IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28173-6-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
BRANDON T. BURNETT,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Brandon Burnett appeals his conviction for custodial assault, arguing that the court's instructions did not include every element of the offense and that the evidence did not support the verdict. We disagree and affirm.

FACTS

Mr. Burnett was incarcerated at the Washington State Penitentiary in Walla Walla at the time of this incident on December 11, 2008. Two corrections officers conducted a random search of Mr. Burnett's cell that day; he waited outside his cell in the dayroom during the search. Correctional Officer Corey Shane left the cell to speak with Mr. Burnett. Burnett punched the officer in the eye and continued to hit the officer multiple

times until he was restrained. Officer Shane went to the hospital for treatment.

Mr. Burnett was charged in the Walla Walla County Superior Court with one count of custodial assault in violation of RCW 9A.36.100(1)(b). A videotape that captured the incident was admitted at trial, as were several photographs of the officer's injuries. There was no objection to those exhibits.

Both parties proposed jury instructions. The trial court selected instructions proposed by the State. Included among those instructions were a definitional instruction (number five) and the elements instruction (number seven). Defense counsel stated that there was no objection to any of the instructions.

The jury convicted Mr. Burnett as charged. He then timely appealed to this court.

ANALYSIS

This appeal raises challenges to instructions five and seven, as well as to the sufficiency of the evidence to support the verdict.[1] Our review of these topics is governed by well-settled law.

Jury Instructions. Because he did not challenge either instruction below, the first question to be resolved is whether Mr. Burnett can now challenge either instruction five

[1] Mr. Burnett also filed a *pro se* Statement of Additional Grounds challenging the admission of the videotape and the photographs. His challenges are without merit. Further, the challenges were waived by the failure to object to the evidence at trial. *E.g., State v. Stevens,* 58 Wn. App. 478, 494, 794 P.2d 38, *review denied,* 115 Wn.2d 1025 (1990).

or instruction seven. A party cannot present an issue on appeal that was not presented to the trial court. RAP 2.5(a). However, an issue of "manifest error affecting a constitutional right" can be presented initially on appeal. RAP 2.5(a)(3). Mr. Burnett argues that both instructions fall within this exception.

We agree that the challenge to instruction seven is proper. A "to-convict" instruction that omits an element presents an issue of constitutional magnitude. *State v. Mills,* 154 Wn.2d 1, 6, 109 P.3d 415 (2005). However, a deficient definitional instruction does not present an issue of manifest constitutional error. *State v. Stearns,* 119 Wn.2d 247, 250, 830 P.2d 355 (1992). Accordingly, we will only consider Mr. Burnett's challenge to the elements instruction.

Instruction seven provided:

> To convict the defendant of the crime of Custodial Assault, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 11th day of December, 2008, the defendant assaulted Corey R. Shane;
>
> (2) That at the time of the assault, Corey R. Shane was a full time staff member at a corrections institution;
>
> (3) That at the time of the assault Corey R. Shane was performing official duties; and
>
> (4) That the acts occurred in Walla Walla County, Washington.
>
> If you find from the evidence that each of these elements have 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 of 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.

The crime of custodial assault, as charged here, is defined in RCW 9A.36.100:

> (1) A person is guilty of custodial assault if that person is not guilty of assault in the first or second degree and where the person:
>
> . . . .
>
> (b) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult corrections institution or local adult detention facilities who was performing official duties at the time of the assault.

Mr. Burnett argues that instruction seven erroneously omitted the word "adult" before the words "corrections institution" in the second element. We disagree, finding guidance in case law dealing with the opening language of subsection (1) that Mr. Burnett does not challenge here ("if that person is not guilty of assault in the first or second degree").

The same language in the felony violation of a no-contact order statute was at issue in *State v. Ward,* 148 Wn.2d 803, 64 P.3d 640 (2003). The court concluded that the introductory language was not an element of the offense, but simply served to distinguish the crime from other offenses while making all assaults in violation of the statue a felony. *Id.* at 812-814. Similarly here, the adult facility language served only to distinguish this assault from one occurring in a juvenile facility, which is governed by RCW 9A.36.100(1)(a). In both instances, assaulting a corrections officer is a felony. The only apparent reason for distinguishing between the two facilities is the differing personnel

present. In light of *Ward,* it is doubtful that specifying the type of facility is an element of custodial assault.

Nonetheless, even if we assume that it is an element, the omission was harmless error. Omission of an element from a "to-convict" instruction is harmless error if it is clear beyond a reasonable doubt that the error did not contribute to the verdict. *Neder v. United States*, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 119 S. Ct. 1827 (1999) (citing *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967)); *State v. Thomas*, 150 Wn.2d 821, 840-841, 83 P.3d 970 (2004). That is the situation here.

The jury saw Mr. Burnett at trial and knew he was an adult. They also saw the video of the assault. There was no doubt that Mr. Burnett was an adult serving a sentence at a correctional facility. The only conclusion that could be drawn was that he was at an adult correctional facility.

Any error in omitting the word "adult" from the elements instruction was harmless beyond a reasonable doubt.

Sufficiency of the Evidence. Mr. Burnett also argues that the State did not prove that Mr. Shane was a full-time corrections officer and that he worked in an "adult" facility. There was sufficient evidence from which the jury could infer those facts.

The standards governing this challenge are well settled. The question presented is

whether there is sufficient evidence to support the determination that each element of the crime was proven beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

As previously noted, there was ample evidence from which the jury could determine that Mr. Shane worked for an adult correctional facility. The remaining question is whether he worked as a "full time" officer or not. Admittedly, he was not asked about his status. He was working an 8.5 hour shift on the day of the assault and had been working in the prison for six months. By the time of trial he had been working there for nearly a year. On the day of the assault he was searching cells with three other officers who were working the same shift and had worked at the facility between 13 months and 7 years. A jury could conclude that they were full time officers working together.

While the evidence is skimpy, we believe there was enough evidence that a jury could infer that Mr. Shane was a full time employee. The *Green* standard is met.

The evidence supported the verdict. The conviction is affirmed.

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.

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Korsmo, J.

WE CONCUR:

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Kulik, C.J.

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Brown, J.