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No. 70324-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS TANZY,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Curtis Tanzy punched Steven Carter outside of Belltown Pizza one night. Mr. Carter fell to the ground and Mr. Tanzy walked away. After Mr. Tanzy left the scene, Justin Rosas approached Mr. Carter, who was still lying on the sidewalk. Mr. Rosas attempted to kick Mr. Carter in the head, but missed and fell to the ground himself. As Mr. Rosas got up, he slammed the edge of his skateboard across Mr. Carter's eyes, fracturing several of the bones in Mr. Carter's face. Although Mr. Tanzy committed fourth degree assault when he punched Mr. Carter in the head, his due process rights were violated when the trial court entered a conviction of second degree assault after the State failed to prove he acted as an accomplice with Mr. Rosas or that Mr. Carter suffered substantial bodily injury from the punch alone.

B. ASSIGNMENT OF ERROR

When the court entered a conviction of second degree assault in the absence of sufficient evidence to prove each element of the offense beyond a reasonable doubt, it deprived Mr. Tanzy of his Fourteenth Amendment right to due process.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. To convict Mr. Tanzy of second degree assault the State had to prove he inflicted substantial bodily injury on Mr. Carter by acting as either a principal or an accomplice. Where the State's evidence did not establish Mr. Tanzy inflicted substantial bodily injury as a principal, or that he acted as an accomplice to the subsequent assault, is there sufficient evidence to support Mr. Tanzy's conviction for second degree assault?

D. STATEMENT OF THE CASE

Steven Carter was a student living in Belltown when he became a regular at a bar called the Empire Lounge. 3/28/13 RP 29-31. He frequented the bar often enough that he became friends with one of the bartenders, Tessa Engler, as well as one of the other regular patrons, Chris Lussek. 3/28/13 RP 32, 33. One night, after Ms. Engler closed the Empire Lounge for the evening, the three decided to walk over to Belltown Pizza for additional drinks and pizza. 3/28/13 RP 33. Mr. Carter drank two pitchers of beer at the Empire Lounge and then a

couple of scotch and cokes at Belltown Pizza, which was common for him during a night out. 3/28/13 RP 35, 37.

At Belltown Pizza, Mr. Lussek expressed interest in a woman seated at a nearby table. 3/28/13 RP 38. Mr. Carter encouraged Mr. Lussek to talk to her and, when Mr. Lussek declined, Mr. Carter sent a drink over on Mr. Lussek's behalf and later approached the woman to introduce himself and Mr. Lussek. Id. Curtis Tanzy was also at Belltown Pizza that night, and at trial the State speculated the woman was there with a group of people that included Mr. Tanzy. 4/1/13 RP 50. The woman accepted the beer Mr. Carter sent over and no harsh words were exchanged between the two groups. 4/1/13 RP 51.

The remainder of the relevant activity that night was captured by Belltown Pizza's security cameras. Ex. 1. About 30 minutes after arriving at the restaurant, Ms. Engler decided to step outside with other patrons to smoke a cigarette, and Mr. Carter joined them. 3/28/13 RP 39, 91; Ex. 1, Track 4 at 00:02-00:22; Ex. 1, Track 5 at 00:29-00:35. Mr. Tanzy followed behind. Ex. 1, Track 4 at 00:16-00:24; Ex. 1, Track 5 at 00:34-00:40. Once outside, the video shows Mr. Tanzy sharing a cigarette with another man, Justin Rosas, who is balancing on a skateboard, while Mr. Carter stands nearby with Ms. Engler and the

other smokers. Ex. 1, Track 6 at 00:39-00:50. Mr. Tanzy and Mr. Rosas may exchange words, but there is no sound to the video and an umbrella blocks most of their interaction. Ex. 1, Track 6 at 00:49-01:00. Mr. Tanzy then moves behind Mr. Carter. Ex. 1, Track 6 at 00:59-01:04. Suddenly, without warning or provocation, Mr. Tanzy punches Mr. Carter from behind, striking the right side of Mr. Carter's head. Ex. 1, Track 6 at 01:12.

Mr. Carter falls forward, bumping into Ms. Engler and landing face down on the concrete sidewalk, where he immediately flips himself over and puts his hand to his face. Ex. 1, Track 6 at 01:12-01:17. He lies there, at one point reaching out for Ms. Engler. Ex. 1, Track 6 at 01:23. Although in the supine position, his legs are bent and his feet are planted on the ground. Ex. 1, Track 6 at 01:17-01:26. Ms. Engler shows brief concern, but turns around to accept a cigarette from a fellow smoker, turning her back to Mr. Carter. Ex. 1, Track 6 at 01:21-01:29. At the same time, Mr. Tanzy walks down the street, eventually disappearing from the camera's view. Ex. 1, Track 01:15-01:48.

As Mr. Tanzy leaves the scene, Mr. Rosas moves to the curb, next to Mr. Carter's head. Ex. 1, Track 6 at 01:14-01:19. He waits

until Ms. Engler's attention returns to smoking and swiftly lodges a kick at Mr. Carter's head. Ex. 1, Track 6 at 01:25-01:27. However, he misses badly and lands almost theatrically on the ground. Ex. 1, Track 6 at 01:27-01:30. Having squandered his opportunity to kick Mr. Carter in the head, Mr. Rosas lashes out as he stands up, slamming the side of his skateboard down on Mr. Carter's face. Ex. 1, Track 6 at 01:33-01:36. Immediately after the blow, Mr. Carter is still. Ex. 1, Track 6 at 01:37-01:52. His arms lay at his sides and his legs lay flat. Id. Ms. Engler eventually kneels beside him and Mr. Carter's legs begin to move again. Ex. 1, Track 6 at 01:47-01:55.

At trial, Mr. Carter testified he remembered nothing between stepping outside the door of the restaurant and waking up on the sidewalk, including the time he spent chatting with the smokers prior to the first blow to his head. 3/28/13 RP 40. When he woke up, his face was numb. 3/28/13 RP 42. Mr. Carter suffered a central midface fracture, meaning that all the bones between the eye sockets were broken, including his nose, and it took five days before he could open his left eye. 3/28/13 RP 43; 4/1/13 RP 8. Craig Birgfeld, M.D., a craniofacial plastic surgeon, testified Mr. Carter's injuries were consistent with a single blow to the face. 4/1/13 RP 13. Testing at the

hospital also revealed Mr. Carter's blood alcohol level was 0.187.

4/1/13 RP 16.

The State charged Mr. Tanzy with second degree assault. CP 9; RCW 9A.36.021(1)(a). It alleged he inflicted substantial bodily harm in one of two ways. First, by knocking Mr. Carter unconscious with the first blow and thereby causing a temporary but substantial loss or impairment to the functioning of Mr. Carter's brain, or second, by acting as an accomplice to Mr. Rosas, who struck Mr. Carter in the face with the edge of his skateboard resulting in the central midface fracture. 4/2/13 RP 95-96. Mr. Tanzy conceded he assaulted Mr. Carter, but argued the evidence supported a conviction for fourth degree assault only. 4/2/13 RP 121.

The jury convicted Mr. Tanzy of second degree assault, and found Mr. Carter's injuries substantially exceeded the level of bodily harm necessary to constitute substantial bodily harm. CP 167, 169. The trial court denied the State's request for an exceptional sentence and imposed 66 months in prison. 5/8/13 RP 177-78; CP 176.

Mr. Tanzy appeals.

E. ARGUMENT

The State did not prove Mr. Tanzy committed second degree assault beyond a reasonable doubt.

- a. Due Process requires the State to prove each element of second degree assault beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. 14; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

In order to convict Mr. Tanzy of second degree assault the State was required to prove he intentionally assaulted Mr. Carter and recklessly inflicted "substantial bodily harm." RCW 9A.36.021(1)(a); CP 9. When the sufficiency of the evidence is challenged, the Court must determine whether, after viewing the evidence most favorable to the State, any rational trier of fact could have found the element beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d

1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

- b. The State did not prove beyond a reasonable doubt that Mr. Tanzy acted as an accomplice to Mr. Rosas.

At trial, the State alleged Mr. Tanzy committed second degree assault both as a principal and as an accomplice. Under a theory of accomplice liability, the State argued the jury should convict Mr. Tanzy as an accomplice to Mr. Rosas, who slammed his skateboard into Mr. Carter's face, causing a central midface fracture. 4/1/13 RP 8; 4/2/13 RP 96.

The language of the accomplice statute requires "that the putative accomplice must have acted with knowledge that his or her conduct would facilitate *the* crime for which he or she is eventually charged." State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000) (emphasis original). "The legislature... intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000). While the accomplice need not have knowledge of

every element of the crime charged, he must have general knowledge of that specific crime. Id. at 512.

In order to convict Mr. Tanzy of second degree assault as an accomplice, the State needed to prove beyond a reasonable doubt that Mr. Tanzy had knowledge Mr. Rosas was going to commit an assault against Mr. Carter, and that he promoted or facilitated the crime in some way. CP 155.

There was limited evidence that Mr. Tanzy and Mr. Rosas were acquainted with one another. Ms. Engler testified she recalled Mr. Tanzy and Mr. Rosas together in the restaurant. 3/28/13 RP 125-26. A street musician, Glen Freeman, testified he saw Mr. Tanzy and Mr. Rosas interact briefly outside the restaurant not long before Mr. Tanzy followed Mr. Carter outside. 3/28/13 RP 156. The video shows Mr. Tanzy accept a cigarette from Mr. Rosas, and possibly exchange words with him, before punching Mr. Carter. Ex. 1, Track 6 at 00:39-01:00. However, there is no evidence about what the two said, and no evidence that Mr. Tanzy had any knowledge Mr. Rosas would later assault Mr. Carter with his skateboard.

Instead, the evidence showed two separate assaults. First, Mr. Tanzy struck Mr. Carter in the head and walked away from the scene.

Ex. 1, Track 01:12-01:48. Mr. Rosas did not attempt to kick Mr. Carter until approximately 12 seconds later. Ex. 1, Track 6 at 01:12-01:25. By the time he lodged the kick, Mr. Tanzy had left the scene, walked down the street, and was almost entirely out of view of the security camera. Ex. 1, Track 6 at 01:26. Mr. Rosas walked over to Mr. Carter only after he was on the ground and vulnerable. Ex. 1, Track 6 at 01:14-01:19. There was no evidence of an exchange between Mr. Tanzy and Mr. Rosas in between the two assaults or after Mr. Rosas attacked Mr. Carter, again because Mr. Tanzy left the scene almost immediately after punching Mr. Carter. Ex. 1, Track 6 at 01:11-0:1:17.

No rational trier of fact could have found, beyond a reasonable doubt, that Mr. Tanzy had promoted or facilitated Mr. Rosas' attack of Mr. Carter, or that he had any knowledge Mr. Rosas was going to assault Mr. Carter with his skateboard. See Green, 94 Wn.2d at 221-22. Because knowledge of the crime is required for a conviction under a theory of accomplice liability, the State failed to prove Mr. Tanzy committed second degree assault as an accomplice to Mr. Rosas. See Cronin, 142 Wn.2d at 579; Roberts, 142 Wn.2d at 512.

- c. The State did not prove beyond a reasonable doubt that Mr. Tanzy inflicted substantial bodily injury by punching Mr. Carter in the head.

There was also insufficient evidence for the jury to find Mr. Tanzy committed assault in the second degree as the principal actor. Under RCW 9A.36.021(1)(a), an individual commits second degree assault when he “intentionally assaults another and thereby recklessly inflicts substantial bodily harm.” Here, the jury was properly instructed that substantial bodily harm is defined as:

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

CP 153; RCW 9A.04.110(4)(b).

The State argued that when Mr. Tanzy punched Mr. Carter, he inflicted substantial bodily harm because Mr. Carter briefly lost consciousness as he fell, thereby causing temporary impairment of his brain functioning. 4/2/13 RP 95. The only evidence the State relied on for this alleged loss of consciousness came from two witnesses: Ms. Engler and Mr. Freeman.

Ms. Engler testified that when Mr. Tanzy punched Mr. Carter, he fell on his back, striking his head on the curb of the sidewalk, and

“laid out completely” with his arms and legs open and his eyes rolled back in his head. 3/28/13 RP 107. However, when confronted with the video, she admitted it contradicted her memory. 3/28/13 RP 129-132. She agreed the video showed Mr. Carter actually fell forward, turned himself over, and laid on the ground with his arms by his head and his legs bent before Mr. Rosas struck him with the skateboard. Id.

Mr. Freeman testified that Mr. Carter fell a “dead man’s fall,” toppling over without bracing himself for the impact. 3/28/13 RP 162. However, unlike Ms. Engler, he recalled Mr. Carter was conscious after the fall, stating that Mr. Carter asked what had happened before being hit with the skateboard. 3/28/13 RP 165.

Adeyinka Adedipe, M.D., the emergency room physician who treated Mr. Carter the night of the assault, testified there was no way to determine whether Mr. Carter had lost consciousness or suffered a concussion at any point that evening. 4/1/13 RP 86. She testified that while there were certain findings in a CAT scan a doctor could look for to suggest the individual had suffered a concussion, none of these findings were present in Mr. Carter’s results. 4/1/13 RP 87-88.

A lay witness’s assessment that Mr. Carter failed to brace himself for impact is not sufficient to find, beyond a reasonable doubt,

that Mr. Carter momentarily lost consciousness while falling after Mr. Tanzy punched him. Mr. Carter had been drinking heavily that night and had a blood alcohol level of 0.187 when he was treated at the hospital, a condition consistent with a slowed reaction time. 3/28/13 RP 35, 37; 4/1/13 RP 16. The evidence did not show that after the punch, but before the assault with the skateboard, Mr. Carter showed any signs of having suffered a temporary but substantial impairment of his brain's function. Cf. State v. McKague, 172 Wn.2d 802, 806, 262 P.3d 1225 (2011) (evidence of concussion and resulting dizziness was sufficient to allow the jury to find the victim had suffered substantial bodily injury). The State therefore failed to prove Mr. Tanzy committed second degree assault by punching Mr. Carter in the head.

d. Mr. Tanzy's conviction for second degree assault must be dismissed.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. Green, 94 Wn.2d at 221; State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) ("[t]he double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second

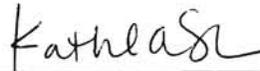
prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence”) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)). Because the State failed to prove, beyond a reasonable doubt, that Mr. Tanzy committed second degree assault, his conviction must be reversed.

F. CONCLUSION

For the reasons stated above, Mr. Tanzy respectfully asks this Court to remand for dismissal of the second degree assault conviction.

DATED this 26th day of March, 2014.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 70324-2-I
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CURTIS TANZY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MARCH, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> CURTIS TANZY 796362 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF MARCH, 2014.

X _____ 

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