72911-0

FILED
July 30, 2015
Court of Appeals
Division I
State of Washington

No. 72911-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE JAIME ROSALES-CONTRERAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

First degree assault is the most serious kind of assault. A person commits the crime only if he or she assaults another with a specific intent to cause death or a grave injury just short of death. Typically, the crime involves the use of a firearm or other deadly weapon such as a knife. If a person uses only his hand or fist, the crime usually does not rise to the level of first degree assault because death or grave injury do not ordinarily result from such an assault. To prove the requisite intent when only fists are used, the evidence must generally show the accused inflicted repeated, forceful blows upon an unresisting victim.

Here, Jose Jaime Rosales-Contreras struck his wife one time in the face with his fist, in an effort to get her to move out of the way. As it happens, her eye was injured and she ultimately lost the use of that eye. The injury was unexpected and improbable, and there are no other facts to show Mr. Rosales-Contreras intended to cause such a serious injury. Because the State did not prove Mr. Rosales-Contreras acted with a specific intent to cause death or grave injury just short of death, the conviction for first degree assault must be reversed.

B. ASSIGNMENT OF ERROR

The State did not prove the elements of the crime beyond a reasonable doubt.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To prove the charged crime of first degree assault, the State was required to prove beyond a reasonable doubt that Mr. Rosales-Contreras assaulted Maria Dimas with the specific intent to inflict great bodily harm, and that he actually did inflict great bodily harm. Was the evidence insufficient to prove that Mr. Rosales-Contreras acted with a specific intent to inflict great bodily harm, where he merely struck Ms. Dimas one time with his fist, in an attempt to get her to move out of the way, and the serious injury she suffered was an unlikely and improbable consequence of a single punch with a fist?

D. STATEMENT OF THE CASE

Jose Jaime Rosales-Contreras and Maria Dimas were married in March 2003. 9/11/14RP 21. Ms. Dimas had two minor sons, Emilio and Jacob, from a previous relationship. 9/11/14RP 16. After the couple married, Ms. Dimas had two more sons. 9/11/14RP 16. In April 2008, the family was living together in a house in Federal Way. 9/11/14RP 21.

On April 2, 2008, Mr. Rosales-Contreras came home from work at around 3 p.m. 9/11/14RP 54. Ms. Dimas, who worked the swing shift at a hospital, was in her bedroom getting ready for work. 9/11/14RP 54. Emilio was in the kitchen cleaning the refrigerator, which was one of his regular chores. 9/16/14RP 100. Jacob was in the living room with the two younger boys. 9/16/14RP 73.

Mr. Rosales-Contreras entered the kitchen and began yelling at Emilio because he had not finished his chores. 9/16/14RP 102-03. Emilio was supposed to finish his chores every day before Mr. Rosales-Contreras got home from work. 9/16/14RP 100. Ms. Dimas could hear Mr. Rosales-Contreras yelling from her bedroom; he sounded angry. 9/11/14RP 58. She rushed into the kitchen. 9/11/14RP 57. Mr. Rosales-Contreras was standing close to Emilio, facing him, and looked very angry. 9/11/14RP 59. Ms. Dimas heard him ask Emilio "why he was not done with his chores." 9/11/14RP 62. Emilio looked frightened. 9/11/14RP 60.

In an effort to protect Emilio, Ms. Dimas stood between him and Mr. Rosales-Contreras. 9/11/14RP 62. She faced Mr. Rosales-Contreras. 9/11/14RP 63. He told her to get out of the way but she refused, saying he would not hit her son. 9/11/14RP 63. He said,

"Move or I'm going to hit you." 9/11/14RP 63. He looked furious. 9/11/14RP 64. She saw him lift his arm and saw his fist come toward her. 9/11/14RP 64. She then saw a flash of light. 9/11/14RP 64. She felt something drip from her eye and felt severe pain. 9/11/14RP 65. She went to the bathroom and saw that her left eye was bleeding; she could not open it. 9/11/14RP 66.

Emilio had heard Mr. Rosales-Contreras yelling at Ms. Dimas "telling her to move" so that he could get at Emilio. 9/16/14RP 107. Emilio ducked behind his mother, felt her "shake a little bit," then heard her cry out. 9/16/14RP 107. He saw that Mr. Rosales-Contreras's fist was raised. 9/16/14RP 108. After that single strike, Mr. Rosales-Contreras "backed up a little bit," then "walked [Ms. Dimas] to the bathroom." 9/16/14RP 108.

Jacob also witnessed the event. He heard Mr. Rosales-Contreras arguing with Emilio, then heard his mother enter the kitchen. 9/16/14RP 74. Jacob got up and stood at the entrance to the kitchen. 9/16/14RP 74. He saw his mother step in front of Emilio, getting between him and Mr. Rosales-Contreras, then heard his parents arguing. 9/16/14RP 75. Mr. Rosales-Contreras grabbed her on the shoulders, then "raised his hand, his right hand," and struck Ms. Dimas

a single time. 9/16/14RP 76. After that, "things just kind of settled down a little" and Ms. Dimas and Mr. Rosales-Contreras left the room. 9/16/14RP 77. A short while later, Mr. Rosales-Contreras asked Jacob to get a slice of onion to put on his mother's eye. 9/16/14RP 90.

Hours later, when the pain in her eye did not improve, Ms. Dimas went to an urgent care center for treatment. 9/11/14RP 68. She told the treatment providers that her son had accidentally hit her in the head with the back of his head. 9/11/14RP 71. She was taken to Harborview for surgery. 9/11/14RP 72. She told the treatment providers at Harborview the same thing—that her son had hit her with the back of his head. 9/11/14RP 72. Later, an ophthalmologist told her the nature of her injury was not consistent with that explanation. 9/11/14RP 79. At that point, she began to tell her treatment providers she had been hit in the eye with a water gun. 9/11/14RP 79. Ms. Dimas did not report the incident to the police until much later.

Ms. Dimas ultimately lost vision in her eye. 9/11/14RP 84. It was removed and replaced with a "glass" eye. 9/11/14RP 86; 9/15/14RP 151.

In December 2008, the couple separated and Mr. Rosales-Contreras moved back to Mexico. 9/11/14RP 94. In March 2009, Ms.

Dimas telephoned him and asked him to sign divorce papers. 9/11/14RP 97. His new girlfriend answered the phone. 9/11/14RP 95-96. Ms. Dimas told Mr. Rosales-Contreras that she wanted custody of the children but he refused. 9/11/14RP 97. He said he would petition the Mexican government for custody of the children and would come and take them from her. 9/11/14RP 98. Only then did Ms. Dimas tell the police he had punched her in the eye. 9/11/14RP 98.

The State charged Mr. Rosales-Contreras with one count of first degree assault, alleging that, "with intent to inflict great bodily harm, [he] did assault another and inflict great bodily harm upon Marie Rosales."[1] CP 5. The jury found Mr. Rosales-Contreras guilty as charged. CP 68.

Although Mr. Rosales-Contreras did not testify at trial, at the sentencing hearing, he apologized to Ms. Dimas and said he had "asked her to forgive me many times." 12/19/14RP 96. He maintained "it wasn't my intention to cause her harm." 12/19/14RP 96.

[1] The State also charged the aggravating factor that the offense involved domestic violence and was committed "within sight or sound of the victim's or the offender's minor child under the age of eighteen years, under the authority of RCW 9.94A.533(3)(h)(ii)." CP 6. Although the jury found the aggravating factor, the court declined to impose an exceptional sentence. CP 67, 70, 72.

E. ARGUMENT

The State did not prove beyond a reasonable doubt that Mr. Rosales-Contreras acted with a specific intent to inflict great bodily harm upon Ms. Dimas

1. The State was required to prove beyond a reasonable doubt that Mr. Rosales-Contreras specifically intended to cause Ms. Dimas to suffer great bodily harm

To prove the charged crime of first degree assault, the State was required to prove *both* that Mr. Rosales-Contreras assaulted Ms. Dimas "with intent to inflict great bodily harm," *and* that the assault actually "resulted in the infliction of great bodily harm." CP 55; RCW 9A.36.011(1)(c).

Constitutional due process required the State to prove this specific intent beyond a reasonable doubt.[2] See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. To find guilt beyond a reasonable doubt, the trier of fact must "reach a subjective

[2] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315.

First degree assault requires proof of a *specific intent* to inflict great bodily harm.[3] State v. Wilson, 125 Wn.2d 212, 218, 883 P.2d 320 (1994). Thus, to prove the crime, the State must prove more than that the defendant intentionally assaulted another, and that the assault resulted in great bodily harm. The State must also prove the defendant acted with the *objective or purpose* of inflicting great bodily harm. Wilson, 125 Wn.2d 218; see also State v. Louther, 22 Wn.2d 497, 502, 156 P.2d 672 (1945) ("An assault in the first degree is a crime which consists of an act combined with a specific intent, hence the intent is just as much an element of the crime as is the act of assault.").

"[W]here specific intent is an element of a crime, the specific intent must be proved as an independent fact and cannot be presumed from the commission of the unlawful act." Louther, 22 Wn.2d at 502. In other words, to prove the defendant had a specific intent to inflict great bodily harm, the State must prove more than that his actions produced that result.

[3] "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP 53; RCW 9A.08.010(1)(a).

Typically, specific intent is proved through circumstantial evidence. State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013). "[I]ntent to commit a crime may be inferred if the defendant's conduct and surrounding facts and circumstances plainly indicate such an intent as a matter of logical probability." Id. (internal quotation marks and citation omitted). Although specific intent may be inferred from the surrounding facts and circumstances, it may *not* be inferred from evidence that is "patently equivocal." Id. (internal quotation marks and citation omitted).

"Great bodily harm" means "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or that causes a significant permanent loss or impairment of the function of any bodily part or organ." CP 54; RCW 9A.04.110(4)(c).

"Great bodily harm" is the gravest kind of injury contemplated by the Legislature and "encompasses the most serious injuries short of death." State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010). There is no injury more serious than "great bodily harm." Id.

Because first degree assault requires proof of a specific intent to inflict "great bodily harm," the crime typically involves use of a

firearm or other deadly weapon such as a knife. State v. Pierre, 108 Wn. App. 378, 383, 31 P.3d 1207 (2001). Although the absence of such a weapon does not prelude the State from charging first degree assault, the evidence must show beyond a reasonable doubt that the actual force or means used was "*likely to produce* great bodily harm." Id. (emphasis added).

Thus, in this case, the State was required to prove beyond a reasonable doubt that Mr. Rosales-Contreras struck Ms. Dimas with the objective or purpose of either causing her death, or causing her to suffer the most serious kind of injury just short of death. Stubbs, 170 Wn.2d at 128. The facts and circumstances of the case do not rise to that level. The evidence does not show unequivocally and beyond a reasonable doubt that Mr. Rosales-Contreras had such an intent when he struck Ms. Dimas only one time with his fist in an effort to get her to move out of the way.

2. The circumstances of the case do not demonstrate beyond a reasonable doubt that Mr. Rosales-Contreras acted with a specific intent either to cause Ms. Dimas to die, or to cause her to suffer an extreme and dire injury just short of death

The question is whether Mr. Rosales-Contreras's conduct and the surrounding facts and circumstances plainly indicate as a matter of

logical probability that he specifically intended to inflict great bodily harm upon Ms. Dimas. Vasquez, 178 Wn.2d at 8. The evidence must show beyond a reasonable doubt the force he used was "likely to produce great bodily harm." Pierre, 108 Wn. App. at 383.

Apparently no published Washington case addresses whether an assault committed by a single blow with a fist can rise to the level of first degree assault. In those cases where the defendant did not use a firearm or other deadly weapon, courts have generally upheld first degree assault convictions only where the defendant inflicted repeated, ongoing, brutal and forceful blows against an unresisting victim. In Pierre, for instance, Pierre and his friends ran toward a car in which the victim was sitting, opened the car door, punched the victim as he tried to crawl out of the car, pulled him out by his feet, causing his head to hit the concrete, and then kicked and stomped his head repeatedly as he lay defenseless on the ground. Pierre, 108 Wn. App. at 380-81. Under these circumstances, the jury could infer Pierre acted with an intent to cause great bodily harm, as "it is difficult to avoid an inference that Pierre could have possibly intended anything other than . . . great bodily harm when he continued to kick at [the victim's] head" "as though it was a ball," causing permanent brain damage. Id. at 386-87.

Similarly, in State v. Alcantar-Maldonado, 184 Wn. App. 215, 225-26, 340 P.3d 859 (2014), the defendant told the victim he would "blow his 'fucking brains out,'" then struck him in the face with his gun three times, hit and kicked him in the face, and pushed him into a door and through a doorway, causing multiple facial bone fractures. According to witnesses, the noise of the defendant striking the victim sounded like "bones breaking," or "a watermelon thrown to the ground." Id. at 226. The victim had two plates surgically implanted in his face in order to fuse the bones together. Id. Under these circumstances, the evidence was sufficient to prove an intent to inflict great bodily harm. Id.

Compared to those cases, the circumstances in this case are far less convincing. They are, at best, equivocal. Instead of engaging in a repeated, ongoing, brutal attack, Mr. Rosales-Contreras struck Ms. Dimas only one time. The assault was then complete and things "settled down." 9/16/14RP 77. Once Mr. Rosales-Contreras saw that Ms. Dimas was injured, he attempted to assist her. He "walked her to the bathroom," then asked his son to get a slice of onion to put on her eye. 9/16/14RP 90, 108. These actions do not demonstrate an intent to inflict a lethal or grave injury.

The injury that Ms. Dimas suffered was unusual and improbable. It is unlikely that a person would lose an eye as a result of being hit in the face one time with a fist. Thus, the jury could not infer, simply from the fact that Ms. Dimas lost her eye, that Mr. Rosales-Contreras specifically intended to cause such an injury. See Pierre, 108 Wn. App. at 383. No other circumstances unequivocally demonstrate Mr. Rosales-Contreras specifically intended to cause Ms. Dimas to suffer great bodily harm.

Courts in other jurisdictions generally agree that when an assault is committed with a hand or fist and not a deadly weapon, the evidence is usually insufficient to prove an intent to kill or cause great bodily harm because death or great bodily harm do not ordinarily result from such an assault. See People v. Spring, 153 Cal App. 3d 1199, 1205, 200 Cal. Rptr. 849 (1984) ("Normally, hitting a person with the hands or feet does not constitute murder in any degree" because death or great bodily harm are not a "reasonable or probable consequence" of such a beating"); McAndrews v. People, 71 Colo. 542, 544, 208 P. 486 (1922) (if "death should ensue from an attack made with the hands and feet only, on a person of mature years, and in full health and strength, the law would not imply malice, because, ordinarily, death would not be

caused by the use of such means"); People v. Crenshaw, 298 Ill. 412, 417, 131 N.E. 576 (1921) ("The striking of a blow with the fist on the side of the face or head is not likely to be attended with dangerous or fatal consequences, and no inference of an intent to kill is warranted"); State v. Lang, 309 N.C. 512, 525, 308 S.E.2d 317 (1983) ("ordinarily if death ensues from an attack made with hands and feet only, on a person of mature years and full health and strength, the law would not imply malice required to make the homicide second-degree murder" because "ordinarily, death would not be caused by use of such means"); Commonwealth v. Thomas, 527 Pa. 511, 514, 594 A.2d 300 (1991) ("a single blow, without a weapon is, ordinarily, not sufficient to establish malice"); Commonwealth v. Dorazio, 365 Pa. 291, 299, 74 A.2d 125 (1950) ("Ordinarily where an assault is made with bare fists only, without a deadly weapon, and death results, there would only be manslaughter" because the evidence would be insufficient to prove an intent to inflict great bodily harm).

In determining whether the evidence is sufficient to prove an intent to inflict great bodily harm where an assault is committed with the fists alone, courts consider whether the defendant inflicted "repeated and continued blows to vital and delicate parts of the body of

a defenseless, unresisting victim." Dorazio, 365 Pa. at 301. The evidence may be sufficient if the assault was "brutal, prolonged, persistent, [and] ferocious," carried out by a "larger, more powerful" assailant. Thomas, 527 Pa. at 516.

Thus, in the following cases, courts concluded the evidence was sufficient to prove an intent to cause death or great bodily harm because the defendant inflicted repeated, brutal blows upon an unresisting victim. State v. Gardner, 522 S.W.2d 323, 323 (Mo. Ct. App. 1975) (evidence sufficient to prove intent to cause death or great bodily harm, where defendant struck victim with fists, knocking him to ground, then kicked him in groin and pounded his head against the pavement); State v. Himmelmann, 399 S.W.2d 58, 59-60 (Mo. 1966) (evidence sufficient to prove intent to inflict great bodily harm, where defendant struck victim with fist in head, then struck him repeatedly on head and face, causing serious bruises, lacerations, fractures and a concussion); Commonwealth v. Buzard, 365 Pa. 511, 514-15, 517, 76 A.2d 394 (1950) (evidence sufficient where defendant pursued victim, forced him to ground, held him between his legs, and struck him repeatedly on his head and face with his hands and feet); Dorazio, 365 Pa. at 293-94, 301-02 (evidence sufficient where defendant engaged in

"brutal, persistent attack on helpless, non-resisting victim" by punching victim who lay on ground repeatedly about the head and body and victim died as result of skull fracture).

By contrast, courts held in the following cases that the evidence was *in*sufficient to prove an intent to cause great bodily harm because the defendant inflicted only a single, isolated blow with a fist, even where the victim suffered actual death or great bodily harm as a result. Spring, 153 Cal App. 3d at 1203, 1205-06 (evidence insufficient to prove malice where defendant punched victim single time above his left eye and victim died later from hematoma caused by punch); People v. Mighell, 254 Ill. 53, 54, 59, 98 N.E. 236 (1912) (evidence insufficient to prove malice were defendant struck victim twice with his hand, causing victim to fall and fracture skull); Nunn v. State, 601 N.E.2d 334, 339 (Ind. 1992) (evidence insufficient where defendant struck victim single time in head and neck area with his hand, and victim fell and died later from severed artery in neck); State v. Johnson, 318 Mo. 596, 602, 605 (1927) (evidence insufficient where defendant slapped wife several times on face and head, and struck her with fist, causing bruises, bleeding, and black and swollen eyes); Thomas, 527 Pa. at 513, 516-17 (evidence insufficient to prove malice where

defendant struck victim single time in face with his fist, and victim fell and suffered fatal brain hemorrhage); Fluornoy v. State, 124 Tex. Crim. 395, 396, 63 S.W.2d 558 (1933) (evidence insufficient where defendant struck victim single time with fist, knocking him down, causing him to strike head on concrete curb and suffer fatal skull fracture).

Like in those cases, here, Mr. Rosales-Contreras struck Ms. Dimas only a single time with his fist. Although she suffered a serious injury, it was unexpected and improbable. The evidence does not show unequivocally that Mr. Rosales-Contreras *specifically intended* to cause such an injury. Thus, the evidence was insufficient to prove the specific intent required for first degree assault beyond a reasonable doubt and the conviction must be reversed. Vasquez, 178 Wn.2d at 8; Wilson, 125 Wn.2d at 218; Pierre, 108 Wn. App. at 383.

F. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Mr. Rosales-Contreras acted with a specific intent to inflict great bodily harm upon Ms. Dimas, the conviction must be reversed.

Respectfully submitted this 30th day of July, 2015.

/s/ Maureen M. Cyr
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. JOSE ROSALES-CONTRERAS, Appellant.	)))))))))	NO. 72911-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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