

FILED
SUPREME COURT
STATE OF WASHINGTON
8/29/2023
BY ERIN L. LENNON
CLERK

FILED
Court of Appeals
Division I
State of Washington
8/28/2023 4:28 PM

No. I02320-I
COA No. 83376-6-I

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERICK LADALE SIMS,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

PETITION FOR REVIEW

THOMAS M. KUMMEROW
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW1

D. STATEMENT OF THE
CASE..... 3

E. ARGUMENT ON WHY REVIEW SHOULD BE
GRANTED16

1. The trial court erred by entering inconsistent guilty
and not-guilty verdicts following a bench trial.16

2. The prosecution did not prove Mr. Sims guilty of
second-degree assault beyond a reasonable doubt..22

F. CONCLUSION.....33

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS

U.S. Const. amend XIV22

FEDERAL CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348,
147 L.Ed.2d 435 (2000).....22

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d
368 (1970)22

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61
L.Ed.2d 560 (1979)22

United States v. Maybury, 274 F.2d 899
(2d Cir. 1960)..... 17, 18, 19, 21

United States v. Powell, 469 U.S. 57, 105 S. Ct. 471, 83
L. Ed. 2d 461 (1984).....17, 18

United States v. Wright, 63 F.3d 1067 (11th Cir.
1995).....21

WASHINGTON CASES

State v. A.M., 163 Wn. App. 414, 260 P.3d 229
(2011)19

State v. Garcia, 20 Wn. App. 401, 579 P.2d 1034
(1978)23

State v. Goins, 151 Wn.2d 728, 92 P.3d 181
(2004)17, 18

<i>State v. McKague</i> , 172 Wn.2d 802, 262 P.3d 1225 (2011)	26
<i>State v. Melland</i> , 9 Wn. App. 2d 786, 452 P.3d 562 (2019)	30, 31
<i>State v. Ng</i> , 110 Wn.2d 32, 750 P.2d 632 (1988).....	17
<i>State v. Thomas</i> , 98 Wn. App. 422, 989 P.2d 612 (1999)	23
OTHER STATE CASES	
<i>Akers v. Commonwealth</i> , 31 Va. App. 521, 525 S.E.2d 13 (2000)	18
<i>Cleveland v. Commonwealth</i> , 38 Va. App. 199, 562 S.E.2d 696 (2002)	20
<i>Haynesworth v. United States</i> , 473 A.2d 366 (D.C. Ct. App. 1984).....	20
<i>People v. McCoy</i> , 207 Ill. 2d 352, 799 N.E.2d 269 (2003)	20
<i>People v. Vaughn</i> , 409 Mich. 463, 295 N.W.2d 354 (1980)	21
<i>People v. Williams</i> , 99 Mich. App. 463, 297 N.W.2d 702 (1980)	18
<i>Price v. State</i> , 405 Md. 10, 949 A.2d 619 (2008)	18
<i>Shell v. State</i> , 307 Md. 46, 512 A.2d 358 (1986) ...	18, 20
<i>State v. Garza</i> , 196 Ariz. 210, 994 P.2d 1025 (Ariz. Ct. App. 1999).....	21

State v. Meyer, 17 Kan. App. 2d 59, 832 P.2d 357
(1992) 19, 20, 21

STATUTES

RCW 9A.08.01030
RCW 9A.36.02123

OTHER AUTHORITIES

Webster’s Third New Int’l Dict. 2280 (2002).....26

RULES

CrR 6.119
RAP 13.41
RAP 18.1733

TREATISES

*Inconsistency of Criminal Verdict as Between Different
Counts of Indictment or Information*, 18 A.L.R.3d
259.....16

A. IDENTITY OF PETITIONER

Erick Sims asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Erick Ladale Sims*, No. 83376-6-I (July 31, 2023). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A trial court sitting as the fact-finder is bound by reason and the law and must explain its decisions. Accordingly, the verdict on one count must be consistent with the verdicts on the other counts. A guilty verdict that cannot be reconciled with the findings supporting a not-guilty verdict is reversible error. Here, the trial court's guilty verdict of second-

degree assault is irreconcilable with its not-guilty verdicts on the other counts. Does an issue of first impression arise regarding inconsistent verdicts by a trial court acting as the trier of fact requiring this Court to grant review and reverse Mr. Sims' conviction?

2. To uphold a conviction, the evidence must permit a reasonable fact-finder to find the prosecution proved all elements of the offense beyond a reasonable doubt. Here, the evidence does not permit an inference Mr. Sims committed second-degree assault. Is an issue arising under the United States and Washington Constitutions presented where the State failed to prove beyond a reasonable doubt that Mr. Sims was guilty of second degree assault requiring this Court to accept review and reverse Mr. Sims' conviction?

D. STATEMENT OF THE CASE

Mr. Turner and Ms. Dixon made plans to go to Ms. Schmidt's place on May 2 after they got off work at 2 am. 9/20 RP 223–24, 375–76. Mr. Turner asked Mr. Sims for a ride. 9/20 RP 224; 10/13 RP 2017.

Ms. Schmidt had already drunk “half a bottle of wine” when they arrived. 9/20 RP 299, 377. Mr. Turner asked Mr. Sims if he had cocaine. 10/13 RP 2023. Mr. Sims pulled out a baggie and made “lines” for everyone. 9/20 RP 226–28; 10/13 RP 2024. Ms. Dixon saw Ms. Schmidt snort cocaine through a straw. 9/20 RP 379.

About an hour later, Ms. Schmidt suggested they get more alcohol. 10/13 RP 2024. The others pointed out it was 3:30 am, and alcohol was no longer being sold. 10/13 RP 2024. She suggested they “steal it.” 10/13 RP 2024. At 3:26 am, she texted, “We need to steal wine meow.” Ex. 88 at 10. Though Mr. Sims did

not intend to steal anything, he agreed to drive Ms. Schmidt to the store. 10/13 RP 2025.

Ms. Schmidt instead directed Mr. Sims to the shore of Lake Washington. 10/13 RP 2025–26. She took some cocaine from her pocket and she and Mr. Sims snorted it from her hand. 10/13 RP 2026, 2101–02.

Ms. Schmidt then stripped off her clothes and jumped into the water. 10/4 RP 1172; 10/13 RP 2027. Mr. Sims took off his clothes too. 10/13 RP 2028. The water was so cold he could only wade in up to his knees. 10/13 RP 2028. He swam as fast as he could to a floating dock to get out of the water. 10/13 RP 2028.

Ms. Schmidt climbed onto the dock too, without using the ladder. 10/13 RP 2029. She sat in Mr. Sims's lap, kissed him, and asked him to run away with her. 10/4 RP 1179; 10/13 RP 2030. Mr. Sims refused and

pointed out he has a family. 10/13 RP 2031. Ms.

Schmidt jumped back into the water. 10/13 RP 2031.

Mr. Sims reentered the water and headed back to the shore. 10/13 RP 2031. He did his best to dry himself and Ms. Schmidt with his T-shirt and underwear. 10/13 RP 2031–32.

When Ms. Schmidt and Mr. Sims returned, Ms. Dixon and Mr. Turner noticed Ms. Schmidt's hair was wet and her clothes were damp. 9/20 RP 237, 381. Ms. Schmidt said they "went skinny dipping" and "jumped into Lake Washington." 9/20 RP 236, 308, 381; 9/22 RP 431; 10/13 RP 2035. Ms. Schmidt changed into sweatpants and a tank top. 9/20 RP 237, 309–10, 381. They continued to drink alcohol and use cocaine. 9/20 RP 237; 10/13 RP 2037–38.

Mr. Sims returned to Ms. Schmidt's place after Mr. Turner and Ms. Dixon left to learn who her cocaine

source was. 10/4 RP 1182; 10/13 RP 2042. At 6:59 and 7:00, he texted her, “Hello” and “I’m looking for some sauce.” Ex. 88 at 10.

Mr. Sims knocked on the door and Ms. Schmidt’s window, but she did not respond. 9/20 RP 256; 10/13 RP 2042–43. He called, but she did not answer. 10/13 RP 2042–43. Mr. Sims left. 9/20 RP 256; 10/13 RP 2043. He went to Home Depot for supplies and may have stopped at home first. 10/13 RP 2045–46.

Ms. Schmidt texted Mr. Turner at 7:10, “Your boy is here what’s the best way to get rid of him?” 9/20 RP 242; Ex. 88 at 10. Mr. Turner advised her to “[t]ell him ur going to sleep.” 9/20 RP 242; Ex. 88 at 10. He asked if she wanted him to return. Ex. 88 at 9–10. Ms. Schmidt told him over the phone, “I’m a big girl. I can handle myself.” 9/20 RP 244. She said Mr. Sims either left or was about to leave. 9/20 RP 328, 358.

Ms. Dixon also spoke to Ms. Schmidt. 9/20 RP 394–95. Neither Mr. Turner nor Ms. Dixon heard Mr. Sims’s voice through the phone. 9/20 RP 245, 396.

Before 7 am, Ms. Schmidt called Mr. Smith multiple times. 10/4 RP 1238; 10/6 RP 1523. He was asleep and did not answer. 10/4 RP 1222. Apparently annoyed, she texted at 6:58, “Wtf? Lol tell the hooker from last night, that there’s cab fare on the table.” 10/6 RP 1515; Ex. 72 at 16. He responded at 7:57, “Get some sleep.” Ex. 72 at 16. Ms. Schmidt’s phone indicated this message was read at 8:04 am. 10/6 RP 1519.

Mr. Marshall went downstairs to tell Ms. Schmidt the news. 9/16 RP 169. Through the open bedroom door, he saw Ms. Schmidt lying on her back on the floor. 9/16 RP 169. Her skin was cool. 9/16 RP 170. Mr. Marshall called 911. 9/16 RP 171.

First responders arrived at 11 am. 9/27 RP 726.
Ms. Schmidt was on the floor wearing only a bra. 9/23
RP 609. Her underwear and sweatpants were on the
bed. 9/23 RP 638, 643. She had vomit on her face. 9/27
RP 766. She could not be revived. 9/27 RP 729.

Brian Mazrim, MD, of the King County Medical
Examiner's Office went to Ms. Schmidt's residence.
9/27 RP 744, 753. Based on the temperature of her
body, Dr. Mazrim estimated the time of death as "9.00
a.m., give or take a couple hours." 9/27 RP 758. Based
on rigor mortis, he surmised she had been dead "at
least half an hour, maybe an hour." 9/27 RP 759.

Dr. Mazrim performed an autopsy on May 4. 9/27
RP 769; Ex. 41 at 2. He found symmetrical bruises on
Ms. Schmidt's hips, and bruises and abrasions on her
knees and the tops of her feet. 9/27 RP 767; Ex. 41 at 3.
There were "very small" abrasions at the corners of her

mouth, a quarter-inch bruise inside her lower lip, and a quarter-inch cut on her right pinky. 9/27 RP 764–65, 771; Ex. 41 at 3. Dr. Mazrim also found a small bruise under the scalp and hemorrhages in the throat. 9/27 RP 764, 772–73; Ex. 41 at 4.

Based on a microscopic examination, Dr. Mazrim found Ms. Schmidt obtained the bruises on her lower extremities within an hour of death. 9/27 RP 768, 770. He did not examine the other injuries microscopically. 9/27 RP 768. He could place the scalp and neck injuries only “within a day or two of her death.” 9/27 RP 772.

Toxicology tests detected cocaine, Sertraline, and a sleep aid drug in Ms. Schmidt’s blood and stomach contents. 9/27 RP 754, 779–80, 782–83. The amounts of Sertraline and cocaine were both potentially lethal. 9/27 RP 781; 9/30 RP 1026–27; 10/12 RP 1886–87. Ms. Schmidt’s blood alcohol content was 0.17. 9/27 RP 780.

Dr. Mazrim and his team took clippings from Ms. Schmidt's fingernails and swabs from various parts of her body and sent them for testing. 9/27 RP 788–90.

Dr. Mazrim ruled the cause of Ms. Schmidt's death "undetermined" because the autopsy findings did not allow him to choose between "two competing diagnoses." 9/27 RP 754, 787; Ex. 41 at 1. First, though the injuries were not fatal, they suggested asphyxia as a possible cause. 9/27 RP 754; 9/29 RP 874; 10/12 RP 1882. Second, the "high levels" of drugs in Ms. Schmidt's system suggested an overdose. 9/27 RP 754.

The bruises on Ms. Schmidt's hips and legs led Dr. Mazrim to consider asphyxia. 9/27 RP 755. A possible explanation was that a person pressed on her backside as she lay face down on a hard surface. 9/27 RP 755, 767. Dr. Mazrim also considered the injuries to

Ms. Schmidt's mouth and lip and the evidence Mr.

Sims returned to the apartment. 9/27 RP 755–56.

The chief medical examiner, Dr. Richard Harruff, concurred with Dr. Mazrim's opinion. 9/29 RP 859;

10/12 RP 1874, 1904.

● On May 2, 2015, Mr. Turner told Mr. Sims that Ms. Schmidt was found dead. 9/20 RP 249–50; 10/13 RP 2046–47. Mr. Sims met Mr. Turner and Ms. Dixon at the police station, where all three gave statements. 9/20 RP 251–52; 10/13 RP 2049–50. Mr. Turner and Ms. Dixon brought Mr. Smith's pickup and left it with the police. 9/20 RP 398.

At Detective Cooper's request, Mr. Sims provided a sample of his DNA. 10/5 RP 1385.

When police first arrived on May 2, Mr. Arrahim told them he heard Ms. Schmidt on the stairs at 9:30. 10/6 RP 1447–48, 1450. Detective Cooper did not think

Mr. Arrahim's account was "good enough evidence" and did not interview Mr. Arrahim. 10/6 RP 1448, 1450.

Kari O'Neill, a forensic scientist, tested the samples Dr. Mazrim took from Ms. Schmidt. 9/29 RP 910. She found amylase, a digestive enzyme in saliva and other fluids, in the swabs from the neck, left and right wrists, left and right nail clippings, and vagina. 9/29 RP 912–13, 918, 928, 929–31, 939, 959; Ex. 99.

In swabs from Ms. Schmidt's neck and right hand, Ms. O'Neill found DNA from three people. 9/29 RP 919–20, 929, 938, 940, 944; Ex. 99. She identified two as Ms. Schmidt and Mr. Sims. 9/29 RP 920, 925; Ex. 100. The DNA quantity was too low to identify the third person. 9/29 RP 920; Ex. 99.

After the lab results came in, Detective Cooper believed there was insufficient evidence to continue the investigation. 10/5 RP 1396.

Nevertheless, the prosecution charged Mr. Sims with two counts: second-degree felony murder based on a predicate felony of second-degree assault, and second-degree rape. CP 1, 9–10.

Mr. Sims waived his right to trial by jury. CP 160. The prosecution's theory was that Mr. Sims assaulted Ms. Schmidt by shoving large amounts of cocaine, Sertraline, and sleep aid pills into her mouth and forcing her to swallow them. 10/18 RP 2220. It argued he held her down on the floor and tried to rape her anally. 10/18 RP 2220–21. Because the lab found p30 but no sperm, it argued only a vasectomized man like Mr. Sims could be responsible. 10/18 RP 2221.

The prosecution asked the court to consider attempted second-degree rape as a lesser included offense. 10/18 RP 2246. The court also indicated it

would consider second-degree assault as a lesser included offense of murder. 10/18 RP 2248.

The trial court found Mr. Sims not guilty of second-degree rape and attempted rape. 10/21 RP 527; CP 216 CL 10, 12. It found a reasonable doubt about whether Mr. Sims and Ms. Schmidt had intercourse and, even if they did, whether any intercourse was consensual. CP 200 FF 17, 205 FF 32–33, 216 CL 9. Notably, the court reasoned that all the forensic evidence the prosecution cited had alternate, innocent explanations. CP 201–03 FF 19–25, 204 FF 29–30.

The trial court also found Mr. Sims not guilty of second-degree murder, reasoning the evidence suggested Ms. Schmidt may have intentionally overdosed. 10/21 RP 524; CP 209–12 FF 41–44, CP 214 CL 1–2. The court noted that Ms. Schmidt's recent treatment for depression and the uncertainty in her

relationship with Mr. Smith supported an inference of suicide. CP 203 FF 26, 209–12 FF 41–44. It rejected the prosecution’s theory that Mr. Sims forced Ms. Schmidt to swallow large amounts of three different drugs simultaneously. CP 212–13 FF 45–46, 215 CL 7.

The court also noted deficiencies in the police investigation as a basis for reasonable doubt. CP 207–09 FF 38, 40.

However, the trial court convicted Mr. Sims of second-degree assault. 10/21 RP 526–27; CP 197 FF 5, 214–15 CL 4–6, 216 CL 8. Despite finding reasonable doubt regarding the prosecution’s interpretation of the forensic evidence as to the rape count, it found the same evidence showed beyond a reasonable doubt that Mr. Sims assaulted Ms. Schmidt. CP 199 FF 12.

Ms. Sims moved to arrest the judgment. CP 454. His attorney argued the trial court’s reasons to doubt

the prosecution's interpretation of the forensic evidence also created reasonable doubt as to second-degree assault, making the conviction "unjust." 11/5 RP 548. The trial court denied the motion. 11/5 RP 550.

The Court of Appeals affirmed, ruling there was sufficient evidence to support the second degree assault conviction and that the trial court's conclusions were not inconsistent verdicts.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. The trial court erred by entering inconsistent guilty and not-guilty verdicts following a bench trial.

The verdicts on two or more counts are inconsistent if they rest on irreconcilable "factual and legal conclusions." *Inconsistency of Criminal Verdict as Between Different Counts of Indictment or Information*, 18 A.L.R.3d 259, § 1[a]. For example, a

conviction on one count may be inconsistent with an acquittal on another, related count. *State v. Ng*, 110 Wn.2d 32, 47–48, 750 P.2d 632 (1988). Fact-finders may reach “inconsistent verdicts for various reasons, including mistake, compromise, and lenity.” *State v. Goins*, 151 Wn.2d 728, 733, 92 P.3d 181 (2004).

In jury trials, inconsistent verdicts are generally permissible. *Ng*, 110 Wn.2d at 48. English common law adopted juries as the “voice of the country” to check the “zeal of prosecutors.” *United States v. Maybury*, 274 F.2d 899, 903 (2d Cir. 1960). Accordingly, juries hold “the unreviewable power . . . to return a verdict of not guilty for impermissible reasons.” *Ng*, 110 Wn.2d at 48, quoting *United States v. Powell*, 469 U.S. 57, 63, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984). Jury decision-making is opaque, and there is no way to know “which was the

verdict that the jury ‘really meant.’” *Goins*, 151 Wn.2d at 733, quoting *Powell*, 469 U.S. at 68.

Whether the *trial court* may return inconsistent verdicts in a bench trial is a separate question, and one of first impression in Washington.

Courts in other jurisdictions conclude the reasons for accepting a jury’s inconsistent verdicts do not apply to the trial court. *Maybury*, 274 F.2d at 903; *Shell v. State*, 307 Md. 46, 57–58, 512 A.2d 358 (1986), *overruled on other grounds*, *Price v. State*, 405 Md. 10, 949 A.2d 619 (2008). These courts hold irreconcilable verdicts of guilty and not guilty after a bench trial require reversal. *Akers v. Commonwealth*, 31 Va. App. 521, 530, 525 S.E.2d 13 (2000); *People v. Williams*, 99 Mich. App. 463, 463, 297 N.W.2d 702 (1980).

Unlike a jury, “[a] trial court is bound by fundamental principles of logic and has a duty to

explain its decisions.” *State v. Meyer*, 17 Kan. App. 2d 59, 70, 832 P.2d 357 (1992). Judges must follow the law—they may not resolve inconsistencies in their findings by resort to a compromise verdict. *Maybury*, 274 F.2d at 903. As for “lenity,” the only appropriate time for a trial court to express it is at sentencing. *Id.*

These principles apply with no less force in Washington. When the trial court sits as the fact-finder, it must explain its verdicts by entering “findings of fact and conclusions of law.” CrR 6.1(d). It must rest its findings on substantial evidence, and the findings must support the legal conclusions. *State v. A.M.*, 163 Wn. App. 414, 419, 260 P.3d 229 (2011).

Permitting trial courts to enter inconsistent verdicts is not only error, but it would erode public confidence in the criminal legal system. *Maybury*, 274 F.2d at 903. “A rule which would permit judgments

which cannot be defended upon a logical basis would not enhance respect for the law, the courts, or the process.” *Meyer*, 17 Kan App. 2d at 70. “It would make utterly no sense” for a trial court to instruct the jury it must follow the law in one case yet ignore that instruction in another. *Shell*, 307 Md. at 57.

Some courts permit inconsistent bench verdicts where the trial court explains the inconsistency. *E.g.*, *Cleveland v. Commonwealth*, 38 Va. App. 199, 204–05, 562 S.E.2d 696 (2002); *Haynesworth v. United States*, 473 A.2d 366, 371 (D.C. Ct. App. 1984).

Other courts take no issue with inconsistent bench verdicts, reasoning trial courts may express leniency in their verdicts in the same manner as juries. *E.g.*, *People v. McCoy*, 207 Ill. 2d 352, 358, 799 N.E.2d 269 (2003); *State v. Garza*, 196 Ariz. 210, 212, 994 P.2d

1025 (Ariz. Ct. App. 1999); *United States v. Wright*, 63 F.3d 1067, 1073–74 (11th Cir. 1995).

This reasoning, however, ignores the trial court's duty to adhere to the law and logic and to explain the reasons for its verdicts. *Meyer*, 17 Kan. App. 2d at 70; *People v. Vaughn*, 409 Mich. 463, 466, 295 N.W.2d 354 (1980). These courts also overlook the jury's unique role as the "voice of the country" and a check on executive power. *Maybury*, 274 F.2d at 903. The many differences between juries and trial courts as fact-finders call for treating them differently, not the same.

The trial court's findings that Mr. Sims assaulted Ms. Schmidt and caused substantial bodily harm are irreconcilable with the findings underlying his acquittal of second-degree rape. Contrary to the Court of Appeals conclusion, the verdicts are inconsistent. *Meyer*, 17 Kan. App. 2d at 70–71.

This Court should grant review and hold that entering inconsistent verdicts after a bench trial is reversible error.

2. The prosecution did not prove Mr. Sims guilty of second-degree assault beyond a reasonable doubt.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

To convict Mr. Sims of second-degree assault, as relevant here, the prosecution had to prove he (1) assaulted Ms. Schmidt, thereby (2) recklessly inflicting (3) substantial bodily harm on her. RCW 9A.36.021(1)(a).

An assault is a touching that “was neither legally consented to nor otherwise privileged, and was either harmful or offensive.” *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999), quoting *State v. Garcia*, 20 Wn. App. 401, 403, 579 P.2d 1034 (1978). A consensual touching is not an assault. *Id.*

The only evidence to suggest Mr. Sims caused any of Ms. Schmidt’s injuries is the presence of his DNA on her neck and right hand and wrist. Exs. 99, 100. But his DNA shows only that he touched her during the evening, or that she touched him—say, when she hugged him goodbye, when he inhaled

cocaine from her hand, or when she sat on his lap and kissed him on the cheek. 10/13 RP 1984, 2030, 2101–02. The mere presence of his DNA does not permit an inference any touching was harmful or offensive.

Besides, if Mr. Sims held Ms. Schmidt down and she fought back, his DNA would be found on *both* wrists and the fingernails of *both* hands, not just on the right side. 9/29 RP 944; CP 195. That Ms. O'Neill did not find Mr. Sims's blood on the clippings also refutes any inference Ms. Schmidt clawed at Mr. Sims in defense. 9/29 RP 936–37.

The only way to reach a guilty verdict on this evidence is to fill the gaps with baseless assumptions. Mr. Sims returned to Ms. Schmidt's residence around 7 am after Mr. Turner and Ms. Dixon left. 10/13 RP 2041–42. Ms. Schmidt's text message to Mr. Turner at 7:10 am that "Your boy is here" supports this inference.

10/6 RP 1516; Ex. 88 at 10. There is no evidence Mr. Sims went inside the residence rather than being rebuffed and leaving.

The cell tower data likewise places Mr. Sims in the vicinity of Ms. Schmidt's apartment but cannot show he entered it. Mr. Sims's cell phone consistently pinged a single tower near the house until 8:14 am. 10/7 RP 1646–47. At most, this data shows Mr. Sims was within the range of that tower at the time. 10/7 RP 1615. No witness testified what that range is, but a defense expert opined it could be a mile and a half or more. 10/12 RP 1802. The cell tower data does not place Mr. Sims inside the apartment.

The prosecution did not present sufficient evidence to find Mr. Sims assaulted Ms. Schmidt beyond a reasonable doubt. The trial court's findings that Mr. Sims assaulted Ms. Schmidt lack substantial

evidence. CP 197 FF 5, 205 FF 32, 205–06 FF 34, 207 FF 37, 215 CL 6, 216 CL 8. So does the trial court’s finding that the presence of Mr. Sims’s DNA indicated assault. CP 199 FF 12.

Further, the prosecution did not prove Mr. Sims inflicted substantial bodily harm. An injury amounts to “substantial bodily harm” if it causes “a temporary but substantial disfigurement.” RCW 9A.04.110 (4)(b).¹ “Substantial” means “considerable in amount.” *State v. McKague*, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011), quoting Webster’s Third New Int’l Dict. 2280 (2002).

A “cut lip” alone does not support a conviction of second-degree assault. *Miles*, 77 Wn.2d at 600–01.

¹ There is no evidence Ms. Schmidt’s injuries included a “fracture” or caused “a temporary but substantial loss or impairment of the function of any bodily part or organ.” See RCW 9A.04.110(4)(b). The cause of her death was asphyxia or drug overdose, not her injuries. 9/27 RP 754–55; 9/29 RP 863; Ex. 41 at 1.

Where the prosecution relies on cuts and bruises, it must show the injuries in total amount to a substantial disfigurement. For example, “facial bruising and swelling lasting several days” and cuts to the face, head, and arm support a finding of substantial bodily harm. *McKague*, 172 Wn.2d at 806–07.

Even if the prosecution’s evidence allowed an inference Mr. Sims assaulted Ms. Schmidt to some degree, the prosecution did not prove he inflicted substantial bodily harm. The trial court relied on the sum of all Ms. Schmidt’s “bruising and abrasions” to find this element satisfied. CP 214–15 CL 4. No reasonable person could infer an assault by Mr. Sims caused most of the injuries. Any remaining are too slight to be substantial.

The most significant injuries were the bruises on Ms. Schmidt’s hips, knees, and feet, which Dr. Mazrim

opined resulted from pressure on her backside as she lay face down on a hard surface. 9/27 RP 767. But there is no evidence Mr. Sims was the source of this pressure. And even if he did lay on top of her—say, during sexual activity—there is no evidence to suggest he did so without her consent. *Supra*, at 54–55.

Because there is no evidence an assault by Mr. Sims caused Ms. Schmidt’s bruising, it cannot support a finding that he caused substantial bodily harm.

The only remaining injuries are the “very small abrasions” at the corners of Ms. Schmidt’s mouth, the quarter-inch bruise inside her lip, and the quarter-inch cut on her right pinky. 9/27 RP 764–65, 771; Ex. 41 at 3. There is no evidence to suggest these injuries resulted from an intentional assault rather than an accidental fall—say, after Ms. Schmidt overdosed on cocaine and her medications. Dr. Mazrim testified Ms.

Schmidt could have sustained the mouth and lip injuries by falling forward and striking her face on an object. 9/29 RP 885–86.

And even if a reasonable person could infer these injuries resulted from an assault by Mr. Sims, they do not add up to “substantial disfigurement.” RCW 9A.04.110(4)(b). The tiny abrasions on Ms. Schmidt’s mouth, the minuscule bruise on her lip, and the superficial cut on her pinky are closer to the “cut” or “swollen lip” in *Miles* than to the extensive bruising and other injuries in *McKague*, *Hovig*, and *Ashcraft*.

The prosecution did not prove an assault by Mr. Sims caused injuries amounting to substantial bodily harm. The trial court’s finding that Ms. Schmidt’s “bruising and abrasions” satisfied this element of second-degree assault lacks substantial evidence. CP 214–15 CL 4, 215 CL 6. To the extent the trial court

included the sub-scalp bruise and neck injury in its finding that the “injuries were recent,” that finding also lacks substantial evidence. CP 215 CL 5.

The prosecution did not prove Mr. Sims recklessly inflicted any injury. Mr. Sims “act[ed] recklessly” if he “kn[e]w[] of and disregard[ed] a substantial risk that a wrongful act may occur,” such that his conduct was “a gross deviation from conduct that a reasonable person would exercise.” RCW 9A.08.010(1)(c). The prosecution had to prove Mr. Sims knew his conduct risked causing the injury. *State v. Melland*, 9 Wn. App. 2d 786, 804, 452 P.3d 562 (2019). The prosecution could meet this burden by showing a reasonable person in Mr. Sims’s place would have this knowledge. *Id.*

The mere fact that a person caused an injury does not support an inference that the person “knew of and

disregarded a substantial risk” the injury would occur.

See Melland, 9 Wn. App. 2d at 804–05.

Even if an assault by Mr. Sims caused the bruises on Ms. Schmidt’s lower extremities, that fact alone does not permit an inference he ignored a risk those injuries would result. The prosecution’s theory was that Mr. Sims lay on top of Ms. Schmidt as she lay face down. 10/18 RP 2220–21, 2224. Because Ms. Schmidt was “slender,” the floor would press her skin into “bony prominences” like her hips and knees, causing bruises. 9/27 RP 767; 9/29 844. The absence of defensive injuries refutes any inference Mr. Sims aggressively held Ms. Schmidt down. CP 204 FF 30.

The prosecution presented no evidence Mr. Sims knew of and disregarded a substantial risk that lying on top of Ms. Schmidt would cause the type of bruising that resulted. The trial court’s finding that Mr. Sims

“recklessly” caused Ms. Schmidt substantial bodily harm lacks substantial evidence. CP 215 CL 6.

This Court should grant review and rule Mr. Sims’ conviction for second degree assault was not supported by sufficient evidence and reverse the conviction with instructions to dismiss.

F. CONCLUSION

For the reasons stated, Mr. Sims asks this Court to grant review and reverse his second degree assault conviction.

Counsel certifies this petition contains approximately 4619 words using Microsoft Word word counter and complies with RAP 18.17.

DATED this 28th day of August 2023.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

tom@washapp.org

wapofficemail@washapp.org

Washington Appellate Project – 91052

Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

ERICK LADAL SIMS,

Appellant.

No. 83376-6-I

DIVISION ONE

UNPUBLISHED OPINION

BIRK, J. — Erick Sims appeals a criminal conviction after a bench trial. Sims asserts the evidence supporting his conviction for assault is not constitutionally sufficient, and his conviction for assault is inconsistent with his acquittal of rape. Finding no error, we affirm.

I

The State charged Erick Sims with rape in the second degree and murder in the second degree of Devan Schmidt. Following a bench trial, the court acquitted Sims of rape and murder, but convicted him of the lesser included offence of second degree assault. Among other arguments, Sims challenges whether the evidence was sufficient to convict him of assault.

Trial evidence showed that in the early hours of May 2, 2015, Schmidt invited Dominique Dixon and Kevin Turner to her home. Dixon and Turner asked Sims for a ride. Schmidt did not know Sims. The three arrived at approximately 3 a.m. After some time, Schmidt and Sims left. When they returned, Schmidt's hair

No. 83376-6-1/2

was wet, and she said they had jumped into Lake Washington. Dixon testified she did not see any injuries on Schmidt. At approximately 6:00 a.m., one of Schmidt's roommates observed Schmidt to be uninjured.

The guests departed shortly before 7:00 a.m. Schmidt texted Dixon at 6:53 a.m., "Woman! I couldn't get u alone but why were you trying to hook me up with your drug dealer? Lol trust me I have enough on my plate already." Schmidt tried to call her boyfriend several times between 6:54 a.m. and 6:58 a.m. At 6:59 a.m., Sims texted Schmidt, "Hello." At 7:00 a.m., Sims texted Schmidt posing a request Sims testified was for drugs but a police officer testified referred to things of a sexual nature. Schmidt texted Turner, "Your boy is here what's the best way to get rid of him?" Turner responded, "Tell him ur going to sleep have a good night," "And you have a bf and u don't wanna fuck it up," and, "Do u need us to come back." At 7:18 a.m., Turner and Dixon spoke with Schmidt on the phone. During that conversation, Schmidt said, "[I]t's okay. I'm a big girl. I can handle myself."

Sims's cell phone records show he remained near Schmidt's home from 5:05 a.m. to at least 8:14 a.m. At 8:39 a.m., Sims's phone connected to a cell tower approximately six blocks to the north of the one it connected to while at Schmidt's home. Sims consistently admitted he returned after initially departing, but provided inconsistent accounts of his actions upon returning. At trial, Sims claimed that when he initially departed he drove two or three blocks, then returned to Schmidt's house to ask her about her cocaine connection. Sims claimed he knocked on the door, waited a few minutes, tapped on the window of her room,

then returned to his truck to text and call Schmidt. Sims testified he waited in his car while he smoked a cigarette, and then got lost and drove in circles in Schmidt's neighborhood, near her home, for 15-20 minutes. The trial court found Sims's testimony that he got lost trying to leave the neighborhood was not credible.

At approximately 10:50 a.m., a roommate found Schmidt deceased. Brian Mazrim, MD estimated Schmidt's time of death at roughly 9:00 a.m., "give or take a couple hours." Based on the lividity on Schmidt's body and the stiffness of her jaw described by responding fire fighters, Schmidt had been dead for "at least half an hour, maybe an hour before the medics arrived."

Dr. Mazrim observed several injuries to Schmidt's body: a one inch diameter bruise to the left temple area which occurred within a day or two of death, two small abrasions to the face, an acute bruise on the inner aspect of the lower lip, which "would be up against her lower teeth," acute bruises over both hip bones caused by pressure strongly applied to those areas externally from a blunt object, a bruise over the pubic bone, acute bruises to both knees, acute bruises from blunt force injuries to the tops of both feet consistent with an individual prone on the floor, scrapes and bruises to the tops of the toes, a small cut on the right pinkie from within about an hour of death, and "Deep down in the neck at the top of what would be the Adam's apple or the voice box there was an area of acute hemorrhage." The last injury "can be seen when there is an external force applied to the neck. Typically a hand because . . . the fingers . . . reach in deep."

The injuries to Schmidt's face were caused by "something to the effect of a hand over the mouth and nose . . . [o]r perhaps the face pressed into the floor or some other material." The bruising to Schmidt's hips, knees, and the tops of both feet suggest they were sustained while lying face down on a hard surface. Dr. Mazrim deemed the cause of death undetermined after identifying as possible causes intoxication and asphyxia.

Swabs were collected from Schmidt's body and sent to the Washington State Patrol crime lab. Amylase, which is an enzyme usually associated with saliva, was found on swabs from Schmidt's neck, right wrist, left wrist, and vaginal area. Deoxyribonucleic acid (DNA) profiles from the neck, right fingernails, and right wrist were consistent with the combined profile from Schmidt and Sims.

When reviewing the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). Relevant here, "[a] person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.36.021(1)(a). Washington recognizes an unlawful touching as assault. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). "Whether sufficient evidence supports finding a defendant acted recklessly 'depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.'" State v. Melland, 9

No. 83376-6-I/5

Wn. App. 2d 786, 804, 452 P.3d 562 (2019) (internal quotation marks omitted) (quoting State v. Graham, 153 Wn.2d 400, 408, 103 P.3d 1238 (2005)). The trier of fact is “permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists.” State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992) (emphasis omitted).

The evidence allowed a rational trier of fact to conclude Sims was present in Schmidt’s home after others left, and that he had unlawful physical contact with Schmidt. This includes Sims’s admission that he returned, text messages from Schmidt’s phone, Sims’s cell phone records placing him in the vicinity of Schmidt’s home, and the presence of Sims’s DNA on Schmidt’s body. In addition, the last people to see Schmidt alive, other than Sims, did not observe any injuries on Schmidt.

The evidence also allowed a rational trier of fact to find Sims acted recklessly. Dr. Mazrim described the injuries to Schmidt’s face as consistent with a hand being held over her mouth and nose. Dr. Mazrim described the acute hemorrhaging in Schmidt’s neck as consistent with external force being applied to her neck. Dr. Mazrim described the constellation of bruises to Schmidt’s hips, knees, and feet as consistent with her being held to the ground with some force. A rational trier of fact could conclude that these actions will cause injury and are a gross deviation from conduct that a reasonable person would exercise in the same situation.

A rational trier of fact could find the injuries described by Dr. Mazrim constitute substantial bodily harm. Bruising can be sufficient to establish substantial bodily harm. State v. Hovig, 149 Wn. App. 1, 13, 202 P.3d 318 (2009) (substantial bodily harm found due to injury from a bite when pain would have been experienced at the time of injury, and bruising would have lasted from 7 to 14 days); State v. Ashcraft, 71 Wn. App 444, 455, 859 P.2d 60 (1993) (substantial disfigurement found when bruise marks were consistent with being hit with a shoe); State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (substantial bodily harm when assault resulted in facial bruising and swelling lasting several days with lacerations to face, back of head, and arm). Schmidt's injuries included bruises and contusions consistent with Schmidt having been held down. There was sufficient evidence of second degree assault.

II

Sims argues the court reached inconsistent conclusions by acquitting him of rape but convicting him of assault. Generally, Sims argues the court's conclusions are inconsistent because, he says, the same circumstances leading to reasonable doubt about rape logically also lead to reasonable doubt about assault. We disagree.¹

¹ We do not understand Sims to assert that there is an inconsistency between the court's acquittal of murder and conviction for assault. Such a claim could not stand. The court acquitted of murder because it found reasonable doubt existed as to whether Schmidt's injuries caused her death. This does nothing to insulate anyone from criminal liability for causing Schmidt's injuries.

Sims argues the court recognized an alternate basis for explaining certain DNA results when finding reasonable doubt as to rape, but then neglected to acknowledge the same doubt about assault. Sims's DNA was found on Schmidt's body coinciding in certain locations with amylase, an enzyme associated with saliva. The court explained, "The State asks the Court to conclude that the presence of Am[y]lase on portions of Ms. Schmidt's body where Mr. Sims' DNA was also found is evidence that the DNA was contained in Mr. Sims' saliva." But the court continued, "This is not the only reasonable inference from this evidence. The uncontroverted testimony presented at trial, from several experts, was that Am[y]lase is an enzyme found in the human digestive system, including in saliva." There was evidence that Schmidt had vomited, which could explain the presence of amylase. Likewise, the court noted, "if Ms. Schmidt and Mr. Sims shared cocaine [by taking 'bumps' off each others' hands], especially once he returned to her house, this would provide an alternate explanation for Am[y]lase on her hands and wrist." But the court went no further than to say the evidence was inconclusive about whether Sims's saliva was the source of the amylase found on Schmidt's body, which tended to undermine the State's theory of rape. Contrary to Sims's implication, doubt about whether Sims's saliva was the source of these particular DNA findings does not mandate a finding of reasonable doubt that Sims could have assaulted Schmidt.

Sims argues the court found the absence of certain injuries supportive of reasonable doubt about rape, and he says this compels a like conclusion about

assault. This discussion begins with DNA results that, unlike those discussed above, were not inconclusive. Sims's DNA was "under Ms. Schmidt's fingernails and on her wrist," as well as "on Ms. Schmidt's neck." The court did not view these findings as proving assault by themselves, but found they were "consistent" with Sims holding Schmidt down, restraining her by the neck, and Schmidt fighting defensively. The court further relied on Dr. Mazrim's testimony that established "Ms. Schmidt's injuries were consistent with the perpetrator holding Ms. Schmidt face-down on the floor with enough strongly applied force to cause bruising along the surfaces of her body that contacted the floor." But the court doubted that Sims inflicted these injuries while committing a sexual assault, stating that if he had done so he may have inflicted greater injury to other parts of Schmidt's body: "Ms. Schmidt had no discernible injuries to the back side of her body. If a perpetrator was holding her down while thrusting or attempting to thrust into her, one might expect to see abrasions or other injuries to her back, buttocks or legs. Again, while the absence of this evidence is not dispositive, it is relevant."

There is no inconsistency. The court viewed the evidence as indicating Sims forcibly restrained Schmidt against the floor. That there were potentially innocent explanations of Sims's DNA being found on Schmidt's neck and wrist does not mandate doubt that he forcibly restrained her. The court did not point to any DNA findings as conclusive, but described them only as "consistent" with an assault evidenced independently by other circumstances. The DNA findings were probative, because they did not rule out an assault causing injuries like those that

were found, and because they could reasonably be caused by such an assault. Similarly, the court's view that Sims might have caused additional trauma if he had inflicted Schmidt's injuries during a sexual assault is not inconsistent with a conclusion he caused those injuries independent of a sexual assault. And, as described above, there was sufficient evidence supporting the conclusion that Sims caused Schmidt's injuries.

Because the court's conclusions are not inconsistent, it is not necessary to analyze the level of scrutiny Washington would apply to inconsistent conclusions following a bench trial in a criminal case.

Affirmed.

Birk, J.

WE CONCUR:

Seldon, J.

Mann, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 83376-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Ian Ith, DPA
[ian.ith@kingcounty.gov]
[PAOAppellateUnitMail@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

Date: August 28, 2023

WASHINGTON APPELLATE PROJECT

August 28, 2023 - 4:28 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 83376-6
Appellate Court Case Title: State of Washington, Respondent v. Erick Ladale Sims, Appellant

The following documents have been uploaded:

- 833766_Petition_for_Review_20230828162756D1838779_6999.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.082823-09.pdf

A copy of the uploaded files will be sent to:

- chris@washapp.org
- ian.ith@kingcounty.gov
- paoappellateunitmail@kingcounty.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Thomas Michael Kummerow - Email: kummerowtm@gmail.com (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230828162756D1838779