

FILED

JAN 03, 2012

Court of Appeals
Division III
State of Washington

No. 300692

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

TRACEY OCAMPO, Appellant

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The state's evidence was insufficient to sustain a conviction for assault third degree.

Issue Related To Assignment Of Error

A. Was the state's evidence insufficient to sustain a conviction for assault third degree?

II. STATEMENT OF FACTS

Tracey Ocampo was charged by information with assault in the third degree, based on events that occurred on September 3, 2010. (CP 1).

Eighteen-year-old Tracey Campo, a special education student, arrived at Wahluke High School for a football game around 8:00 p.m. Accompanied by her brother and two other teens, Alejandro and Ventura Rivera, she walked toward the entrance gate. (RP 114,117). A school employee, Luis Medrona, who provided security for the football game, called the group away from the gate area because he questioned whether Ventura Rivera was allowed on campus. (RP 38, 40).

As Officer Validivia of the Mattawa police department talked with the students, Alejandro Rivera walked toward him and grabbed

at the handle of his taser. (RP 26). Officer Ingersoll, also of the Mattawa police department joined the group. He spoke privately with Alejandro and shortly thereafter told him to leave. (RP 86).

Despite the fact that Ms. Ocampo had not been involved in any wrongdoing, she also was directed to leave the game. (RP 28, 87,115). Officers testified that Ms. Ocampo complied with the directive to leave. Along with the other teens, she moved off to the avenue adjacent to the school and football field- some 50 feet away. (RP 29,30,42, 87,88).

Jody Roberts, a paraprofessional at the school and event security coordinator, noticed that after the teens had moved away, they stopped to smoke cigarettes. (RP 55). Believing the students were still on school grounds, Mr. Roberts instructed the officers, "I want them removed from the district or I will have them arrested." (RP 55).

Officers Ingersoll and Valdivia again approached the students and told them they were free to leave, but Ventura Rivera was to stay with officers. (RP 30, 88). Ventura Rivera began to walk away with Tracey and her brother. One officer grabbed Ventura, who resisted and flailed, and "put him on the ground." (RP 30).

Officer Ingersoll stated Ms. Ocampo grabbed his arm. (RP 89). Alejandro Rivera charged one of the officers and pushed him to the ground. (RP 43). According to Mr. Medrano's testimony, he was about 50 feet away, and saw a female, whom he later believed to be Ms. Ocampo, jump on Officer Ingersoll's back. (RP 42-43). At trial, however, Mr. Medrano testified he did not state anywhere in his incident report that he observed Ms. Ocampo make physical contact with Officer Ingersoll. (RP 48).

Mr. Roberts testified he saw Ms. Ocampo jump on Officer Ingersoll's back and punch him. (RP 58). The "assault" lasted a total of between three and ten seconds. (RP 43-44, 100).

Ms. Ocampo admitted she yelled at officers for using pepper spray and arresting Ventura Rivera. (RP 123). She testified that Mr. Roberts tackled her from behind and pushed her to the ground. She denied attacking anyone. (RP 123, 135). Officer Valdivia testified he never saw Ms. Ocampo hit anyone. (RP 36).

After a jury trial, Ms. Ocampo was convicted of assault in the third degree. (CP 47). She appeals. (CP 73).

III. ARGUMENT

The State's Evidence Is Insufficient To Sustain A Conviction For Assault In The Third Degree.

In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d. 216, 616 P.2d 628 (1980). In such a challenge, the defendant admits the truth of the State's evidence and all reasonable inferences that can reasonably be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 72, 794 P.2d 850 (1990).

Here, no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Green*, 94 Wn.2d at 220. The issue at trial was whether it was Ms. Ocampo who physically assaulted Officer Ingersoll. While credibility determinations are for the fact finder and not reviewable, the State's evidence here fails to prove beyond a reasonable doubt that Ms. Ocampo assaulted Officer Ingersoll. *State v. Myers*, 133 Wn.2d. 26, 38, 941 P.2d 1102 (1997).

Alejandro and Ventura Rivera were the focus of efforts by the police and security workers. (RP 32,36). Officer Ingersoll testified, "When I attempted to contact Ventura, he was behind

Tracey, so she was blocking me from Ventura.” (RP 89). In describing the incident, Officer Ingersoll stated: “I think she was trying to get me to stop arresting Alejandro.”

Question: “And was she hitting you at all?”

A. I felt punches about my body, but I don’t know, you know which hand was which. I just felt punching. So I don’t know which hand was – she was punching me with.

Q. And how do you know it was the defendant who jumped on your back?

A. I could hear her yelling in my ear.” (RP 100).

The same officer also testified that it was Alejandro Rivera who charged from behind Ms. Ocampo and tackled him. (RP 96). Ms. Ocampo testified she yelled at the officer for pepper-spraying Alejandro.

Another individual testified he saw someone, from about 50 feet away, “jump” on Officer Ingersoll, and it was not until later that he identified that person as Ms. Ocampo- but he never recorded that information in his official report. Officer Valdivia testified he never saw Ms. Ocampo touch anyone. The one person who stated he saw Ms. Ocampo physically jump on and punch Officer Ingersoll

was Mr. Roberts: the very security coordinator Ms. Ocampo testified actually tackled her from behind.

Individuals were tackled, pepper-sprayed, and punched in what could easily be described as a melee. The events occurred very quickly, as described by all witnesses. On this record, no reasonable juror could have found beyond a reasonable doubt that it was Tracey Ocampo who assaulted Officer Ingersoll.

Basing a conviction on insufficient evidence is an error of constitutional magnitude that can be raised for the first time on appeal. *Colquitt*, 133 Wn. App. at 795-96. The remedy for a conviction based on insufficiency of the evidence is dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Ocampo respectfully urges this court to reverse her conviction and dismiss with prejudice.

Dated this 30th day of December 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that a true and correct copy of the brief of appellant was sent by first class mail, postage prepaid, on December 30, 2011, to:

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