

March 21, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MILLISSA Y. KELLOGG-BEAUPRE,

Appellant.

No. 48822-1-II

UNPUBLISHED OPINION

LEE, J. – A jury found Millissa Y. Kellogg-Beaupre guilty of second degree assault. She appeals, contending sufficient evidence does not exist to support her conviction because the State failed to show that Kellogg-Beaupre recklessly inflicted substantial bodily harm. We affirm.

**FACTS**

Amber McCall went to a tavern to celebrate her birthday with some of her co-workers. Among the co-workers were Megan Shane, Zachary Peterson, Kellogg-Beaupre, and Kellogg-Beaupre’s boyfriend, Chris Burke. McCall drank “more than [she] should have” and does not remember the exact events of the evening, but she remembers Kellogg-Beaupre yelling at her while McCall was on the ground. 1 Report of Proceedings (RP) at 99. The next morning, McCall woke up in significant pain and spitting up blood. McCall had a “boot-print” on one side of her head. 1

RP at 108. McCall's boyfriend, James McKenzie, and McCall's brother told her that she "had gotten beaten up." 1 RP at 100. McCall's brother took her to the hospital.

McCall suffered a compound fracture on the left side of her jaw and a fracture on the right side. Dr. Sukhdeep Dhaliwal, an oral and maxillofacial surgeon, treated McCall's injuries. Dr. Dhaliwal repaired the two fractures by exposing them surgically and then placing plates into the area to hold the fractures together. Dr. Dhaliwal noted, "Usually these injuries are a result of an assault." 2 RP at 198. He opined that McCall's injuries were "not caused by a fall" because there were no "abrasions or . . . contusions to the skin or cuts." 2 RP at 194.

McCall called the police. Kitsap County Sheriff's Deputy Amy Rogers contacted McCall, McKenzie, Peterson and Shane. Deputy Rogers also reviewed text messages from Kellogg-Beaupre to McCall stating that she was sorry for hurting McCall.<sup>1</sup> Based on Deputy Rogers' report, the State charged Kellogg-Beaupre with second degree assault with a special allegation of particularly vulnerable victim based on McCall's intoxication.

During trial, Shane testified that on the night of the incident the co-workers met at Peterson's apartment and then walked to a nearby tavern. McCall became inebriated at the tavern and was discussing her past relationship with Kellogg-Beaupre's boyfriend, Burke. As the night wore on, Kellogg-Beaupre began to get increasingly bothered by the remarks. At one point, Shane and McCall went outside to smoke and ran into Burke. McCall hugged Burke just as Kellogg-

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<sup>1</sup> These text messages were later admitted at trial, but they were not included in our record. Kellogg-Beaupre testified that one of her text messages stated that she would "take care" of McCall and that McCall replied back that Kellogg-Beaupre "broke [her] jaw on both sides." 2 RP at 265.

Beaupre was walking outside. No words were exchanged between McCall and Kellogg-Beaupre at that point.

Shane decided to take McCall home. Shane and Peterson each took one of McCall's arms and walked down an alleyway toward Shane's vehicle. Peterson twisted his ankle and fell down. Shane grabbed McCall's arm to ease her fall, but McCall still fell to the ground. Shane testified that McCall then sat up and did not complain about any pain. Shane did not see any blood on McCall's face.

Shane testified that while McCall was still on the ground, Kellogg-Beaupre approached and began calling McCall names. Kellogg-Beaupre then started kicking McCall in "[h]er face, her head." 1 RP at 163. Shane tried to pull Kellogg-Beaupre off but could not. Eventually, Burke arrived and pulled Kellogg-Beaupre off McCall. McCall had "blood . . . coming out of her mouth." 1 RP at 165. McKenzie arrived and took McCall home.

Kellogg-Beaupre also testified at trial. She testified that she punched McCall in the nose and then left to go home. Kellogg-Beaupre claims she never made contact with McCall's jaw.

Peterson testified at trial for the defense. He testified that he was a close friend of Kellogg-Beaupre. On the night of the altercation, Peterson was helping Shane walk McCall to Shane's vehicle when he twisted his ankle, causing him and McCall to fall "on the pavement" and then McCall "rolled into the dirt." 2 RP at 211-12. When Peterson asked if McCall was okay, she responded that her "face hurts." 2 RP 212. Peterson then testified he observed Kellogg-Beaupre throw "[o]ne punch." 2 RP at 214.

Burke also testified for the defense. He testified that Kellogg-Beaupre saw McCall fall on her face and heard her say, "Ow, my face." 2 RP at 238. He also said that he only saw one punch.

The jury found Kellogg-Beaupre guilty as charged. Kellogg-Beaupre appeals.

#### ANALYSIS

Kellogg-Beaupre argues that there was insufficient evidence to convict her of second degree assault. We disagree.

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in a light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When reviewing the sufficiency of the State's evidence, we consider circumstantial evidence and direct evidence as equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of conflicting witness testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

To convict Kellogg-Beaupre of second degree assault as charged, the State had to prove beyond a reasonable doubt that she intentionally assaulted McCall and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). "Substantial bodily harm means bodily injury . . . which causes a fracture of any bodily part." RCW 9A.04.110(4)(b). Kellogg-Beaupre argues the State failed to prove that her actions broke McCall's jaw.

Here, the evidence in the record shows McCall woke up in significant pain and spitting up blood. She had a "boot-print" on one side of her head. McCall suffered a compound fracture on the left side of her jaw and a fracture on the right side. Dr. Dhaliwal testified that usually these

fractures are a result of an assault. And he opined that McCall's injuries were "not caused by a fall" because there were no "abrasions or . . . contusions to the skin or cuts." 2 RP at 194.

Shane testified that she and Peterson were walking McCall to Shane's car. On the way, Peterson twisted his ankle and fell down, but Shane grabbed McCall's arm to ease her fall to the ground. Shane also testified that McCall then sat up and did not complain about any pain. Shane did not see any blood on McCall's face.

Shane further testified that while McCall was still on the ground, Kellogg-Beaupre approached and began calling McCall names. Kellogg-Beaupre then started kicking McCall in "[h]er face, her head." 1 RP at 163. Shane tried to pull Kellogg-Beaupre off but could not. Eventually, Burke arrived and pulled Kellogg-Beaupre off McCall. McCall had "blood . . . coming out of her mouth." 1 RP at 165.

Viewing these facts in the light most favorable to the State, a rational trier of fact could conclude beyond a reasonable doubt that McCall's injuries were caused by Kellogg-Beaupre's actions and not the fall to the ground. While Kellogg-Beaupre, her close friend Peterson, and her boyfriend Burke testified that Kellogg-Beaupre only punched McCall once and Kellogg-Beaupre testified it was a punch to the nose and not the jaw, we defer to the trier of fact on issues of conflicting witness testimony. *Thomas*, 150 Wn.2d at 874.

Kellogg-Beaupre argues the jury was required to solely rely on speculation or conjecture to find she caused McCall's injuries and not the fall. We disagree.

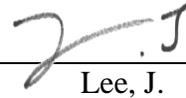
Evidence based upon speculation and conjecture does not amount to substantial evidence. *State v. Mriglot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977). Here, the jury did not have to speculate that the injuries may have been caused by Kellogg-Beaupre because there was evidence of a boot print on the side of McCall's face, eye-witness testimony that Kellogg-Beaupre repeatedly kicked McCall in the head and face, and opinion testimony from McCall's surgeon that McCall's injuries were not caused by a fall to the ground. The jury weighed the evidence, and when there is conflicting testimony, we defer to the jury. "The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered." *State v. McDaniel*, 155 Wn. App. 829, 878, 230 P.3d 245 (quoting *State v. O'Connell*, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)), *review denied*, 169 Wn.2d 2010 (2010).

In viewing the evidence in the light most favorable to the State, there was sufficient circumstantial and direct evidence to conclude beyond a reasonable doubt that Kellogg-Beaupre intentionally assaulted McCall and caused substantial bodily harm to McCall by breaking her jaw. Thus, we hold that there was sufficient evidence to convict Kellogg-Beaupre of second degree assault.

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



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Lee, J.

We concur:



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Bjorgen, C.J.



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Melnick, J.