

NO. 67957-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KERSAN PASCAL,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY

BRIEF OF RESPONDENT

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prong. CP 12. The court imposed a standard range sentence of 15 to 36 weeks at JRA. CP 22. This appeal follows.

2. SUBSTANTIVE FACTS

On May 26, 2011, Metro King County bus driver Melody Brutscher was driving her bus southbound on Third Avenue towards Seneca Street in downtown Seattle. 1 RP 34. As she approached the intersection, she saw victim Betty Damien standing on the curb with her back to the street and appellant Kersan Pascal facing Damien. 1 RP 40. Brutscher observed the two parties to be having an acrimonious discussion. 1 RP 35. As Brutscher drove closer, she saw Pascal use both hands to shove the victim in the chest, sending the victim reeling backwards off the curb and in front of Brutscher's bus, where she was struck. 1 RP 41. The victim hit the windshield of the bus with such impact that it cracked. 1RP 41. The victim then fell on the curb. 1 RP 42. The bus, Brutscher explained, weighs about 22 tons. 1 RP 65.

Brutscher immediately stopped the bus, hit the emergency alarm button, and exited the bus so that she could follow and photograph Pascal, who was now casually walking away. 1 RP 42-43. As Brutscher attempted to take photos of Pascal with

a camera, she yelled, "Why did you try to kill that woman?"

1 RP 45. Pascal slapped the camera from her hand and told her, "I didn't do nothing, bitch." 1 RP 47.

Lonnie Smith was at the corner of Spring Street and Third Avenue when he observed Pascal push the victim in front of the bus. 1 RP 69. Smith saw the victim hit the bus's bike rack at midwaist, her body spin around and re-catch the passenger front side of the bus, and then fall to the ground with her head hitting the curb. 1 RP 71, 74. The victim did not get up. 1 RP 75, 112. After seeing Pascal push the victim, passerby Elizabeth Skoczen also saw the victim hit the front corner of the bus and "bounce off of it" before landing on the curb. 1 RP 128, 130-31. Skoczen immediately went to the victim and attempted to assess her condition and to comfort her until aid arrived. 1 RP 131. Ms. Skoczen said the victim was conscious, but was only able to say her first name. 1 RP 132. The victim never made a move to get up. 1 RP 137. Passerby Tina Thomas, who was a passenger on the bus, saw the victim lying on the ground with an expression of pain on her face. 1 RP 100.

Across the street, three co-workers, Shawn Roller, Marge Evans and Jeff Williamson, were standing outside their building on

Third Avenue and Seneca Street when the assault occurred.

1 RP 79, 105-05; 2 RP 72. All three heard Pascal and the victim arguing. 1 RP 82, 107-08; 2 RP 74. Roller saw Pascal grab the victim and push her into the bus, where she was “pretty much hit flat by the bus” in her upper body. 1 RP 82-83. He saw that her upper body was pushed forward and then possibly struck a second time before she landed on the curb. 1 RP 83. Roller followed Pascal as he tried to leave the scene, and heard Pascal ask his friends, “Did you see that bitch fly?” 1 RP 85. Roller followed Pascal as he walked south, got on a bus, then got off where police arrested him. 1 RP 86.

Marge Evans also observed the initial verbal argument, with the victim getting “up in [Pascal’s] face” and Pascal “smirking” at the victim. 2 RP 78-79. Jeffery Williamson observed Pascal and victim initially laughing and then yelling and swearing at each other. 1 RP 107-08. Williamson saw the victim attempt to swing at Pascal several times, missing each time, and then saw Pascal give the victim “a good push” into the street. 1 RP 108-10. The bus hit the victim, who was “launched up into the air” and then hit again, after which she landed on the ground face-down. 1 RP 111.

When Emergency Medical Technician Greg Edwards arrived, the victim complained to him of severe head pain and pain in her leg and left side. 2 RP 10-11; 1 RP 181. The victim was brought to Harborview Medical Center where she was examined by emergency room physician, Dr. Jeremy Branzetti. 1 RP 142. The victim was crying and it was difficult to get answers from her, but she repeated to Dr. Branzetti that she was suffering pain in her right chest, left hip and head.² 1 RP 143-44. Her blood alcohol level was .359. 1 RP 145. Dr. Branzetti administered CAT scans of her head and diagnosed a subdural hematoma, which is a form of bleeding in the brain. 1 RP 145-46. Per Dr. Branzetti, this bleeding typically occurs when the brain is torn and bleeding beneath the bone, and is very uncommon to have without trauma. 1 RP 146-47. In his words, “[T]he simplest terms I could put it into is if you’re walking and bang [y]our head into a cabinet counter or something along those lines, you’re highly unlikely to have this occur . . . it needs to be some degree of force.” 1 RP 149. He described a subdural hematoma as a “traumatic brain injury.” 1 RP 182. It

² This is contrary to appellant’s assertion that the victim was not in pain at the hospital. Appellant’s Opening Brief 4. She in fact told Dr. Branzetti that she felt pain in several areas of her body.

could also be likened to “a bruise on the brain.” 1 RP 155. In terms of the effect on brain functioning, Dr. Branzetti testified:

The constant to brain function is a hard thing to quantify acutely, and so in the ER other than gross behavioral changes or neurologic – an arm being numb or a leg not working, something along those lines, it’s hard to know – to be able to state anything about long-term or brain function in that way. But can somebody have an injury that would not necessarily present immediately with a lot of outward effects, would that be compatible with this? Absolutely. And there are certainly times where those can get much worse.

1 RP 180. Dr. Branzetti testified that the Glasgow Coma Score is one indication of a brain’s level of functioning, although “by no means an absolutist predictor.” 1 RP 158-59. Dr. Branzetti testified that if he had given the victim a Glasgow Coma Score, he would have given her a 14 out of 15 because she was at times unable to answer questions or gave answers that were confused. 1 RP 163. He also noted that she was unable to provide a significant amount of history, so they had to investigate/interview her more aggressively. 1 RP 145. A resident at the hospital who later examined the victim gave her a Glasgow Coma Score of 15. 1 RP 171.

The victim was admitted to the hospital and stayed the night for observation. 1 RP 153-54. The next day, doctors at her

neurological examination noted that she was drowsy, something Dr. Branzetti explained would be noted "for the purpose of saying this is not necessarily normal." 1 RP 173. Dr. Fink, a radiologist, examined the victim's two CAT scans, one taken in the ER, and the followup scan obtained approximately six hours later. 2 RP 41. He indicated that after suffering a traumatic brain injury, including a subdural hematoma, a patient can suffer from headaches. 2 RP 40. He also deemed subdural hematomas "substantial because the treatment for this injury includes monitoring the patient in the Intensive Care Unit which is a high level of medical care." 2 RP 43. He further noted that he considered it substantial because of the potential for damage to the brain, which include death or brain damage. 2 RP 37, 43. Dr. Fink described the victim's hematoma after reading each scan as three-four cm long each. 2 RP 45. Like Dr. Branzetti, he likened the hematoma to an internal type of bruise:

Just like when you get a bruise on your arm, when you have bleeding in the brain, the blood clot goes through a series of changes so the bruise might start out purple and turn green or yellow as the blood products break down and are reabsorbed. In the head on the CAT scan, the blood products become progressively grey and then dark and look more black. So this hematoma was white which suggested or which tells me that it is acute.

2 RP 42. Per Dr. Fink, subdural hematomas take weeks to months to reabsorb. 2 RP 44. After six hours, the victim's hematoma was the same size. 2 RP 44.

The victim herself did not remember the incident itself at all, only waking up at some point in the hospital. 2 RP 60. She testified that she did not remember feeling pain because of "the alcohol and whatever the IV pain medicine they give you." 2 RP 61. She did not followup with additional neurosurgery visits or CAT scans. 2 RP 61. She suffered headaches every two weeks starting one month after the incident, and leg numbness. 2 RP 62. She confirmed that she did not start feeling this pain until after the assault. Id.

C. ARGUMENT

1. SUFFICIENT EVIDENCE IN THE RECORD SUPPORTS PASCAL'S CONVICTION FOR ASSAULT IN THE SECOND DEGREE

Pascal argues that there is insufficient evidence in the record to sustain his conviction for assault in the second degree under the substantial injury prong. Specifically, Pascal claims that the evidence was insufficient for any rational factfinder to find that the victim suffered a temporary but substantial loss or impairment of

the function of any bodily part or organ. Appellant's Opening Brief, at 7. Accordingly, he asserts that his assault conviction must be reversed and remanded with an order to enter a judgment and sentence for assault in the fourth degree. Appellant's Opening Brief, at 10. This claim should be rejected. The trial court's finding of guilt is supported by substantial evidence, and this Court should affirm the conviction.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational factfinder could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 929 P.2d 1068 (1992).

Furthermore, an appellate court considering a sufficiency challenge must defer to the trier of fact's determination as to the weight and credibility of the evidence, and to the trier of fact's

resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. In addition, circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence supporting a verdict. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Furthermore, in determining whether sufficient evidence was presented, reviewing courts need not be convinced of Pascal's guilt beyond a reasonable doubt, but only that a reasonable trier of fact could so find. State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002). In sum, under these deferential standards, any question as to the meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

As found by the trial court in this case, a person commits assault in the second degree by intentionally assaulting another and thereby recklessly inflicting substantial bodily harm. RCW 9A.36.021(1)(a). "Substantial bodily harm" means "bodily injury which involves a temporary but substantial disfigurement, or which causes 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).

The courts have established that a bruise can constitute substantial but temporary disfigurement for the purposes of this definition under the assault statute. State v. Hovig, 149 Wn. App. 1, 13, 202 P.3d 318, 324 (2009); State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60, 66 (1993). In Ashcraft, the court held that the State had produced sufficient evidence to support the defendant's conviction for assault in the second degree when it showed that the defendant had left bruise marks on a child after hitting her with a shoe. Ashcraft, 71 Wn. App. at 13. In Hovig, the court held that there was sufficient evidence of substantial disfigurement constituting assault in the second degree when it showed photographs of a bite-mark bruise on a child's cheek taken hours after the defendant bit the four-month-old child, and medical testimony that the bruise would have lasted from seven to 14 days. Hovig, 149 Wn. App. at 13.

The courts have further defined the word "substantial" in the context of "substantial bodily harm" in State v. McKague. 172 Wn.2d 802, 262 P.3d 122 (2011). In McKague, the defendant punched the victim in the head and pushed him to the ground, causing the victim's head to strike the pavement. McKague, 172 Wn.2d at 803. The victim was dizzy and unable to stand for a time.

Id. When police arrived, they noted the victim's face was extremely puffy and that he seemed "out of sorts . . . distracted and stunned."

Id. The victim reported a headache and severe neck and shoulder pain which lasted for more than a week, and residual lesser pain for another two months. Id. Doctors diagnosed him with a concussion with no loss of consciousness. Id. The court held that:

[T]he term "substantial," as used in RCW 9A.36.021(1)(a), signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence. While we do not limit the meaning of "substantial" to any particular dictionary definition, we approve of the definition cited by the dissent below: "considerable in amount, value, or worth." Webster's, supra, at 2280.

Id. at 806. The court further found that the State had produced sufficient evidence to prove assault in the second degree under both the prong of substantial temporary disfigurement and substantial temporary loss or impairment of a body part or an organ's function. Id. at 806-07. In doing so, it held that the victim's facial bruising lasting several days, and lacerations to his face, head and arm were enough to allow the jury to find the required level of disfigurement. Id. It also found that the victim's concussion, causing dizziness for a time, was sufficient by itself to support a finding of the necessary level of impairment. Id. at 807.

There is ample evidence in the record for a rational factfinder to find that when the victim was hit by the bus, she suffered a traumatic brain injury that caused a substantial but temporary loss or impairment of a bodily function or organ. Here, the victim suffered a traumatic brain injury after the defendant pushed her in front of a 22-ton bus, causing her to “bounce” off of it twice with enough force to crack the windshield. 1RP 41, 65, 130. One witness described her as “pretty much hit flat by the bus” and possibly struck a second time. 1 RP 82-83. Another described seeing her hit the bus midwaist, spin around, re-catch the front side of the bus, and then fall headfirst on the ground. 1 RP 74. By another witness account, the victim was then “launched” into the air and landed face first on the curb, an extreme impact that arguably parallels or exceeds the repeated punching and kicking of the victim in McKague. 1 RP 111. Also, like the victim in McKague, Damien was unable to stand after being hit and thrown by the bus, with three witnesses confirming she never made any move to get up out of the street. 1 RP 75, 112, 137. She was in tears and making expressions that evinced discomfort. 1 RP 100, 132. The most she could say was her first name, a clear contrast with her verbose exchanges she’d been having with the defendant

immediately before he pushed her in the front of the bus.

1 RP 132. She complained of severe head, hip, and chest pain to EMT staff and the emergency room doctors. 2 RP 10; 1 RP 143, 181. Doctors diagnosed her as having sustained a subdural hematoma, described as a bruise to the brain, which would take weeks to months to reabsorb. 1 RP 155; 2 RP 42, 44. This bruise to the brain was serious enough to require her admittance into the hospital for at least a day so that doctors could observe her and ensure she did not suffer potential brain damage. 1 RP 153-54. As in McKague, where the victim was described as “out of sorts” after being punched and kicked, Dr. Branzetti noted that Damien was at times unable to answer questions in the emergency room, and that her answers were confused. 1 RP 163. Like the victim in McKague, Damien did not lose consciousness. However, the next day during her neurological examination, it was noted that she was drowsy. 1 RP 173. One month later, the victim began suffering headaches and numbness in her leg. 2 RP 62.

Although the State did not charge the defendant under the prong for “temporary but substantial disfigurement,” it is important to note that the brain injury suffered by Ms. Damien was essentially a bruise, which would be enough to support a conviction of assault

in the second degree if it had been visible on the outside of the body. It seems contrary to allow that an external bruise on the skin can constitute substantial bodily harm under the assault statute, but that an internal – and arguably potentially much more dangerous – bruise on the brain cannot. Here, as in Hovig, there was evidence that a “picture” was taken of the bruise (CAT scan) and the introduction of medical testimony describing the length of time it would take for the bruise to disappear, both of which were found to be sufficient evidence in Hovig to support a finding of substantial temporary disfigurement. In fact, Dr. Fink testified in this case that a subdural hematoma can take weeks or months to reabsorb. 2 RP 44. This exceeds the seven to 14 days estimated by the doctor in Hovig for that victim’s external bruise to go away. Hovig, 149 Wn. App. at 13. Similarly, the court in McKague held that a victim’s external facial bruising lasting several days, along with lacerations to face, head and arm, constitute substantial bodily harm. McKague, 172 Wn.2d at 806-07. Here, although Damien did not suffer lacerations, the bruise to her brain was one that would last for weeks to months. In Ashcraft, evidence of bruise marks on a child after being hit with a shoe was also found to be sufficient evidence for any rational factfinder to make a finding substantial

temporary disfigurement, and therefore substantial bodily harm. Ashcraft, 71 Wn. App. at 13. It seems incongruous that evidence of a bruise on the brain after being hit by a 22-ton bus would not also be found to constitute substantial bodily harm, merely because it exists inside the body.

D. CONCLUSION

For all the foregoing reasons, Pascal's conviction should be affirmed.

DATED this 27 day of July, 2012.

Respectfully submitted,

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