

NO. 73624-8-I

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

STATE OF WASHINGTON

Respondent

v.

JASON C. SCHWIESOW,

Appellant

BRIEF OF RESPONDENT

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I. ISSUES

Did sufficient evidence support the jury's finding of guilt on the charge of Interfering with Reporting of Domestic Violence?

II. STATEMENT OF THE CASE

The State of Washington charged the defendant with count 1, assault in the second degree – domestic violence, a class B felony, and count 2, interfering with reporting of domestic violence, a gross misdemeanor. CP 163-164, 172-173. The case proceeded to a jury trial, and the jury convicted the defendant of both crimes as charged. CP 71, 74. The court imposed a standard range sentence of 6 months total confinement, followed by 12 months of community custody on count 1. CP 44-45. On count 2 the court imposed 180 days in jail, concurrent with the sentence on count 1. CP 35.

The defendant filed a notice of appeal and obtained an order staying execution of the judgment. CP 9-10, 17. The defendant then filed a brief in this Court which does not challenge any aspect of his conviction for count 1, second degree assault– domestic violence. Br. App. 1-5. The sole challenge raised on appeal is the sufficiency of the evidence for count 2, interfering with reporting of domestic violence. Id.

A. THE EVIDENCE AT TRIAL.

The jury first heard from Tova and Michael Tausen, a married couple who were both home caring for a newborn infant on October 10, 2014, when they heard a woman screaming outside their Everett home. Even though the woman lived across the street from them, the Tausens had never seen the woman before. When they opened the front door the woman was on their front steps. She then collapsed to the ground while uncontrollably shaking and crying. She was saying, "He hit me. He hit me. Am I bleeding? Call 911." Tova Tausen could see that the woman's face was red, and she was hunched over holding her hand which was already swollen and discolored. There was a puncture mark on the woman's neck which appeared to be caused by her earring. Michael Tausen called 911 in order to obtain help for the victim. The couple stayed with the victim until first responders arrived. Within minutes the Mill Creek Police Department, the Snohomish County Sheriff's Office, and an ambulance arrived on the scene. RP 30-36, 54.

The screaming, injured woman was Angel Zumbroich, who had lived with the defendant in a rented house across the street from the Tausens for about a year. RP 127. She lived there with her boyfriend, the defendant Jason Schwiesow, whom she had known

since junior high school and had dated for about 2 ½ years before these crimes. On October 4, 2014, the victim decided to end their dating relationship. RP 40-42. On October 7th or 8th, the lease was modified to remove the defendant and left Ms. Zumbroich as the only renter of the home. RP 43-44. The defendant moved in with his mother in Bellevue. RP 129.

At about 10:30 AM on October 10, 2014, the victim was at work as a software test engineer when she received a very angry phone call from the defendant. He was at the victim's house retrieving the rest of his belongings, but the victim was worried he was going to destroy things in the house. She decided to leave work and drive home to make sure nothing happened. RP 40, 44.

When the victim returned home she saw the defendant outside the home packing a truck with his remaining possessions from the home. The victim went inside the house and the defendant followed, after which the two began a verbal argument first about when the defendant was going to relinquish his key to the house, and then because the defendant was upset to find condoms in the victim's bedside nightstand. RP 44-46.

The two were arguing face to face, within inches of each other, and the defendant was chewing tobacco, when the

defendant intentionally spit in the victim's face. The victim reacted by slapping the defendant in the face, to which the defendant promptly retaliated in kind by slapping the victim's face. Then the defendant began punching the victim repeatedly in the head as he grabbed her around the neck with his other arm. This forced the victim to the ground, where she got into the fetal position in an attempt to "stay small" and protect herself. She used her hand to try protecting her ear from the defendant's repeated, closed-fist strikes. She estimated the defendant punched her "probably 20 or more times." All the while she was screaming, telling the defendant to stop. RP 47-49.

In the commotion of the assault the victim's purse had spilled its contents onto the ground, and she noticed that her cellphone was "kind of lit up." The victim testified:

I can see it, so I reached for it. Then, he saw me do that, and I was trying to get the phone to call 911, and he grabbed the phone. I just remember thinking, and saying out loud, "No, no, no," because I thought that was kind of my last chance, and if I didn't do that, I would end up dead. . . .He grabbed the phone, and he – I don't know how he was over me, but he got up and he let me go, and he threw the phone against the wall in the back of the second bedroom. We were in the hallway just outside that second bedroom.

RP 49-50. The defendant threw the victim's cell phone about 10 feet across the room, where it struck the back wall so hard it left a

mark in the wall and broke the phone into multiple pieces. The cellphone screen was shattered, the battery and the outer case had come apart, and the phone was destroyed. RP 51, 60-61, 118. The victim testified that when the defendant destroyed her phone it prevented her from calling 911. She said, "I didn't have any other phone, so I couldn't call." RP 51.

The defendant's momentary focus on destroying the victim's phone allowed her to get up and run out of the house with her dog, Elvis. When the victim reached the front lawn she paused, trying to figure out where to go, and eventually ran across the street to a neighboring house. She selected that house because both cars were in the driveway, and she knew the big dog that lived there might give her some additional protection. RP 51-52. When a woman (Tova Tausen) answered the door, the victim asked her to call 911. RP 53. The defendant left quickly, squealing the tires of the white truck he arrived in. RP 54.

The victim was transported by ambulance to the Mill Creek Emergency Room of Swedish Hospital, where she was diagnosed with a fractured third metacarpal bone in her left hand (the "middle finger kind of down into the hand just below the knuckle"). She also

sustained bruising to her left ear, her head, and the left side of her back. RP 57, 98-100.

The defendant testified in his own defense. RP 123-156. He insisted that a small drop of spit inadvertently flew out of his mouth onto the victim's face during their face-to-face verbal argument. RP 141. After the victim slapped him in response, he used both hands to push her down, then struck her. RP 142. He said he struck her three or four times in the head while the victim was using her hands, trying to push the defendant off of her. RP 148-149. The victim's dog tried to bite the defendant during the assault, so the defendant hit the dog. According to the defendant, after he hit the dog the victim "got up and tried to grab her phone." In response the defendant "[g]rabbed the phone out of her hand[, and [t]hrew it against the wall." RP 144.

III. ARGUMENT

The defendant argues there was insufficient evidence to find him guilty of interfering with reporting of domestic violence. Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d

628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to convict the defendant of interfering with reporting of domestic violence the jury had to find beyond a reasonable doubt:

- (1) That the defendant committed a crime of domestic violence as defined in RCW 10.99.020;
- (2) That the defendant prevented or attempted to prevent the victim of or a witness to that domestic violence crime from calling a 911 emergency communication system, obtaining medical assistance, or making a report to any law enforcement official.

RCW 9A.36.150.

The defendant argues that the record lacks evidence "that Mr. Schwiesow interfered with Ms. Zumbroich 'calling a 911 communication system, obtaining medical assistance, or making a report to any law enforcement official.'" Br. App. 4. In support of this

argument he claims, "Rather, before Ms. Zumbroich even had the phone in her hand, Mr. Schwiesow picked it up threw [sic] it against the wall." Id. This factual representation is unsupported by the record; in fact, the defendant himself testified that he "[g]rabbed the phone out of her hand." RP 144.

Yet, even if the record supported the defendant's claim that the victim never physically possessed the phone she was trying to reach for, there is no authority for the argument that a victim's physical possession of a communication device is a necessary element of the crime of interfering with reporting of domestic violence. The statute itself contains no such provision, and the defendant has certainly supplied no authority for the position. Br. App. 3. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Logan, 102 Wn. App. 907, 911 fn.1, 10 P.3d 504 (2000).

There are not many reported cases evaluating sufficiency of the evidence for the particular crime of interfering with reporting domestic violence. However, in State v. Nonog, this court affirmed a conviction of that crime despite an insufficient evidence challenge, based on facts remarkably similar to the facts in this

case. State v. Nonog, 145 Wn. App. 802, 187 P.3d 335 (2008) aff'd, 169 Wn.2d 220, 237 P.3d 250 (2010). In Nonog the victim came home to find the defendant inside her home, which constituted both a violation of a domestic violence no contact order and also domestic violence residential burglary. The victim attempted to call 911 from her cell phone, but Nonog grabbed her cell phone from her and threw it against a wall. The victim was finally able to call 911 using her friend's cell phone. Id. at 805. This Court held that the evidence was sufficient to prove the essential elements of the offense. Id. at 813.

The defendant in this case did the exact same thing to prevent the victim from calling 911 as the defendant in Nonog did. Mr. Schwiesow grabbed the victim's cell phone out of her hand as she was trying to call 911 for help, then threw it against the wall so hard that it left a mark on the wall, shattered the phone's screen and broke the battery and cover off of the phone. The phone was rendered inoperable, which forced the victim to run across the street to plea for help from a neighbor she'd never met. The neighbors called 911 on the victim's behalf. RP 49-53, 60-61, 87, 118, 144. Mr. Schwiesow's behavior matches the precise conduct

described by the criminal statute he was convicted of violating. His conviction should be affirmed.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm the defendant's convictions.

Respectfully submitted on February 10, 2016.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 10th day of February, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Bryan G. Hershman, bghershman@aol.com.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 10th day of February, 2016, at the Snohomish County Office.



Diane K. Kremenich
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