

NO. 48822-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MILLISSA Y KELLOGG-BEAUPRE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01114-4

BRIEF OF RESPONDENT

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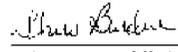
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the evidence was sufficient to support conviction as a matter of law?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Millissa Y. Kellogg-Beaupre was charged by original information filed in Kitsap County Superior Court with assault second degree, based on allegation of intentional assault recklessly inflicting substantial bodily harm. CP 1-2. A first amended information was filed adding special allegations of particularly vulnerable victim and excessive injury. CP 7-8.

Pretrial, the defense challenged the special allegations. CP 44-50. Ultimately, the state filed a second amended information that omitted excessive injury. CP 57-58. Particular vulnerability remained and the jury was charged thereon. CP 86-87 (instructions 15 and 16).

Kellogg-Beaupre was convicted. CP 90. The jury answered in the affirmative on the question of particular vulnerability. CP 91. However, the sentence was not enhanced by that answer; Kellogg-Beaupre received a sentence below mid-point of the standard range. CP 95. The present appeal was timely filed. CP 107.

B. FACTS

Deputy Sheriff Amy Rogers testified that she responded to an assault call in Port Orchard. 1RP 83. She contacted Amber McCall and her boyfriend. Id. She observed that Ms. McCall appeared to be in pain with a swollen jaw. 1RP 84. Ms. McCall was spitting blood, crying off and on, and had a hard time speaking. Id. She had a bruise on her forehead and a scratch behind her left ear. Id. She spoke with McCall's boyfriend, James Mckenzie. 1RP 87.

Amber McCall was celebrating her birthday on the date of the incident. 1RP 96. After dinner with her mother, 1RP 96, her friend Zachary Peterson picked her up. 1RP 97. They had a couple of drinks at his apartment and then went a nearby bar. Id. At the apartment were Milissa Kellogg-Beaupre and her boyfriend Chris Burke along with some other coworkers. 1RP 98.

They went to the Rendezvous Tavern and continued drinking. 1RP 99. Ms. McCall drank "more than I should have." Id. She could not remember her interactions with Kellogg-Beaupre. Id. She recalled going to the bathroom after which the events are "really blurry." Id. She recalled some yelling and being on the ground but not what was yelled or where she was on the ground. 1RP 100. She recalled that a friend named Megan Shane had come to the bar. 1RP 101. The next thing she

remembered was waking up the next morning. Id. When she woke up, she was spitting out blood and had blood all over her hands. Id. She was in a lot of pain and was told by her boyfriend and her brother that she had gotten beaten up. Id. She went to the hospital. 1RP 102. A “Cat” scan was done and Ms. McCall was told that her jaw had “a compound fractured on the left side and then fractured on the right.” Id. She had a boot-print on either side of her head and a cut on her lip in addition to the broken jaw. 1RP 108. She had surgery three days later. 1RP 111. At trial, Ms. McCall said she still gets pain in her jaw (nearly six months later). Id. She has not had pain in her nose. 1RP 115-16.

Doctor Sukhdeep Dhaliwal is a maxillofacial surgeon. 2RP 187. He met with Ms. McCall a day or two after the incident. 2RP 188. X-ray of Ms. McCall’s face revealed a “mandible fracture.” Id. There were fractures on both the left and right sides of her face. Id. Doctor Dhaliwal repaired the two fractures by exposing them and screwing plates into the area to hold the fractures together. 2RP 191. The doctor opined that for a fall to cause the injuries there would have to be “direct impact to the mandible.” 2RP 192. In treating the injuries, the cause of them is typically not the doctor’s concern. Id. But he opined that if the impact had happened from a fall “[y]ou would see abrasions, bruises, maybe a cut in skin typically.” Id. Based on his review of pictures of Ms. McCall’s

face, the doctor opined that the “this fracture was likely not caused by a fall.” 2RP 194. It would be “virtually impossible” to fall on concrete and not have abrasions. Id. Defense witness Zach Peterson testified that when he and Ms. McCall fell, it was on the pavement. 2RP 211.

James Mckenzie is Ms. McCall’s boyfriend and lives with her, her mother, and her two brothers. 1RP 121. The two had been dating for six years. Id. He had not gone out that night with Ms. McCall because he was watching three children. Id. Later that night, he was called by Megan Shane to come pick up Ms. McCall. 1RP 122. He saw Ms. McCall in Ms. Shane’s company and “[s]he was pretty beat up.” 1RP 123. She was crying. Id. She was also drunk. Id. He cleaned her up and laid her down. 1RP 126. She slept but got up occasionally to spit up blood. Id. They decided to take her to the hospital because the bleeding would not stop. 1RP 127.

Megan Shane is a coworker of Ms. McCalls’ and had known her for almost a year. 1RP 148. McCall and Shane are pretty close friends. 1RP 149. Ms. Shane also knows Kellogg-Beaupre as a coworker. Id. Ms. Shane joined Ms. McCall on the night of the incident to celebrate her birthday. 1RP 150. She met the others at Zach’s apartment and noticed that Ms. McCall was already “buzzed.” 1RP 150-51. Ms. Shane had half a drink at the apartment. Id. They walked to the Rendezvous Tavern. Id.

At the bar, people were buying Ms. McCall drinks. 1RP 152. Ms. Shane had a sip of one drink but then decided not to drink that night. *Id.* Ms. McCall became inebriated and was loud and mouthy, “saying things that were making Milissa uncomfortable.” 1RP 153. She spoke loudly about her past relationship with Kellogg-Beaupre’s boyfriend. *Id.* Ms. Shane told her to cool it and she would but “then she would start back up again.” 1RP 154. She asked Ms. McCall to stop three or four times. 1RP 170. As the night wore on, Kellogg-Beaupre began to get increasingly bothered by the remarks. *Id.*

At one point, Ms. Shane and Ms. McCall went outside to smoke and ran into Kellogg-Beaupre’s boyfriend Chris Burke. 1RP 155. Ms. McCall either stumbled into or hugged Mr. Burke, which was apparently seen by Kellogg-Beaupre. *Id.* No words were exchanged between McCall and Kellogg-Beaupre at that point. *Id.* Ms. Shane determined that it was time to take Ms. McCall home and she and Zach Peterson each took one arm and headed McCall down the alleyway. 1RP 156. They held her by the arms because she was very intoxicated. 1RP 157. At some point, Zach twisted his ankle and he and McCall “stumbled down.” 1RP 158. Ms. Shane let go and watched her fall. *Id.* She fell “like, on her right side” and then sat up. *Id.* Ms. Shane did not see McCall’s face hit the ground. 1RP 159. Ms. Shane observed no injuries or blood on McCall

after the fall. *Id.* As McCall sat there, she was “bawling her eyes out” over hurting Kellogg-Beaupre’s feelings. 1P 160.

At this point, Kellogg-Beaupre came “running down the alley, screaming.” 1RP 161. She was not saying anything, just screaming. *Id.* She stopped near where McCall was on the ground and began yelling at McCall, calling her a slut, a bitch, and a whore. 1RP 162. Kellogg-Beaupre was within two or three feet of McCall and Shane while yelling. *Id.* Ms. McCall was still sitting on the ground. 1RP 162-63. Then, Kellogg-Beaupre approached closer and “she just started kicking her and calling her a slut and kicking her over and over again.” *Id.* Ms. Shane tried to pull Kellogg-Beaupre off but could not. *Id.* Kellogg-Beaupre kicked McCall in “her face, her head, her stomach, legs.” *Id.* She saw Kellogg-Beaupre’s kicks land on Ms. McCall’s face. 1RP 168. Ms. McCall started kicking back. *Id.*

Eventually, Chris Burke bear-hugged Kellogg-Beaupre and the assault ended. 1RP 164. Now, Ms. McCall was bleeding: “blood was coming out of her mouth.” 1RP 165. Ms. McCall remained sitting on the ground as blood was going on her clothing. *Id.*

III. ARGUMENT

A. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION.

Kellogg-Beaupre argues that the evidence adduced at trial was insufficient as a matter of law to support conviction. This claim is without merit.

It is well settled that

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences therefrom. We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence.

State v. Garbaccio, 151 Wn.App. 716, 742, 214 P.3d 168 (2009) (internal citation omitted). Moreover, appellate courts defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Hernandez*, 85 Wn.App. 672, 675, 935 P.2d 623 (1997). Kellogg-Beaupre cannot overcome these very high standards in the present case.

First, a closer review of the transcripts reveals that Kellogg-Beaupre’s argument proceeds from a mischaracterization of the evidence.

In Kellogg-Beaupre's argument, it is asserted that "[t]he evidence presented at trial was that Ms. McCall fell and landed on area of hard dirt. . ." Brief at 12. She cites to transcript pages 159, 211, 212, 229, and 238 to support this assertion. In her statement of facts she asserts that "Ms. McCall fell onto a hard dirt area next to the street she was walking on." Brief at 5. She cites to transcript page 211 again to support that assertion. The state disagrees as only one witness in the case alleged that Ms. McCall fell any where but in the roadway, and that witness, Christopher Burke, described a grassy area where she fell.

Megan Shane is testifying at 1RP 159. Ms. Shane does not say that Ms. McCall landed on a hard dirt area. She recounts that Ms. McCall and Mr. Peterson was laying "on the ground." The references to the "ground" on that page simply do not differentiate the dirt area from the pavement. In fact, on that page, Ms. Shane was asked "Did she hit her face at all on the ground?" She responded "Not that I saw." Nothing on that page refers to Ms. McCall falling on dirt or "hard dirt."

At 2RP 211 and 212, Zachary Peterson, who was called by the defense, is testifying. At 211, Mr. Peterson describes the existence of a dirt hill that goes up to a sidewalk. He does not say that Ms. McCall fell on that dirt. In fact he says the opposite in the following exchange:

Q. And you fell down, right?

A. Yes.

Q. And when you fell, did you hit the pavement?

A. Yes.

Q. Did you see where Amber fell?

A. Directly next to me on the pavement.

(emphasis added). Kellogg-Beaupre's belief that 2RP 211 supports her assertion that Ms. McCall fell on the dirt is simply wrong. Similarly, nowhere on 2RP 212 does Mr. Peterson refer to Ms. McCall falling on the dirt. In fact, just after the page break from the exchange quoted above on page 211, Peterson says "She rolled into the dirt and I asked her if she was okay." Again, Kellogg-Beaupre's characterization of the testimony is simply wrong.

Christopher Burke, Kellogg-Beaupre's boyfriend and also a defense witness, is testifying at 2RP 229. Mr. Burke says

Zach stumbled. The weight of him pulled Amber down. Amber hit her face on the ground. She hit the side of her head on the ground. Once again, the reference to the "ground" is clearly not intended to refer to either the dirt or the pavement. At lines 4-11, Mr. Burke describes a pathway when describing Kellogg-Beaupre's (not Ms. McCall's) route down the alley. Nowhere on that page does he speak of hard dirt and certainly never says that Ms. McCall fell on such hard dirt. Again, Kellogg-Beaupre's characterization of the testimony is simply incorrect.

At 2RP 238, Mr. Burke describes "a grassy slope to the side" when

describing the thoroughfare referred to in the case as an alley. He says that Ms. McCall fell on this slope. He does not describe the area of the fall as dirt and certainly not as “hard dirt.” Thus, this one bit of testimony is close to Kellogg-Beaupre’s assertions in this appeal, but falls short of establishing the supposed fact that is asserted in the briefing.

It should also be noted that in arguing the testimony of doctor Dhaliwal, Kellogg-Beaupre rather studiously ignores parts of his testimony. The doctor did in fact say that the mechanism of the injury could not be determined by the x-rays taken of Ms. McCall’s jaw (here, not using the word “impossible”). However, his opinion, given without objection and never rebutted in this record, included that the injury “was likely not caused by a fall.” 2RP 194. This opinion was based on the doctor looking at contemporaneously taken photos of Ms. McCall’s face. 2RP 193. Then, the following exchange took place:

Q. Do you think it makes it more likely it was caused by an assault?

A. Can I qualify? I could say they weren't caused by a fall on concrete or hard surface, because of lack of abrasions or, you know, contusions to the skin or cuts.

Q. And what degree of certainty -- if you accept the premise she was on concrete?

A. Virtually impossible to fall on concrete and not have an abrasion or fracture.

2RP 194. The only time the doctor uses the word “impossible” is in this passage. The fact is that upon viewing the photos of Ms. McCall, the doctor, by his testimony alone, rebutted the defense argument about a fall causing the injury. No speculation on the part of the jury was required for them to understand the doctor’s testimony and apply that testimony in its deliberations.

These mischaracterizations and omissions are important since the argument here is that the jury had to speculate to determine whether Kellogg-Beaupre’s injury occurred from Kellogg-Beaupre’s kicks to the face or from her fall on hard dirt. Moreover, she has to have the hard dirt fact in response to Doctor Dahliwal’s testimony that the injuries were inconsistent with a fall on concrete. 2RP 194. But since that fact is simply not supported by the record, it is unsurprising that the jury did not believe the defense argument on this point. Neither should this Court. The jury is the sole arbiter of credibility.

The jury exhibited its rationality in rejecting the factually unsupported argument about hard dirt. Moreover, the testimony of Ms. Shane that Kellogg-Beaupre kicked Ms. McCall in the face, head stomach and legs, specifically mentioning that kicks landed on her face, is more than sufficient for a rational jury to find an intentional assault that caused substantial harm to Ms. McCall. This coupled with doctor Dahliwal’s

opinion and defense witness Peterson's testimony that they fell on the "pavement," rather inexorably leads to a guilty finding. Add also that the witnesses nearly uniformly agreed that Kellogg-Beaupre was angry with Ms. McCall because of McCall's repeated comments about Mr. Burke, adding motive to the mix. It is certain that this evidence is substantial as any rational trier of fact would find the elements therefrom. This is true with no reference at all to the requirement of the rule that the evidence be viewed in a light most favorable to the state. The direct testimony of the witnesses supports the conviction without the necessity of reasonable inference therefrom.

Kellogg-Beaupre's argument here is based on mischaracterization of much of the testimony and studious omission of other unrebutted facts. She asks this Court to reweigh the evidence, including second-guessing the jury's credibility determinations. The evidence was more than sufficient and Kellogg-Beaupre's argument has no merit.

IV. CONCLUSION

For the foregoing reasons, Kellogg-Beaupre's conviction and sentence should be affirmed.

DATED September 15, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is fluid and cursive, with a large initial "J" and "C".

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KITSAP COUNTY PROSECUTOR

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