

FILED

AUG 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 30319-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

KENT RAYMOND DAVIS, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The State's evidence was insufficient to support Kent Raymond Davis' convictions of two counts of second degree assault.

Issues Pertaining to Assignments of Error

1. Was the State's evidence sufficient to support Mr. Davis' conviction of second degree assault by strangulation against Judith Long? (Assignment of Error A).

2. Was the State's evidence sufficient to support Mr. Davis' conviction of second degree assault by recklessly inflicting substantial bodily harm against Raylene Davis? (Assignment of Error A).

II. STATEMENT OF THE CASE

Mr. Davis was charged by information with one count of second degree assault by strangulation against Judith Long and one count of second degree assault by recklessly inflicting substantial bodily harm against Raylene Davis. (CP 12). After the court granted several good cause continuances over the objection of Mr. Davis, the case proceeded to jury trial. (CP 19, 21).

Judith Long is Mr. Davis' fiancée and they lived at 207 E. Sanson in Spokane on June 19, 2011. (Trial RP 19). The couple have a child together.

Mr. Davis had been drinking on June 19, 2011, when some neighbors down the street started fighting. (Trial RP 20). He tried to stop them from beating up an underage girl. Their daughter was at Mr. Davis' mother's house. (*Id.*). Raylene Davis, his younger sister, was at the Sanson house to stay the night. (*Id.* at 21).

Ms. Long left to get formula for her daughter around a quarter to 11 on June 18. (Trial RP 21). She got home from the store at 11:15, but did not remember much of the rest of the night. (*Id.* at 22). Ms. Long left to go to Holy Family Hospital, about two blocks from her house, to call Mr. Davis' mother. (*Id.* at 22, 44). There was a free phone there and Raylene Davis could not find her cell phone. (*Id.*). Ms. Long was not hurt or injured. (*Id.* at 23).

She eventually ended up at Deaconess Hospital because if she did not go, Mr. Davis' mother would be in trouble for interfering with a police investigation. (Trial RP 23-24). Ms. Long did not remember talking to any doctors and did not remember what she told police. (*Id.* at 27). Although she was at the hospital about 2 ½

to 3 hours, she had no injuries. (*Id.* at 31). She did not need medical care. (*Id.* at 32).

Ms. Long saw nothing out of the ordinary happen between Raylene and her brother that night. (Trial RP 29). She said Raylene scraped herself on the counter. (*Id.* at 30). Ms. Long saw no assaults that night. Mr. Davis' mother was in Airway Heights when she came down to Holy Family to take Ms. Long and Raylene to Deaconess. (*Id.* at 44-45). There, Ms. Long was given hydrocodone that made her sleepy and tired. (*Id.* at 45).

Raylene, the 18-year-old sister of Mr. Davis, was at the Sanson house on June 19, 2011. (Trial RP 49). She was intending to stay the night, but her brother was sad and drinking. (*Id.* at 50). Raylene tried to rough house with Mr. Davis to make him happier. (*Id.*). She got injured while rough housing. (*Id.* at 54).

Trevor Carr, a friend, had his dog at the Sanson house. (Trial RP 54). The dog bit Raylene. (*Id.* at 55). She went to Deaconess that night with her mother and Ms. Long. (*Id.* at 56-57). Raylene went there because the police told her mother they had to or get arrested. (*Id.* at 57). She talked to the police after she was given hydrocodone. (*Id.* at 72).

Raylene injured her face on a counter from rough housing and also was bit by Mr. Carr's dog. (Trial RP 60, 66). She was not beaten up by her brother. (*Id.* at 61). Raylene talked to the police and told them about the dog and the "pity party" Mr. Davis was having for himself. (*Id.* at 67). She said her brother did not punch her and Ms. Long neither intervened nor lost consciousness. (*Id.* at 68). The rough housing ended when the dog attacked Raylene. Mr. Davis picked up the dog and put him outside. (*Id.*). She called Mr. Carr to ask what was wrong with her brother as he was acting strangely when putting the dog out. (*Id.*). Raylene did not call him for any help. (*Id.* at 69).

Spokane Police Officer Erick Specht was on duty June 19, 2011. (Trial RP 73). He would not have told anyone she had to go to the hospital or else get arrested. (*Id.* at 76). He went to Deaconess with Officer Holt Widhalm after midnight. (*Id.* at 77). Officer Specht talked to Trevor Carr, who had called in a complaint and asked to meet at the hospital. (*Id.*). He spoke to Mr. Carr in the ER waiting room. (*Id.* at 78).

Officer Widhalm responded that night after an anonymous caller reported two women were at Deaconess with injuries suffered in a domestic violence situation. (*Id.* at 84). The officer testified he

did not call anyone or threaten them to go to the hospital. (*Id.*). At the hospital, he talked to both women, who appeared shaken and scared and “out of it.” (*Id.* at 86, 90). Ms. Long was also upset and angry. (*Id.* at 88). Officer Widhalm said Raylene had a large mark on her forehead and blood in her eye as if punched. (*Id.* at 86). He noticed no injuries to Ms. Long. (*Id.*).

The officer testified Raylene told him her brother had assaulted her by smashing her head into the counter, a freezer, and a wall. (Trial RP 90-91). Ms. Long told him she was punched on the left side of her face by Mr. Davis when she tried to help Raylene. (*Id.* at 89). She also said she lost consciousness after he grabbed her by the neck and choked her, finally waking up on the ground. (*Id.*).

Dr. Kevin Innes, an emergency room doctor at Deaconess, was working on June 19, 2011. (Trial RP 99, 102). He met with Raylene, who said she was assaulted by her brother. (*Id.* at 104). He punched, kicked, choked, and threw her up against a wall and the dog bit her as well. (*Id.* at 108). The blood in her eye was from a subconjunctival hemorrhage, that can compromise vision but generally heals itself in 7-10 days. (*Id.* at 105). Although it was part of the protocol for release, the doctor did not indicate whether

she had consented to any punching, kicking, choking, or being thrown against a wall. (*Id.* at 114).

Dr. Innes met with Ms. Long, who told him she was assaulted by her boyfriend. (Trial RP 108). She was punched, kicked, and choked, with bruising about her neck and arm. (*Id.*). The concern with choking or strangling was soft tissue injury, broken bones to the anterior part of the neck, swelling comprising the airway, and hypoxia or lack of airflow to the brain. (*Id.* at 109). The doctor indicated no loss of consciousness by Ms. Long. (*Id.* at 114).

The defense presented no witnesses. (Trial RP 115). Mr. Davis' motion to dismiss for failure of the State to present a prima facie case was denied. (*Id.* at 116-18). No exceptions were taken to the court's instructions. (*Id.* at 119).

The jury found Mr. Davis guilty of both counts of second degree assault. (CP 69, 70). The court imposed a sentence of 63 months. (CP 89-100). This appeal follows.

III. ARGUMENT

A. The evidence was insufficient to support the second degree assault by strangulation conviction and the second degree assault by recklessly inflicting substantial bodily harm conviction.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it 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, 220-21, 616 P.2d 628 (1980). Credibility determinations are for the trier of fact and not subject to review. *State v. Stevenson*, 128 Wn. App. 179, 114 P.3d 699 (2005). The defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). But the existence of facts cannot be based on guess, speculation, or conjecture by a fact finder. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

As for the conviction on count 1, second degree assault by strangulation against Judith Long, the State's evidence was insufficient because it failed to prove strangulation as defined by the court. RCW 9A.04.110(26). Instruction 9 provided that definition:

Strangulation means to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe. (CP 61).

There was no testimony from any eyewitness, police officer, or the victim that Mr. Davis compressed Ms. Long's neck so as to obstruct her blood flow or ability to breathe or did so with the intent to obstruct her blood flow or breathing ability. Doctor Innes testified his dictation reflected no loss of consciousness and no restriction of breathing. (Trial RP 114-15). This is not proof beyond a reasonable doubt. The State's evidence fails to satisfy the definition of strangulation so the conviction for the assault against Ms. Long cannot stand and must be reversed. *Green, supra*.

With respect to the conviction for second degree assault by recklessly inflicting substantial bodily harm against Raylene Davis, the State's evidence fails to show beyond a reasonable doubt that there was an assault.

Instruction 11 defines assault:

An assault is an intentional touching or striking of another person, with unlawful force, that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive. (CP 63).

The State did not prove beyond a reasonable doubt that Mr. Davis assaulted his sister, who testified she was injured while rough housing with him. (Trial RP 53, 60, 66). Her other injuries came

from dog bites. (*Id.* at 55, 60, 66). She consented to the rough housing and its consequences. Accordingly, the touching and striking was neither harmful nor offensive to her and could not constitute an assault. See *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

Even if there were an assault, the State failed to prove substantial bodily harm. It was defined in instruction 12:

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

The State conceded Ms. Davis did not suffer any fracture. (Trial RP 135). No one testified there was substantial disfigurement from the bruises and discoloration. Even the State acknowledged the large mark on her forehead was not really the issue. (*Id.*). Rather, the State focused on Ms. Davis' subconjunctival hemorrhage, *i.e.*, the broken blood vessel in her eye:

Might lead to blindness but not necessarily. It should heal, but she is gonna lose the functioning. Fortunately, it is not permanent, it is temporary, but right there you have a substantial loss or impairment of a function of a bodily part or an organ. (*Id.*).

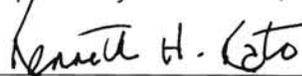
The State's problem, however, is that no one, including Doctor Innes, testified that Ms. Davis did indeed suffer a substantial loss or impairment of the eye with the broken blood vessel. The doctor indicated the condition could compromise vision, but generally not. (Trial RP 105). The eye was affected and injured, but the doctor did not say that Ms. Davis did indeed suffer a substantial loss or impairment of that eye. Without that proof, there is no substantial bodily harm. And that essential element of the offense cannot be based on guess, speculation, or conjecture by the jury. *Hutton*, 7 Wn. App. at 728. The conviction for second degree assault against Ms. Davis must therefore be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Davis respectfully urges this Court to reverse his convictions and dismiss the charges.

DATED this 27th day of August, 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 27, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Kent Raymond Davis, # 860863, PO Box 769, Connell, WA 99326; and by email, as agreed by counsel, on Mark E. Lindsey, at kowens@spokanecounty.org.

Kenneth H. Keto