

NO. 67957-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

K. P.,

Appellant.

REC'D
MAY 30 2012
King County Prosecutor
Appellate Unit

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

The Honorable Michael J. Trickey, Judge

BRIEF OF APPELLANT

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RCW 9A.36.0217

A. ASSIGNMENT OF ERROR

The appellant, K.P., assigns error to the trial court's conclusion that the State proved each element of second degree assault beyond a reasonable doubt. CP 27 (Conclusion of Law II, attached as appendix).

Issue Pertaining to Assignment of Error

The complainant suffered a small subdural hematoma, or a "brain bruise," without losing consciousness. She had no other bruises, no lacerations or scrapes, no swelling, and no fractures. The results of several examinations were normal and after being observed overnight, the complainant was discharged from the hospital. One month after the incident, the complainant began to suffer periodic headaches and numbness in a leg. Under these circumstances, did the trial court err by concluding the State proved "substantial bodily harm" beyond a reasonable doubt.

B. STATEMENT OF THE CASE¹

Three co-workers were standing outside on a work break in downtown Seattle when their attention was drawn to a young man and an older woman engaged in a loud conversation at a bus stop across the street.

¹ 1RP refers to the verbatim report of the October 24, 2011, proceedings. 2RP refers to the verbatim report of the October 25, October 28, and November 18, 2011, proceedings.

1RP 79, 81-82, 103, 105-08; 2RP 72-75. The young man was K.P. 1RP 81-82. The woman, 51-year-old Betty Damien, was extremely drunk; she had already drank a fifth of whiskey and was headed to the liquor store for another fifth and some beer. 2RP 59. This was about her normal amount for a day. 1RP 167.

One of the three co-workers, Marge Evans, heard Damien yelling, "Mother-fuckers, this is a bus stop." 2RP 75. Another, Jeffrey Williamson, heard "'f bombs" being exchanged. 2RP 108. Evans saw an angry-looking Damien get "up in [K.P.'s] face" while yelling at him. 2RP 76-78. K.P. smirked at Damien. 2RP 78.

According to Williamson, Damien approached K.P. inside the bus stop shelter and twice swung at him in a "roundhouse" motion with an open hand. 1RP 108-09, 121-22. K.P. then moved to another shelter, but Damien followed and swung at him two more times. 1RP 109-110, 122-23. She may have made contact with her fourth swing. 1RP 123.

Metro bus driver Melody Brutscher slowed her bus to less than five miles per hour as she approached the stop because she saw Damien had her back to the street and was within three feet of the curb. 1RP 33-37. Damien appeared to be engaged in an "acrimonious" conversation with K.P. 1RP 34-35. She was wagging her finger near K.P.'s chest as if

lecturing him. 1RP 58. When the bus got to within about five feet of them, Brutscher saw K.P. look up and then push Damien toward the street with both hands. 1RP 40-41, 51-52. Other witnesses also saw the push. 1RP 73-74, 82-83, 97-98, 111, 128-29; 2RP 79. One of them, Elizabeth Skoczen, who had heard a loud discussion between K.P. and Damien at the stop, described K.P.'s action as a "reactive shove." 1RP 126-27, 136.

Damien lost her balance and was hit by the bus. 1RP 41-42, 74, 82-83, 111, 129-30, 2RP 79. The contact caused the windshield to crack. 1RP 41-42. Damien recalled none of this. 2RP 59-60. Skoczen, who was certified in first aid, tended to Damien. 1RP 131. Damien lay on the ground, breathing and with her eyes open. She was not bleeding, and gave her correct first name. 1RP 131-32.

Bus driver Brutscher got off the bus and told Skoczen she had called 911. 1RP 42-43, 132-33. Brutscher's focus turned to K.P., who had walked away from the bus stop. 1RP 43. With camera in hand, Brutscher began to follow K.P. and yelled at him. 1RP 44-45, 74-75, 83, 98-99, 112-13. K.P. continued walking, then slapped Brutscher's camera out of her hand and said, "I didn't do nothing, bitch." 1RP 47-48. Brutscher picked up her camera and returned to her bus. 1RP 47-48.

The third of the three co-workers, Shawn Roller, crossed the street and followed K.P. 1RP 78, 83-84. Roller heard K.P., who was with two companions, say, "Did you see that bitch fly?" 1RP 85. A few blocks later, two responding police officers apprehended K.P. without incident. 1RP 85-87, 116-18; 2RP 14-15, 22-24. K.P. spontaneously told one of the officers that he "did not see the bus when he pushed the lady." 2RP 17.

Meanwhile, Damien's first memory was being at Harborview Medical Center, although she was conscious the entire time. 1RP 142, 161; 2RP 7-9, 60-61. The paramedics on the scene reported a Glasgow Coma Score of 13-15, with 15 being the highest level of functioning. 1RP 158-60, 171. Damien was alert and oriented. 2RP 9. She complained of head and right leg pain. 2RP 9.

An emergency room doctor said Damien was too intoxicated to provide an accurate history. She presented with a .359 blood-alcohol level. 1RP 144-45, 160-64. She was able to speak, however, and did not complain of dizziness or vision loss. 1RP 164. Nor was she in pain. 2RP 62. She was seen later walking in a hospital hallway. 1RP 174.

Damien suffered no fractures and had no lacerations or bruises. 1RP 145-46, 167-69. CT scans revealed a subdural hematoma – a bruised brain – which is a form of bleeding between the bone and the brain. 1RP

146-48, 2RP 36-38, 41-42. According to the radiologist who interpreted Damien's CT scan, a subdural hematoma "has the potential to be severe, but it's not always severe." 2RP 43. If continued over time, the bleeding can put pressure on the brain. 1RP 149, 2RP 37-38.

The larger hematomas, according to the emergency room doctor, are generally the worst. 1RP 149-50. In relative terms, Damien's hematoma was small. 2RP 45. A follow-up scan six hours later showed no growth in the hematoma. 2RP 41. Damien was discharged the following day with instructions to follow up in three weeks for another CT scan. 1RP 153; 2RP 61. She did not follow the instructions, however, because she had no pain at that time. 2RP 61-62. About a month after the incident, she began getting headaches, which occurred about twice a month, and numbness in her leg. 2RP 62.

The State charged K.P. with second degree assault against Damien, alleging he assaulted her with a deadly weapon -- the bus -- and recklessly inflicted substantial bodily harm. The State also charged K.P. with third degree assault against Brutscher based on her status as a bus driver. CP 10-11.

K.P. did not testify. Defense counsel conceded K.P. pushed Damien, but did so in self-defense. 2RP 160-61. Counsel maintained

Damien initiated the affray and persisted in yelling at him and trying to hit him. 2RP 161-65. Counsel also argued K.P. did not inflict substantial bodily harm. 2RP 170-75.

The juvenile court judge rejected the defense, finding K.P. used more force than necessary to defend himself against the seriously intoxicated Damien. CP 27; 2RP 186-89. Although the judge found K.P. not guilty of assault with a deadly weapon, he found him guilty of intentionally assaulting Damien and recklessly inflicting substantial bodily harm. CP 27; 2RP 185-86, 190-92. The judge also found K.P. guilty of fourth degree assault against Brutscher. CP 27; 2RP 192. The judge imposed standard range dispositions. CP 21-23.

C. ARGUMENT

THE STATE FAILED TO PROVE SUBSTANTIAL BODILY HARM BEYOND A REASONABLE DOUBT.

Due process requires the State to prove each essential element of a crime beyond a reasonable doubt. State v. A.M., 163 Wn. App. 414, 419, 260 P.3d 229 (2011). In assessing a challenge to the sufficiency of the evidence, a reviewing court views the evidence in the light most favorable to the State. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The question is whether a rational fact finder could have found the

essential elements of the offense beyond a reasonable doubt. State v. Budik, 173 Wn.2d 727, 733, 272 P.3d 816 (2012).

To sustain the second degree assault conviction against K.P., the State has to prove beyond a reasonable doubt that he recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). "Substantial bodily harm" is bodily injury that "involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part[.]" RCW 9A.04.110(4)(b).

Our Supreme Court has interpreted the term "substantial" as meaning a level of harm that is "considerable and necessarily requires a showing greater than an injury merely having some existence." State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011). In McKague, for example, the complainant suffered a concussion without loss of consciousness, a scalp contusion and lacerations, head and neck pain, and lacerations on his arm. A CT scan showed a possible fracture of facial bones. He had facial bruising and swelling for several days. The complainant's severe neck and shoulder pain remained for more than a week, and residual pain lasted another two months. McKague, 172 Wn.2d

at 804, 806. The Court found this constituted substantial bodily harm. Id., 172 Wn.2d at 807.

Serious, lasting bruises may alone constitute "substantial bodily harm." In State v. Hovig,² the "substantial bodily harm" consisted of a mouth-shaped bite mark that covered an infant's entire cheek. Photographs showed "individual red and violet teeth-marks" along the upper and lower circumference of the injury. The entire right cheek was bruised. Id., 149 Wn. App. at 5. A doctor testified the child would have felt pain at the time of the injury and the bruise would have lasted from seven to 14 days. Id., 149 Wn. App. at 13.

In another suspected child abuse situation, doctors observed bruises on the child's body, some of which were more than three days old, as well as adult-sized bite marks. State v. Ashcraft, 71 Wn. App. 444, 448-49, 859 P.2d 60 (1993). Some of the bruises appeared to be consistent with being hit with a cord or rope, others with a belt or ruler, and still others with a stiff-soled shoe. Ashcraft, 71 Wn. App. at 449. The bruises caused by the belt, and those consistent with a shoe strike, prompted this Court to hold that "[t]he presence of the bruise marks

² 149 Wn. App. 1, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009).

indicates temporary but substantial disfigurement[]" sufficient to establish substantial bodily harm. Ashcraft, 71 Wn. App. at 455.

By comparison, Damien's injury was minor. The radiologist, who specialized in neuroradiology, said Damien suffered a "small amount of bleeding" in the front of her brain. 2RP 33-34, 41. The follow-up CT scan showed "the same bleeding which had not worsened." 2RP 41. Damien suffered no fractures, had no problems with her extremities, and displayed no bruises or lacerations. 1RP 167-69. Her neurological status was normal. 1RP 170-71.

In short, the State failed to establish temporary but substantial disfigurement, or temporary but substantial loss or impairment of function, or any broken bones. Whatever the potential for serious injury when someone gets hit by a moving bus, that potential was simply not realized here. Damien did not suffer substantial bodily harm, which means Pascal's conviction should be reversed and remanded with an order to enter judgment for fourth degree assault. See State v. Garcia, 146 Wn. App. 821, 830, 193 P.3d 181 (2008) (unproven conviction for third degree assault, in which trial court found defendant pushed complainant, dismissed and cause remanded for entry of judgment and sentence for fourth degree assault), review denied, 166 Wn.2d 1009 (2009).

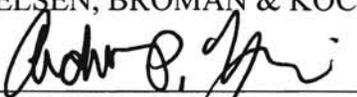
D. CONCLUSION

For the above reasons, this Court should reverse K.P.'s second degree assault conviction and remand with an order to enter a judgment and sentence for fourth degree assault.

DATED this 30 day of May, 2012.

Respectfully submitted,

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DIVISION ONE

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Respondent,)	
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v.)	COA NO. 67957-1-1
)	
KERSAN PASCAL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF MAY 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KERSAN PASCAL
6016 S. 117TH PLACE
SEATTLE, WA 98178

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF MAY 2012.

x. Patrick Mayovsky

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