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SEPTEMBER 17, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. TIMOTHY EDWARD NATION, Appellant.	)))))))))	No. 39151-5-III UNPUBLISHED OPINION

COONEY, J. — While being treated at Trios Hospital in Kennewick, Washington, Timothy Nation spit on Michael Thorpe.[1] Consequently, Mr. Nation was charged with assault in the third degree and was convicted following a jury trial.

Mr. Nation appeals, arguing there was insufficient evidence to support a conviction because the State failed to present any evidence that Dr. Thorpe was a physician or health care provider. Mr. Nation also challenges the crime victim penalty assessment (VPA). We agree the State failed to present evidence sufficient to establish

[1] Although the State and the witnesses at trial referred to Michael Thorpe as "Dr. Thorpe," the record is void of any evidence that Mr. Thorpe is a licensed physician. For consistency, we refer to him as "Dr. Thorpe."

that Dr. Thorpe was a physician or health care provider. Because we reverse Mr. Nation's conviction, we need not address his VPA argument.

BACKGROUND

On October 10, 2018, an employee at a restaurant in Kennewick called 911 to report a customer who was coughing and vomiting. Paramedics responded to the call and found Mr. Nation laying on his stomach, extremely agitated and spitting. The paramedics believed Mr. Nation was likely under the influence of narcotics. Due to safety concerns, Mr. Nation was placed in physical restraints, including a "spit sock" over Mr. Nation's face to protect the paramedics from exposure to his bodily fluids. Rep. of Proc. (Aug. 29, 2022) (RP) at 152. He was then transported to Trios Hospital.

At Trios Hospital, the paramedics transferred Mr. Nation to a gurney; the restraints and the "spit sock" were not removed. Mr. Nation was taken into the emergency room where Dr. Thorpe and Nurse Elizabeth Mango provided treatment. Mr. Nation was "yelling, spitting, swearing, and aggressive" with hospital staff. RP at 160-61. On Mr. Nation's complaints that he was choking and unable to breathe, Dr. Thorpe lifted the right side of the spit hood to examine Mr. Nation's airway. Mr. Nation promptly "cleared his [] throat and spit on [Dr. Thorpe]," with the spit striking him in the back of his neck. RP at 183-84. Hospital staff contacted police who arrested Mr. Nation for assault.

The State charged Mr. Nation with assault in the third degree premised on the assault occurring against "a nurse, physician, or health care provider, who was

performing nursing or health care duties at the time of the assault." Clerk's Papers (CP) at 1.

At trial, the State presented testimony from Benjamin Dill, a paramedic who transported Mr. Nation to the hospital, Nurse Mango, Kennewick Police Officer Seth Reil, and Dr. Thorpe. The State elicited testimony from Dr. Thorpe about the circumstances surrounding the assault, but neglected to inquire about Dr. Thorpe's professional training, education, experience, qualifications, certifications, or licensure.

At the conclusion of trial, the court instructed the jury on the definition of assault. Jury instruction 6 reads:

> A person commits the crime of Assault in the Third Degree when he or she assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault.

CP at 484. The court also instructed the jury on the elements of the crime. Jury instruction 7 states:

> To convict the defendant of the crime of Assault in the Third Degree, as charged in the information, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> 1. That on or about October 10, 2018, the defendant assaulted Michael Thorpe;
> 2. That Michael Thorpe was a nurse, physician, or health care provider;
> 3. That at the time of the assault Michael Thorpe was performing his nursing or health care duties; and
> 4. That any of these acts occurred in the State of Washington.

> If you find form the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP at 485.

The jury found Mr. Nation guilty of assault in the third degree. He was later sentenced to four months of confinement and ordered to pay a $500 VPA.

Mr. Nation timely appeals.

ANALYSIS

On appeal, Mr. Nation contends the evidence was insufficient to establish that Dr. Thorpe was a physician or health care provider as defined under RCW 9A.36.031(1)(i). We agree.

The due process clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The sufficiency of the evidence is a question of law this court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). "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." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When analyzing a sufficiency of the evidence claim, all reasonable inferences must be drawn in favor of the State. *Id.* "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

RCW 9A.36.031 defines assault in the third degree as:

> (1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
> . . . .
> (i) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or contracting with, a hospital licensed under chapter 70.41 RCW.

Mr. Nation argues that because the State did not present any evidence that Dr. Thorpe was a person licensed under chapter 18.57 RCW or chapter 18.71 RCW, or regulated under Title 18 RCW, the State failed to prove beyond a reasonable doubt that he assaulted a physician or a health care provider.

In support of his argument, Mr. Nation relies on this court's holding in *State v. Gray*, 124 Wn. App 322, 325, 102 P.3d 814 (2004), where we reversed Mr. Gray's conviction for assault in the third degree because the evidence did not support that the

victim was a "health care provider" because "[t]here was no testimony . . . that [the victim] was indeed certified under Title 18 RCW [or] . . . that Sacred Heart [Medical Center] was licensed under chapter 70.41 RCW."

Similarly, here, the State failed to admit any direct evidence that Dr. Thorpe was a physician or health care provider, let alone one licensed, certified, or regulated by statute. The only evidence remotely related to Dr. Thorpe's credentials was Dr. Thorpe's limited testimony that he was "employed at Trios" in the emergency room. RP at 180. As for Dr. Thorpe's employment history, he explained to the jury that he "did locums tenens through the U.S. Navy and through several physicians' office[s] including Harborview [Medical Center] and the local [emergency room] providers as far as Alaska, Wyoming, and California." RP at 180-81. Dr. Thorpe described the locums tenens as: "It's essentially rent a doc[ ]. I cover for other providers that are sick or ill or cannot afford or don't have the ability for full-time providers. I cover and go in and work on a part-time basis depending on upon what they need." RP at 181.

In support of the argument that sufficient evidence was admitted into evidence, the State directs us to the witnesses who referred to Dr. Thorpe as "Doctor Thorpe" and to those who referred to Trios as "Trios Hospital." During their testimony, Nurse Mango and Mr. Nation repeatedly referred to Dr. Thorpe as "Doctor Thorpe" or "the doctor." RP at 160-65, 230-31. Paramedic Dill testified that he transported Mr. Nation to "Trios

Hospital." Officer Reil testified he contacted Mr. Nation "[a]t Trios Hospital in Kennewick." RP at 168.

The State contends that reasonable inferences from this testimony could lead any rational trier of fact to have found Mr. Nation guilty beyond a reasonable doubt. Specifically, the State claims Dr. Thorpe's testimony and the witnesses' references to him as "Doctor Thorpe" is sufficient to establish he was a physician. The State further asserts the jury could infer Dr. Thorpe was licensed because both the paramedic and the police officer referred to "Trios" as a "hospital" and RCW 70.41.090 prohibits the word "hospital" to be used to describe an institution not so licensed. As such, the State posits that Trios Hospital would not have granted Dr. Thorpe privileges if he was not licensed.

Nevertheless, like in *Gray*, the record here lacks evidence that Dr. Thorpe was licensed under chapters 18.57 or 18.71 RCW, regulated under Title 18 RCW, or that Trios was licensed under chapter 70.41 RCW.

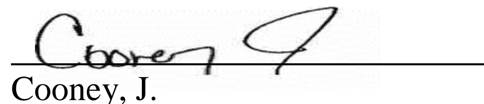
Citing *State v. Saunders*, 177 Wn. App 259, 311 P.3d 601 (2013), the State argues Washington courts have long held that definitions are not essential elements and do not necessarily need to be included in the to-convict instruction. We agree. However, *Saunders* specifically addressed whether definitions of words are essential elements if those definitions are located outside the originating statute. Even though definitions are not always required to be given with a to-convict jury instruction, the State is not relieved of its burden to prove an element of the crime as defined in the originating statute.

Lastly, citing *Gray*, the State requests that we remand for the trial court to enter a conviction for fourth degree assault if we find error. We decline the State's invitation. In *Gray*, the jury was instructed on the lesser included offense of fourth degree assault. Here, no lesser included offenses were offered nor provided to the jury.

CONCLUSION

Because the State failed to admit evidence sufficient to establish an essential element of the crime of assault in the third degree, we reverse Mr. Nation's conviction and remand for the trial court to enter a judgment of acquittal. *See State v. Hescock*, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999). Because we reverse Mr. Nation's conviction, we need not address his VPA argument.

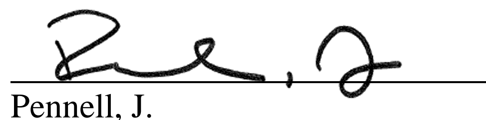
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Cooney, J.

WE CONCUR:

Staab, J.



Pennell, J.