Breland similarly testified that "[i]t would take significant force" to cause S.H.G.'s injury. RP at 236. Breland further testified that, based on her training and experience, S.H.G.'s injury was not consistent with normal wiping during a diaper change, and S.H.G.'s injury was also inconsistent with an accidental injury. Specifically, Breland testified:

> There was no accidental way that [S.H.G.] did this to herself . . . it's penetration into a very . . . small area . . . with significant force that is just not going to happen through an accidental means. It's not going to slip into the vagina. It just isn't—there's too much protection there. And again . . . the finger is pretty big in comparison to the area that we're looking at. So I just don't see how it could be accidental. That just doesn't make sense to me.

RP at 238. In his defense, Gilbert testified that, although he must have caused the injury, he did not do so intentionally; rather, it was an accident.

Although Gilbert did not present any proposed jury instructions of his own, he took issue with the State's instruction defining assault. The State proposed a pattern instruction from *Washington Pattern Jury Instructions: Criminal* that read: "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. . . ." Clerk's Papers (CP) at 80. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 35.50 (3d ed. 2008) (WPIC). Gilbert suggested that the instruction defining assault needed to include some of the instruction's optional language and should instead

read: "An assault is an intentional touching of another person, *with unlawful force*, that is harmful or offensive . . . ." RP at 270 (emphasis added). Gilbert's defense was that he changed S.H.G.'s diaper with lawful force and so the touching was lawful and the injury was accidental. The trial court found that neither the testimony nor the evidence Gilbert presented suggested that a lawful use of force caused S.H.G.'s injury. The trial court further found that including the instruction's optional language per Gilbert's request would force the jury to speculate on what constituted the lawful use of force. Thus, the trial court accepted the State's jury instruction on the definition of assault.

The jury found Gilbert guilty of second degree assault of a child and found that the aggravating factors for domestic violence, position of trust, and vulnerable victim all applied. The trial court sentenced Gilbert to an exceptional sentence of 102 months imprisonment followed by 18 months of community custody. Gilbert appeals.

ANALYSIS

I. Expert Opinion Testimony

Gilbert argues that the trial court abused its discretion when it denied his motion in limine to limit medical expert opinion that S.H.G.'s injury was inconsistent with a normal diaper change and inconsistent with an accidental injury because Gilbert's defense was that he accidentally caused the injury. Gilbert further asserts that Nurse Practitioner Breland's expert medical opinion testimony that S.H.G.'s injuries were inconsistent with accidental injury invaded the provenance of the jury and thereby deprived Gilbert of his constitutional right to a jury determination of guilt or innocence. We disagree.

A. *Standard of Review*

We review a trial court's ruling on motions in limine and on the admissibility of evidence for abuse of discretion. *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Similarly, we apply an abuse of discretion standard when reviewing a trial court's decision to allow expert opinion testimony. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion if its exercise of that discretion is manifestly unreasonable or based on untenable grounds. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's decision is manifestly unreasonable or its grounds for a decision are untenable if the trial court relied on facts not in the record, applied an improper legal standard, or adopted a view "that no reasonable person would take." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Lewis*, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

B. *Admissibility and Scope of Expert Opinion*

Expert witnesses may offer opinion testimony as long as the witness qualifies as an expert and the testimony would be helpful to the jury. ER 702; *State v. We*, 138 Wn. App. 716, 724-25, 158 P.3d 1238 (2007). Expert witnesses may offer their otherwise admissible opinions even if they embrace the ultimate issue for jury determination. ER 704; *Montgomery*, 163 Wn.2d at 590. Indeed, qualified experts may testify regarding their opinion of medical causation of injuries. *Jones*, 59 Wn. App. at 750. However, neither an expert nor a lay witness may testify to their opinion regarding a criminal defendant's innocence or guilt. *Demery*, 144 Wn.2d at 759. But, opinion testimony, even on ultimate factual issues, that supports the conclusion that a criminal defendant is guilty, does not make that opinion an improper comment on the defendant's

innocence or guilt. *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993).

Where an expert witness's opinion testimony directly implicates a criminal defendant's guilt or innocence, that testimony improperly invades the role of the fact finder. *Montgomery*, 163 Wn.2d at 591, 594 n.8. Expert testimony containing personal beliefs, rather than professional opinions, is also improper. *Montgomery*, 163 Wn.2d at 591-92.

In *Hudson*, expert opinion testimony by sexual assault nurse examiners (SANEs) in a rape prosecution that the victim's injuries were caused by nonconsensual sex was improper because the defendant did not dispute that his encounter with the victim caused the injuries. 150 Wn. App. at 653. Thus, the expert opinion testimony that nonconsensual sex caused the injuries was akin to testimony that the defendant was guilty of rape. *Hudson*, 150 Wn. App. at 653. The SANEs testified that the injuries were "extensive . . . [and] related to nonconsensual sex" and that it "was a very traumatic nonconsensual . . . penetration." *Hudson*, 150 Wn. App. at 651. Importantly, the *Hudson* majority stated that *if* "the SANEs opined only that the evidence was consistent with nonconsensual sex [. . .], the testimony would probably have been proper under *Montgomery*." 150 Wn. App. at 653, n.2.

Conversely, where medical experts based their opinions on physical evidence, they properly testified that the victim's injury was inconsistent with the defendant's claim that he accidentally injured his son. *Jones*, 59 Wn. App. at 746-47, 751. The State's medical expert in *Jones* also opined at trial that the victim's injury was "a non-accidental blunt injury." *Jones*, 59 Wn. App. at 746-47. The expert's opinion was helpful because physicians are better qualified to assess the cause of death than jurors, and the expert opinion testimony that the injury was "non-

accidental" was proper even though Jones's defense was that he accidentally caused the injury. *Jones*, 59 Wn. App. at 746-47, 751. Moreover, the *Jones* court held that in stating the injury was "non-accidental," the experts did not opine that Jones committed the offense. 59 Wn. App. at 746-47, 751. Therefore, the trial court acted within its discretion in admitting the expert opinion testimony. *Jones*, 59 Wn. App. at 751.

Here, as in *Hudson*, the only issue is whether Gilbert intended to injure S.H.G. Gilbert argues that he did not intend to harm her; rather, as in *Jones*, he says it was an accident. Before denying Gilbert's motion in limine, the trial court analyzed *Hudson*, *Jones*, and *Montgomery* and delineated the parameters of admissible testimony. Because Breland based her opinion testimony on her physical examination of S.H.G. and on S.H.G.'s medical records, the trial court found that this testimony was very similar to the opinion testimony derived from physical evidence allowed in *Jones*.[5] The State confirmed that it would limit its inquiry of the expert to whether the injury was "inconsistent with an accidental injury." RP at 197. Based on the trial court's careful analysis of the scope of admissibility of Breland's expert opinion testimony, its denial of Gilbert's motion in limine was neither unreasonable nor based on untenable grounds. Therefore, the trial court did not abuse its discretion and we affirm the trial court's denial of Gilbert's motion in limine.

Moreover, as in *Jones*, Gilbert's defense was that he accidentally injured S.H.G., and the State presented Breland's medical expert opinion testimony that the injury was "inconsistent with

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[5] Gilbert argues that the only physical evidence supporting Breland's testimony was her comparison of the relative size of an adult's finger and S.H.G.'s vaginal area, but this argument is unfounded because Breland testified that she examined S.H.G. on three separate occasions, photographed her and examined the photographs, and reviewed S.H.G.'s medical records.

an accidental injury." RP at 238. Breland continued that she"just [did not] see how it could be accidental. That just [did not] make sense to [her]." RP at 238. This testimony is very similar in character to the permissible testimony in *Jones*, that the injury was "non-accidental." 59 Wn. App. at 746-47. Here, as in *Jones*, the expert opined that the injury was non-accidental but did not opine on whether Gilbert actually committed the offense. Hence, here, as in *Jones*, the jury retained its functions of determining the amount of weight to attribute to both Breland and Gilbert's testimony and in deciding whether Gilbert committed the crime. The trial court did not abuse its discretion in admitting this expert opinion evidence and it did not deprive Gilbert of his right to a jury determination of innocence or guilt. Consequently, we affirm the trial court's admission of this evidence.

II. Jury Instruction

Gilbert argues that the trial court erred in denying his request to include the optional language "with unlawful force" in its jury instruction defining assault because his defense was that he changed S.H.G.'s diaper with lawful force but accidentally caused her injury. Br. of Appellant at 22. We disagree.

A. *Standard of Review*

Appellate courts review jury instructions for errors of law de novo, considering the challenged instruction in the context of all of the jury instructions as a whole. *State v. Hayward*, 152 Wn. App. 632, 641-42, 217 P.3d 354 (2009). Jury instructions are proper if they inform the jury of the applicable law without misleading the jury and allow the parties to argue their theories of the case. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). However, a jury

instruction on a theory unsupported by the evidence presented is improper. *State v. Jarvis*, 160 Wn. App. 111, 120, 246 P.3d 1280 (2011).

B. *Lawful Use of Force*

The use of force is lawful if it is (1) necessarily used by a public officer performing a legal duty; (2) necessarily used by a person arresting someone who committed a felony and delivering that person into custody; (3) used in defense of self, others, or property; (4) used to detain someone who unlawfully enters or remains in a building and reasonably necessary for investigation; (5) used by a passenger carrier to remove a passenger who refuses to obey lawful, reasonable regulations; or (6) used to prevent a mentally ill, mentally incompetent, or mentally disabled person from committing a dangerous act to any person. RCW 9A.16.020. Moreover, in its definition of assault, the Washington Supreme Court Committee on Jury Instructions explains that the "with unlawful force" language should be included if the defendant argued either self defense or lawful use of force. WPIC 35.50, note on use at 548. "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." WPIC 35.50 at 550 (emphasis added); *State v. Arthur*, 42 Wn. App. 120, 122, 708 P.2d 1230 (1985).

Here, Gilbert testified that he did not intend to injure S.H.G.; he testified that it was an accident. Gilbert's only reference to a lawful use of force defense is in his argument to include "with unlawful force" language in the jury instruction defining assault. RP at 270-77. Indeed, all of the evidence Gilbert presented supports his theory that he accidentally injured S.H.G. But accidental force is not included in the statutory definition of lawful use of force. RCW 9A.16.020. Thus, Gilbert's argument that his use of force was lawful is incorrect. Because

accidental force is not a lawful use of force, and because the jury instructions allowed Gilbert to argue that the injury was accidental rather than intentional, the instructions allowed him to present his theory of the case. Therefore, Gilbert's argument fails.

III. Sufficiency of the Evidence

Gilbert contends that the State presented insufficient evidence to convict him of second degree assault of a child because there was not substantial evidence that he acted intentionally. We disagree.

A. *Standard of Review*

In reviewing challenges to sufficiency of the evidence in criminal cases, we view all evidence in the light most favorable to the State and query whether any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). In making this inquiry, we draw all reasonable inferences from the evidence in favor of the State and interpret inferences most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. A defendant admits the truth of the State's evidence and all reasonable inferences from that evidence by challenging its sufficiency. *State v. Myers*, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

B. *Evidence of Intent*

A finder of fact may reasonably infer criminal intent from the defendant's conduct as a matter of logical probability. *Myers*, 133 Wn.2d at 38. In making this inference, circumstantial evidence is equally reliable as direct evidence. *Myers*, 133 Wn.2d at 38. Moreover, the jury evaluates the credibility of all witnesses, and the existence of conflicting evidence does not justify

a new trial; instead, the finding of the jury is final. *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

A conviction for second degree assault requires two distinct acts with two corresponding mental states: the defendant must intentionally assault and recklessly inflict substantial bodily harm on another. RCW 9A.36.021(1)(a); *State v. McKague*, 159 Wn. App. 489, 509, 246 P.3d 558 (2011). "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." CP at 75.

Here, the State's evidence established that S.H.G. was not injured before Gilbert changed her diaper, Gilbert changed her diaper by himself and in the dark, and "significant force" caused the injury that required surgery and three levels of sutures to repair. The State also presented Breland's expert opinion that S.H.G.'s injury was inconsistent with both a normal diaper change and an accidental injury. The State further introduced evidence illustrating Gilbert's inconsistent statements about when he noticed S.H.G.'s injury.[6]

Gilbert argues that the jury could infer that he would not intentionally injure S.H.G. in such close proximity to her mother and that he did not act intentionally because he took all of the physical evidence to Mary Bridge. Because appellate courts review the evidence and inferences in the light most favorable to the State, Gilbert's argument fails. While Gilbert testified that he accidentally injured S.H.G., the State presented sufficient conflicting evidence that the injury was inconsistent with an accidental injury and that Gilbert himself gave inconsistent statements about

[6] Specifically, although Gilbert testified that he first noticed blood after putting a clean diaper on S.H.G. and taking her into the kitchen, Detective Rodrigue testified that Gilbert said he first noticed blood while S.H.G. was on the changing towel before he put a clean diaper on her.

the circumstances surrounding S.H.G.'s injury. Thus, a rational finder of fact could find sufficient evidence of his intent to convict Gilbert of second degree assault of a child.

Affirmed.

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.

Worswick, J.

We concur:

Van Deren, J.

Penoyar, C.J.