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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34361-8-III

STATE OF WASHINGTON, Respondent,

v.

ISRAEL FABIAN-SANCHEZ, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. INTRODUCTION

Israel Fabian-Sanchez was convicted of second degree assault arising out of a prison fight in which the victim suffered injuries, but no witness testified to a diagnosis that would establish a fracture of a bodily part or other condition satisfying the essential element that the assault cause "substantial bodily injury." On appeal, he contends that insufficient evidence supports the conviction and requests that the court decline to impose appellate costs.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports the conviction for second degree assault.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Whether a nurse's observation that an individual has the appearance of a deviated septum, without a medical diagnosis, is sufficient proof to establish the essential elements of assault in the second degree.

IV. STATEMENT OF THE CASE

The State charged Israel Fabian-Sanchez with assault in the second degree by recklessly inflicting substantial bodily injury against Ignacio

Cobos. CP 1. Both were inmates at Coyote Ridge Corrections Center at the time. RP 33-34.

At trial, the State presented video evidence and testimony from Department of Corrections employees to establish that Fabian-Sanchez initiated a fight with Cobos. RP 33-34, 44-45, 51. A Department of Corrections nurse, Jeff Nelson, testified that he provided treatment to Cobos that morning for bruises, swelling, lacerations, and "the appearance of a deviated septum." RP 71. He later referred to the injury as "[t]he appearance of a broken nose or deviated septum" and that the nose "looks deviated to the right." RP 71-72, 74. A deviated septum is when the thin wall between the nostrils is displaced to one side. RP 75.

Nelson further indicated that the doctor ordered x-rays for confirmation and that the deviated septum was assumed. RP 71-72, 75. However, Nelson was not able to diagnose Cobos with any specific injury; his role was merely to assess and treat Cobos. RP 75. The x-rays were not introduced into evidence, nor did the State present testimony from any doctor to establish whether the x-rays confirmed the assessment and permitted a diagnosis of deviated septum, nor whether a deviated septum resulted from the assault or from some other cause. Cobos denied

recollection of the incident, of receiving any x-ray results, and of whether his nose had been broken. RP 77-78.

The jury convicted Fabian-Sanchez of second degree assault, and the trial court imposed a high end sentence of 20 months. RP 153, 164, CP 15, 23. He now appeals. CP 64.

V. ARGUMENT

The sole issue on appeal is whether the State's evidence was sufficient to establish the essential element of second degree assault that Fabian-Sanchez inflicted substantial bodily injury upon Cobos. Because the admissible evidence does not establish a *prima facie* case, the conviction should be reversed and judgment entered on the lesser charge of assault in the fourth degree. Fabian-Sanchez additionally asks that the court decline to impose appellate costs in the event he does not prevail on appeal on the grounds of his continued indigency.

The Due Process clause prohibits a conviction without proof of all essential elements of a charged crime beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). If the State fails to present sufficient evidence to support a conviction at trial, double jeopardy prohibits retrial. *Burks v. U.S.*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978).

In a challenge to the sufficiency of the evidence, the reviewing court considers all of the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). Circumstantial evidence is as reliable as direct evidence and the reviewing court defers to the trier of fact on questions of credibility, resolving conflicting evidence, and persuasiveness. *State v. A.T.P.-R.*, 132 Wn. App. 181, 184-85, 130 P.3d 877 (2006). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth or correctness of the matter. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm'n,* 151 Wn. App. 788, 807, 214 P.3d 938 (2009).

To prove Fabian-Sanchez committed assault in the second degree, the State was required to prove that in the course of the assault, Fabian-Sanchez recklessly inflicted substantial bodily injury. RCW 9A.36.021(1)(a). "Substantial bodily injury" consists of an injury "which 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). For purposes of this definition, "substantial" indicates a considerable degree of harm, more than a simple showing that an injury

has occurred. *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011).

The State's evidence here failed to establish that any of these variants of "substantial bodily injury" were inflicted. Although the nurse suspected a broken nose or deviated septum, the nurse was unable to diagnose any fracture of a bodily part. It is unclear from the nurse's definition of a deviated septum as displacement of the membrane between the nostrils would meet the definition of a fracture in any event. Moreover, no testimony established that the injuries substantially impaired the function of Cobos' nose, or demonstrated substantial disfigurement. While the testimony established that Cobos suffered injuries, the evidence did not show that they rose to the considerably higher level required to show substantial bodily injury.

Because the State's evidence, even viewed in its most favorable light, does not show that a substantial bodily injury was inflicted, the evidence fails to establish the essential elements of assault in the second degree. Accordingly, the conviction should be reversed and judgment entered on the lesser charge of fourth degree assault.

With respect to appellate costs, Fabian-Sanchez was found to lack sufficient funds to prosecute an appeal and was found indigent for that

purpose by the trial court. CP 62. The presumption of indigence continues throughout review. RAP 15.2(f).

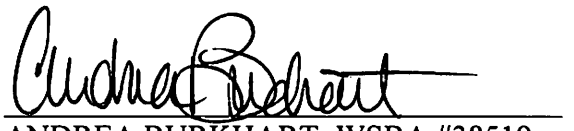
The Court of Appeals recently recognized that in the absence of information from the State showing a change in the appellant's financial circumstances, an award of appellate costs on an indigent appellant may not be appropriate. *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612 (2016). The Supreme Court has additionally recognized that application of RAP 14.2 should "allocate appellate costs in a fair and equitable manner depending on the realities of the case." *State v. Stump*, 185 Wn.2d 454, 461, 374 P.3d 89 (2016).

Here, Fabian-Sanchez was found to be indigent for appeal purposes. His completed Report as to Continued Indigency, attached hereto, shows that he has no assets, no income, and existing outstanding debt. He has only a fourth grade education and has only slight employment history in unskilled work, while supporting three children. In addition, he is already serving a sentence of up to life imprisonment for a prior conviction. RP 163. His appeal is prosecuted in good faith, and he has complied with the requirements of this court's General Order issued on June 10, 2016. Under these circumstances, this court should exercise its discretion under RAP 14.2 to decline to impose appellate costs.

VI. CONCLUSION

For the foregoing reasons, Fabian-Sanchez respectfully requests that the court REVERSE the conviction for second degree assault and remand the cause for further proceedings.

RESPECTFULLY SUBMITTED this 3rd day of October, 2016.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

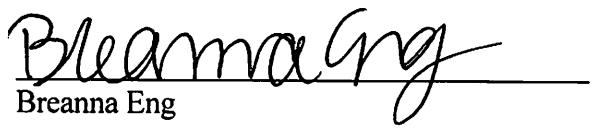
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Shawn P. Sant
Franklin County Prosecutor's Office
1016 N. 4th Avenue
Pasco, WA 99301

Israel Fabian-Sanchez, DOC # 379721
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-1899

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of October, 2016 in Walla Walla, Washington.



Breanna Eng

REPORT AS TO CONTINUED INDIGENCY

(in support of motion or request that the court exercise discretion not to award costs on appeal)

Please fill out this report to the best of your ability. While you are not required to answer all of the questions, complete information will help the court determine whether to deny costs on appeal to the State, should it prevail.

I, Israel Fabian certify as follows:

1. That I own:
   - (X) a. No real property
   - ( ) b. Real property valued at $_____.
   - ( ) c. Real property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

2. That I own:
   - (X) a. No personal property other than my personal effects
   - ( ) b. Personal property (automobile, money, inmate account, motors, tools, etc.) valued at $_____.
   - ( ) c. Personal property valued at $_____, on which I am making monthly payments of $_____ for the next _____ months/years (circle one).

3. That I have the following income:
   - (X) a. No income from any source.
   - ( ) b. Income from employment: $_____ per month.
   - ( ) b. Income of $_____ per month from the following public benefits:

☐ Basic Food (SNAP) ☐ SSI ☐ Medicaid ☐ Pregnant Women Assistance Benefits

☐ Poverty-Related Veterans' Benefits ☐ Temporary Assistance for Needy Families

☐ Refugee Settlement Benefits ☐ Aged, Blind or Disabled Assistance Program

☐ Other: _____

4. That I have:
   - ( ) a. The following debts outstanding:

	Approximate amount owed:
Credit cards, personal loans, or other installment debt:	$_____
Legal financial obligations (LFOs):	$ 1,100.00
Medical care debt:	$_____
Child support arrears:	$_____
Other debt:	$_____

Approximate total monthly debt payments: $_____

( ) b. No debts.

5. That I am without other means to pay costs if the State prevails on appeal and desire that the court exercise discretion to deny costs.

6. That I can pay the following amount toward costs if awarded to the State: $ 0.00 .

7. That I am 33 years of age at the time of this declaration.

8. That the highest level of education I have completed is: 4 Grade .

9. That I have held the following jobs over the past 3 years:

Employer/job title	Hours per week	Pay per week	Months at job
Food Prep.	70	11.25	42

10. That I have received the following job training over the past three years: Food Prep.

11. That I have the following mental or physical disabilities that may interfere with my ability to secure future employment: none .

12. That I am financially responsible for the following dependents (children, spouse, parent, etc.): 3 children .

I, Israel Fabian, certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

08-03-16
Date and Place

I. Fabian
Signature of (Defendant) (Respondent) (Petitioner)