

42781-8

No. 42405-3-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

YOVANY GOMEZ HERNANDEZ,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Was there sufficient evidence presented to convict Gomez Hernandez of Assault in the First Degree?
- B. Did the trial court err when it imposed 24-48 months of community custody?

II. STATEMENT OF THE CASE

Anna Garcia Campuzano decided to leave her husband, Gomez Hernandez, on May 5, 2011 and stay with her brother, Hector Garcia. 1RP 43-46. Ms. Campuzano and Gomez Hernandez were married in 2006 and have three children. 1RP 44. On May 4, 2011, Gomez Hernandez and Ms. Campuzano had an argument regarding their son and Gomez Hernandez hit Ms. Campuzano. 1RP 44. Ms. Campuzano was tired of Gomez Hernandez mistreating her so she left the next day. 1RP 44.

Gomez Hernandez went over to Mr. Garcia's residence sometime around 7:00 to 7:30 p.m. the evening of May 5, 2011. 1RP 72. Gomez Hernandez knocked loudly on Mr. Garcia's door. 1RP 72. Mr. Garcia told Gomez Hernandez that Ms. Campuzano did not want to see Gomez Hernandez. 1RP 72. Gomez Hernandez told Mr. Garcia he did not care what Ms. Campuzano wanted and pushed his way into Mr. Garcia's residence. 1RP 72. Ms. Campuzano had gone into the bathroom and the children were

in the living room playing. 1RP 46, 74. Gomez Hernandez went to the bathroom and tried to speak to Ms. Campuzano. 1RP 47. Gomez Hernandez told Ms. Campuzano that she needed to come home and she said, "No." 1RP 48. Gomez Hernandez hit Ms. Campuzano and would not let her leave the bathroom so he hit her again as she called for Mr. Garcia. 1RP 48. Ms. Campuzano managed to leave the bathroom, and she and Gomez Hernandez ended up in the kitchen. 1RP 48-51. While in the kitchen Ms. Campuzano saw Gomez Hernandez eyeing the knives. 1RP 51. Gomez Hernandez grabbed a knife and Ms. Campuzano took off running. 1RP 76. Gomez Hernandez went after Ms. Campuzano, grabbing her by her ponytail, Ms. Campuzano fell in the bathroom and Gomez Hernandez stabbed her in the back neck. 1RP 51, 76.

Mr. Garcia took Ms. Campuzano to Providence Centralia Hospital. 1RP 55; 2RP 6. Dr. Paula Godfrey treated Ms. Campuzano at the hospital. 2RP 6. Dr. Godfrey observed that Ms. Campuzano had a "one centimeter approximately stab wound on the back of the neck, just to the left of the midline, just below where the skull stops..." 2RP 9. The stab wound was three and half inches deep. 2RP 8-9. Ms. Campuzano could have died from this type of injury but in this case the knife missed her spinal cord and

there were no vascular injuries. 2RP 13, 18. Ms. Campuzano was left with a permanent scar from the attack. 1RP 56; 2RP 28.

Gomez Hernandez was charged with and convicted of Assault in the First Degree – Domestic Violence. CP4-5, 33, 35. Gomez Hernandez timely filed his notice of appeal. CP 49.

The State will supplement the facts as needed in the argument section below.

III. ARGUMENT

A. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION AGAINST GOMEZ HERNANDEZ FOR ASSAULT IN THE FIRST DEGREE.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If “any rational jury could find the essential elements of the crime beyond a reasonable doubt”, the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence

presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

1. The State Presented Sufficient Evidence That Gomez Hernandez Inflicted Great Bodily Harm On Anna Garcia Campuzano

To convict Gomez Hernandez of the crime of Assault in the First Degree, as charged in the second amended information, the State must prove the following:

(1) A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm:

(c) Assaults another and inflicts great bodily harm.

RCW 9A.36.011(1)(c). Great bodily harm is defined as,

bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

RCW 9A.04.110(1)(c); CP 7-8. In this case, Gomez Hernandez stabbed Ms. Campuzano in the back of the neck, at the base of her skull. 1RP 51-54, 76-77; 2RP 9. Gomez Hernandez argues to this Court that the State failed to prove that Gomez Hernandez inflicted great bodily harm on Ms. Campuzano. Brief of Appellant 11-15. The State respectfully disagrees with Gomez Hernandez's analysis and argues to this Court that the State did sufficiently prove Gomez Hernandez inflicted great bodily harm upon Ms. Campuzano.

While the State must reluctantly agree with Gomez Hernandez that the testimony from Dr. Godfrey did not establish that the injury Ms. Campuzano suffered created a probability of death or that Ms. Campuzano suffered significant permanent loss or impairment of a bodily part or organ, the State argues to this Court that the evidence was sufficient to prove that Ms. Campuzano suffered a bodily injury that caused significant serious

permanent disfigurement. See 1RP 56-57; 2RP 10, 21-22, 28. Dr. Godfrey stated “every scar is always permanent, and it *should* be pretty minimal, but it will be there forever.” 2RP 28 (emphasis added). Ms. Campuzano testified that she still had a scar on her neck, almost five months after the attack. 1RP 56. The finder of fact in this case, the jury, was able to view Ms. Campuzano’s scar in open court on September 26, 2011. 1RP 56-57. A scar, a permanent mark on one’s body, is significant serious permanent disfigurement.

Serious significant permanent disfigurement is not defined. Courts may look to dictionaries to determine the meaning of undefined, ordinary terms. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 576, 964 P.2d 1173 (1998). Serious can be defined as, “grave in disposition, appearance, or manner...such as to cause considerable distress, anxiety, or inconvenience, attended with danger.” Webster’s Third New International Dictionary, 2073. Significant has many possible definitions, but under this context is best defined as, “having or likely to have influence or effect : deserving to be considered : IMORTANT, WEIGHTY, NOTABLE.” Webster’s Third New International Dictionary, 2116. The courts have previously considered bruising to be sufficient to constitute

temporary but substantial disfigurement. *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). If a bruise can be considered disfigurement, surely a scar is more than sufficient to meet the definition of disfigurement. A scar on the back of a person's neck is notable, significant, could certainly cause considerable distress, anxiety or inconvenience, is a permanent disfigurement and therefore is great bodily harm.

The evidence, viewed in the light most favorable to the state, was sufficient for any jury to find Gomez Hernandez guilty beyond a reasonable doubt of the crime of Assault in the First Degree due to the significant serious permanent disfigurement of Ms. Campuzano. The jury was able to view the scar in person. 1RP 56-57. While the record does not contain a picture of what Ms. Campuzano's scar looked like the day she testified, the evidence is not only viewed in the light most favorable to the State but the State also gets the benefit of all reasonable inferences from that evidence. *State v. Goodman*, 150 Wn.2d at 781. It is not for this Court to reweigh the importance of the evidence as that is solely left to the jury. *State v. Green*, 94 Wn.2d at 221. The jury clearly believed and found that Gomez Hernandez inflicted great bodily harm on Ms. Campuzano. The great bodily harm suffered was a significant

serious permanent disfigurement of Ms. Campuzano's neck from the scar she received from the stab wound that Gomez Hernandez inflicted. The Court should affirm Gomez Hernandez's conviction for Assault in the First Degree.

2. In The Alternative This Court Should Remand And Direct The Trial Court To Enter A Finding Of Guilt On Assault In The Second Degree.

The trial court included a jury instruction for the inferior included offense of Assault in the Second Degree. CP 22, 23, 25. The jury returned a verdict for Assault in the First Degree and therefore did not fill out the verdict form, as per the instructions, for the inferior included offense of Assault in the Second Degree. CP 33-34. While the State believes there is sufficient evidence to support the conviction for Assault in the First Degree, if this Court was to determine there was insufficient evidence to sustain the conviction, the State argues, in the alternative, that this Court remand the case back to the trial court with the direction that it is to enter judgment on the inferior included offense of Assault in the Second Degree.

When the Court of Appeals or Supreme Court reverses a conviction, it can direct the trial court to enter judgment on a lesser crime when the jury has been instructed on the lesser crime. *In re*

Heidari, 159 Wn. App. 601, 615, 248 P.3d 550 (2011), *aff'd* 174 Wn.2d 288, 274 P.3d 366 (2012). In *Heidari* the Court of Appeals explained that when the jury necessarily must find each and every element of the lesser crime to find a defendant guilty of the greater crime, if the greater crime is found by the reviewing court to not be supported by sufficient evidence, the reviewing court may direct the trial court to enter judgment on the lesser included crime if the jury had been instructed on the lesser crime. *In re Heidari*, 159 Wn. App. at 606-07.

Heidari was charged with child molestation in the first degree and found guilty after a jury trial. *Id.* at 603. The facts established at trial were that Heidari pulled his robe away and exposed his penis to his niece, who was in the sixth grade. *Id.* Heidari grabbed his nieces head and pushed her down towards his penis but his niece turned her head before there was any contact and was able to run away. *Id.* On the direct appeal the Court of Appeals found that the facts were insufficient to establish the niece's age was under twelve, but the trial court instructed on the lesser offense of child molestation in the second degree so judgment was entered against Heidari for child molestation in the second degree. *Id.* (footnote 1). The Court of Appeals reversed the conviction for child

molestation in the second degree because there was no evidence of sexual contact. *Id.* at 604, 616. The State argued that the Court of Appeals should remand for judgment of attempted child molestation in the second degree because the evidence established that crime. *Id.* at 605. The Court of Appeals declined the State's invitation to remand on the lesser offense because the trial court did not instruct the jury on attempted child molestation in the second degree. *Id.* at 615-16.

In this case the trial court did instruct the jury on the inferior included offense of Assault in the Second Degree. CP 22-25. The jury was instructed that to convict Gomez Hernandez of Assault in the Second Degree the jury would have to find beyond a reasonable doubt that Gomez Hernandez recklessly inflicted substantial bodily harm or assault Ms. Campuzano with a deadly weapon. CP 25. The State proved both prongs of Assault in the Second Degree that jury was instructed on. Recklessly is proved when a person acts intentionally, and Gomez Hernandez's actions by chasing down Ms. Campuzano and stabbing her in the back of the neck show that he intended to inflict at a minimum substantial bodily harm. WPIC 10.03; 1RP 51, 76.

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or

that causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

WPIC 2.03.01. The scar that resulted from Gomez Hernandez stabbing Ms. Campuzano in the back of the neck would at the very least be considered temporary but substantial disfigurement. See RCW 9A.36.021; WPIC 2.03.01; 1RP 56. In the alternative, the evidence proved beyond a reasonable doubt that Gomez Hernandez assaulted Ms. Campuzano with a deadly weapon. A deadly weapon is defined as: “any weapon, device, instrument, substance, or article, which under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.” WPIC 2.06.01. The knife that Gomez Hernandez plunged into the back of Ms. Campuzano’s neck meets the definition of a deadly weapon. Therefore, the State proved both alternative means of Assault in the Second Degree that the jury was instructed upon and this Court should direct that the trial court enter judgment on the inferior included offense of Assault in the Second Degree.

B. THE STATE CONCEDES THAT THE TERM OF COMMUNITY CUSTODY IMPOSED BY THE TRIAL COURT IS INCORRECT.

Gomez Hernandez was convicted of Assault in the First Degree. CP 33. Assault in the First Degree is a Serious Violent Offense. RCW 9.94A.030(45)(v). The proper term of community custody for a person convicted of a serious violent offense is 36 months. RCW 9.94A.701(1)(b). The trial court in this case imposed a term of community custody of 24 to 48 months. CP 40. The State concedes that the term of community custody imposed on Gomez Hernandez was incorrect and this Court should remand the case back to the trial court with the instructions to impose 36 months of community custody.

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IV. CONCLUSION

For the foregoing reasons, this court should affirm Gomez Hernandez's conviction for Assault in the First Degree and remand the case back to the trial court for the sole purpose of correcting the judgment and sentence to impose the correct term of community custody.

RESPECTFULLY submitted this 22nd day of July, 2012.

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by: _____
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LEWIS COUNTY PROSECUTOR

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