

NO. 66018-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

SHIRLEY ANN LOVERN,

Appellant.

2011 MAY 31 AM 11:04

COURT OF APPEALS
CLERK OF COURT
JULIA M. HARRIS
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 10-1-00146-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

- A. Whether Sufficient Evidence Exists for the Jury to Have Found That Ms. Lovern Assaulted Nurse Ulloa Beyond a Reasonable Doubt.**
- B. Whether Sufficient Evidence Exists for the Jury to Have Found that Ms. Lovern Assaulted Paramedic Crager Beyond a Reasonable Doubt.**

II. STATEMENT OF THE CASE

A. Procedural Facts. See Brief of Appellant.

B. Substantive Facts:

On June 26, 2010, Paramedic Debra Crager and Emergency Medical Technician (hereinafter, "EMT") Richard Cannon were dispatched in an ambulance to the Whidbey Island residence of the Defendant Shirley Lovern. RP 133-135. Ms. Lovern was 57 years old. RP 254. Paramedic Crager and EMT Cannon found Ms. Lovern collapsed on a wooden ramp outside the residence. RP 134¹. South Whidbey Fire and Rescue were already on scene. RP 166. Fire and medical personnel were able to use a blanket to lift Ms. Lovern on to the ambulance gurney.

¹ Paramedic Crager testified that this was the third time in her shift she had responded and picked up Ms. Lovern. RP 133-134. EMT Cannon testified that it was the second time during his particular shift he had picked up and transported Ms. Lovern. RP 165.

RP 167. EMT Cannon could not say whether Ms. Lovern was conscious or not, only that her eyes were closed. RP 167. Ms. Lovern was then loaded into the ambulance where she was non-responsive. RP 135.

Paramedic Crager put oxygen on Ms. Lovern and began to prepare an intravenous line. RP 135. Ms. Lovern spoke and stated “You are not going to put in an IV.” RP 135-138. Ms. Lovern jerked her hand away. RP 168. Paramedic Crager explained to Ms. Lovern that because she was non-responsive on arrival it was protocol to begin an intravenous line. RP 168-169. After the explanation, Ms. Lovern allowed Paramedic Crager to put the intravenous line in. RP 169. The intravenous line was taped down and Ms. Lovern was put on a heart monitor. RP 137. Ms. Lovern began to repeatedly call Paramedic Crager a “fat bitch,” which continued throughout most of the transport. RP 136². This is Ms. Lovern’s particular nickname for Paramedic Crager. RP 162, 179³. The ambulance eventually left Ms. Lovern’s residence in route to the hospital with EMT Cannon driving and Paramedic Crager and Ms. Lovern in the back. RP 137. At one point, Ms. Lovern unhooked the seatbelts, sat up

² EMT Cannon testified that Ms. Lovern actually repeatedly called Paramedic Crager a “fat fucking bitch.” RP 170.

³ Paramedic Crager testified that as of June 26, 2010, she had transported Ms. Lovern to the hospital probably forty times. RP 145.

and said she was getting out. RP 138. EMT Cannon stopped the ambulance and called law enforcement. RP 138-139. Deputy Frank Gomez of the Island County Sheriff's Office responded. RP 140. Deputy Gomez had a conversation with Ms. Lovern, calmed her down, and assisted in placing Ms. Lovern in soft restraints. RP 140-141, 161-162.

Again, the ambulance was able to continue on its journey to the hospital. RP 141. Ms. Lovern then yanked the intravenous line out of her body. RP 141. Blood was spraying all over the ambulance. RP 141. Paramedic Crager tried to staunch the blood flow with a towel and Ms. Lovern purposely scratched Paramedic Crager's wrists, which were covered in blood. RP 142-143. Ms. Lovern continued to scratch at Paramedic Crager's arm which caused pain. RP 142-143. Paramedic Crager informed Ms. Lovern that she would bleed to death (if she continued to resist the paramedic's efforts to stop the bleed,) Ms. Lovern answered, "go ahead, just let it go." RP 143. Paramedic Crager had Ms. Lovern's blood on her arms and clothing, she had to lean on top of Ms. Lovern for five minutes as she attempted to stop the bleeding. RP 144. Ms. Lovern was breathing heavily in Paramedic Crager's face during the struggle, "spittle" went on the paramedic's face, while Ms. Lovern continuously laughed. RP 144-147. Once at the hospital, it took five

people to get Ms. Lovern from the ambulance gurney to the hospital gurney. RP 149. Deputy Marshal Chris Peabody of the Coupeville Marshal's Office assisted moving Ms. Lovern to a hospital bed. RP 218. Deputy Marshal Peabody had to grab Ms. Lovern's legs and restrain her so that hospital staff could get restraints on her. RP 218. Ms. Lovern was yelling profanities, kicking and spitting in people's faces. RP 218.

Emergency department Registered Nurse Ulloa started her shift shortly after Ms. Lovern arrived at the emergency room. RP 190. Nurse Ulloa has worked as a nurse since 1986. RP 203. When Nurse Ulloa initially checked on Ms. Lovern, she was asleep. RP 191. Later, Ms. Lovern awoke and began screaming that she had peed in her diaper. RP 192⁴. Nurse Ulloa began trying to clean up Ms. Lovern, but Ms. Lovern was resistive and Nurse Ulloa called another nurse for assistance. RP 191-192. Ms. Lovern was released from the soft restraints and Nurse Ulloa was able to get her cleaned up and changed. RP 192-193. All the while, Ms. Lovern showered Nurse Ulloa and Registered Nurse Jacqueline Haynes with expletives. RP 208. The restraints were reapplied albeit looser than before. RP 193. Nurse Ulloa walked around the foot of the

⁴ Ms. Lovern had refused a bed pan so the hospital staff were forced to employ diapers. RP 191-192.

bed and Ms. Lovern “reached her leg up and just kicked me in the chest.” RP 194. Nurse Ulloa experienced sharp pain that lasted five or ten minutes. RP 194. It was the first time Nurse Ulloa was ever kicked by a patient. RP 194. Ms. Lovern stated, “Ah, I am so sorry, I didn’t mean to kick you,” Nurse Ulloa stated to Ms. Lovern, “Shirley, I can’t believe you kicked me.” Ms. Lovern then began to spit at Nurse Ulloa and yell profanities. RP 194-195. Nurse Ulloa contacted the police to report the assault. RP 201.

Nurse Haynes was assisting Nurse Ulloa and witnessed the kick. RP 209. Nurse Haynes immediately restrained Ms. Lovern’s legs after the kick. RP 210. Ms. Lovern yelled out various profanity, including calling the nurses “bitches” and yelling “fuck me.” RP 210-211. Ms. Lovern also yelled “you can’t keep me here.” RP 211. At one point she pulled her diaper aside, thrust her bottom in the air and screamed at Deputy Marshal Peabody “fuck me.” RP 208.

Ms. Lovern was arrested at the hospital by Deputy Marshal Peabody. RP 224. He indicated that she was medically cleared and discharged from the hospital a little over one hour after her arrival. RP 224. She was able to walk unassisted, follow instruction and speak intelligibly. RP 224-226.

III. ARGUMENT

1. THE STATE PROVED MS. LOVERN INTENTIONALLY ASSAULTED PARAMEDIC CRAGER AND NURSE ULLOA.

The principles of due process require the State to prove beyond a reasonable doubt every essential element of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In deciding whether there is sufficient evidence to support a conviction, this court must view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). “A reviewing court defers to the trier of fact on issues of the persuasiveness of the evidence, witness credibility, and conflicting testimony.” *State v. Nieto*, 119 Wn.App 157, 165, 79 P.3d 473 (Div. 1 2003), citing *State v. Ainslie*, 103 Wn.App 1, 5-6, 11 P.3d (2000), (citing *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999)). Further, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Partin*, 88 Wn.2d 899, 906, 907, 567 P.2d 1136 (1977). The Defendant’s claim of insufficiency “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.”

Salinas, 119 Wn.2d at 201, citing *State v. Theroff*, 25 Wn.App 590, 593, 608 P.2d 1254, affirmed, 95 Wn.2d 385, 622 P.2d 1240 (1980).

A. The State Proved Ms. Lovern Assaulted Nurse Ulloa.

The State proved Ms. Lovern assaulted Nurse Ulloa beyond a reasonable doubt. The Defendant argues that because Nurse Ulloa made one contradictory statement, the jury could not find Ms. Lovern guilty of assault.

On re-direct at trial, Nurse Ulloa's testimony was slightly contradictory regarding the kick from Ms. Lovern:

“Q. And you said you've never been kicked before intentionally like this. How do you know this was intentional?”

A. Because immediately it was – it wasn't like an accident. I mean, you pretty much know when it's intentional. I was walking around the bed and she just went wham, and as soon as she made contact she apologized. I think – you know, I can only guess what her intention was; probably just to gesture, but she made contact. You know, not a good thing.

I don't think – I shouldn't say this probably, but I don't think she really meant to, you know – but apparently she did mean to kick me because she did. I've never – you know what, I've never seen her be physically violent or kick anyone or hit anyone before in all the times that I've taken care of Ms. Lovern, and my biggest concern is that she's escalating to the point of becoming physically violent and a danger to others. That's my biggest concern.

Q. So after this you feel threatened by her?

A. Yes, I do. Oh, yeah. I won't be walking close to her bed anymore. I'll be a lot more careful."

RP 203-204

The Defendant argues that based on this testimony that there was insufficient evidence to convict Ms. Lovern of assault. The Defendant is incorrect. This Court must make all reasonable inferences in favor of the State. The evidence is uncontroverted that Ms. Lovern was combative with ambulance personnel prior to arrival at the hospital. RP 136-137, RP 141-143. Ms. Lovern was screaming profanities at hospital personnel prior to and after the kick. RP 218, 194-195. Ms. Lovern spat at the nurses after the kick and called the nurses "bitches." RP 194-195. Nurse Ulloa immediately reported the kick as an assault to law enforcement. The kick was painful and the pain lasted for many minutes. RP 194. Both Nurse Ulloa and Nurse Haynes described Ms. Lovern "kicking" Nurse Ulloa in the breast, not just moving her leg. RP 193-194, 209-210. Nurse Haynes testified that "... Shirley [Ms. Lovern] kicked her leg out and kicked Patty [Nurse Ulloa] in the breast." RP 209.

The jury was able to consider the evidence in the case as a whole and found that Ms. Lovern intentionally kicked Nurse Ulloa, which constituted an assault. This Court must defer to the trier of fact on issues

of conflicting testimony and persuasiveness of the evidence and in so doing, it is clear that the State proved the assault beyond a reasonable doubt.

B. The State Proved Ms. Lovern Assaulted Paramedic Crager.

The Defendant argues that Ms. Lovern had a right to refuse medical treatment and therefore did not assault Paramedic Crager by scratching her. This issue is raised for the first time on appeal and this court should therefore not consider it. RAP 2.5(a). “Arguments and theories not presented to the trial court will generally not be considered on appeal.” *Washburn v. Beat & Equipment Co.*, 120 Wn.2d 246, 290, 840 P.2d 860 (1992), citing *Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992), *In re Marriage of Tang*, 57 Wn.App 648, 655, 789 P.2d 118 (1990)⁵.

In the alternative, the Defendant’s argument that Ms. Lovern objected to medical care is not supported by the record. Paramedic Crager’s and EMT Cannon’s undisputed testimony was that after Paramedic Crager explained that she needed to start an intravenous line,

Ms. Lovern allowed her to do so. RP 168-169. It was only much later in the transport that Ms. Lovern ripped it out. RP 141. It was then that Paramedic Cramer attempted to re-insert the intravenous line and then surrendered that attempt and just did her best to staunch the loss of blood. RP 141-144. Ms. Lovern testified that she had no memory of the ambulance ride and that the first thing she remembered after drinking vodka was waking up in the emergency room. RP 258-259.

Lastly, in the third alternative, Ms. Lovern did not have the right to decline medical treatment as argued by the Defendant.

A common law right to be free of bodily invasion exists in some circumstances which can give rise to the right to refuse medical treatment. *In re the Welfare of Coyer*, 99 Wn.2d 114, 121-122, 660 P.2d 738 (1983). The right to refuse treatment is not absolute, for the State has an interest in protecting the sanctity of the lives of its citizens. *Id.*, at 122. The State interest has been identified in four areas: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; (4) maintenance of the ethical integrity of the medical profession.

⁵ At trial, the defense theory was that Ms. Lovern was too intoxicated to form the intent necessary for assault. RP 285-291. The Defendant requested and the Court gave a voluntary intoxication instruction. CP 54.

McNabb v. Department of Corrections, 163 Wn.2d 393, 403, 180 P.3d 1257 (2008), citations omitted.

In the present case, Paramedic Crager had an interest in preserving Ms. Lovern's life as well as maintaining the ethical integrity of the medical profession. Paramedic Crager came upon an unresponsive 57-year-old woman whom she had already taken to the emergency room twice in a single shift. RP 134-135. Ms. Lovern was considered unstable on arrival and that protocol is to insert an intravenous line. RP 168-169. Therefore if drugs are needed prior to the emergency room taking over, they can be administered immediately. RP 169.

Emergency medical personnel cannot forgo treatment of patients who are potentially in a life or death situation simply because they have not filled out a consent form. Even if Ms. Lovern had unequivocally stated and stood by the assertion that she did not want an intravenous line, emergency medical personnel have a duty to treat patients.

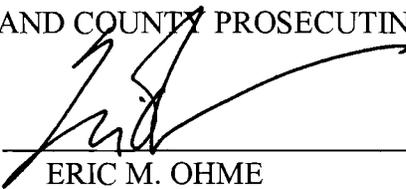
IV. CONCLUSION

This Court should affirm the Defendant's convictions. There were sufficient facts for the jury to find the Defendant guilty of assaulting Nurse Ulloa as both Nurse Ulloa and Nurse Haynes described an intentional and forceful kick to Nurse Ulloa's breast. Secondly, this Court should not

consider the Defendant's argument regarding the Defendant's alleged right to refuse medical treatment as it is raised for the first time on appeal. Further, the record clearly shows that the Defendant acquiesced to the intravenous line and the Defendant's argument that the Defendant refused and continued her refusal is without merit. Lastly, the Defendant did not have the right to refuse an intravenous line as the State interest in preserving life overcame any right to refuse under these circumstances.

Respectfully submitted this 27th day of May, 2011.

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DECLARATION OF SERVICE

I, MICHELE M. GRAAFF, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 27th day of May, 2011, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

Gregory Charles Link
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Signed in Coupeville, Washington, this 27th day of May, 2011.


MICHELE M. GRAAFF