

No. 34997-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

EDWARD MICHAEL GLASMANN,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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On Appeal from the Pierce County Superior Court
Cause No. 04-1-04983-2
The Honorable Beverly Grant, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. Assignment of Error

The State failed to present sufficient evidence to establish every element of second degree assault beyond a reasonable doubt.

B. Issue Pertaining to the Assignment of Error

Did the State fail to present sufficient evidence of intent where the evidence did not establish that Appellant purposefully drove over the victim's leg with his car?

II. STATEMENT OF THE CASE

A. Procedural History

The State charged Edward Michael Glasmann by Amended Information with one count of first degree assault (RCW 9A.36.011(1)(a)), one count of attempted first degree robbery (RCW 9A.56.190, .200; RCW 9A.28.020), one count of first degree kidnapping (RCW 9A.40.020(1)(a)), and one count of obstructing a law enforcement officer (RCW 9A.76.020(1)). (CP 7-9)

The jury convicted Glasmann of second degree assault, attempted second degree robbery, first degree kidnapping, and

obstructing a law enforcement officer. (RP9 4, 6, 8, 10; CP 86-95)¹
Glasmann stipulated to his offender score, and the trial court
sentenced him to a standard range sentence totaling 210 months.
(SRP 3, 16; CP 104-05, 112, 119)²

B. Substantive Facts

Michael Glasmann and Angel Benson had a romantic relationship for several years, and in the Fall of 2005 they were engaged to be married. (4/25 RP 67) On the night of October 22, 2005, Glasmann's birthday, they went to dinner in Tacoma, then rented a motel room at the Budget Inn Motel in Lakewood. (4/25 RP 6, 68, 70) Around midnight they began to argue. (4/25 RP 72-73) The argument turned physical, with Glasmann and Benson hitting each other. (4/25 RP 77) Glasmann said he wanted to go for a ride, and they left the hotel room. (RP 4/25 RP 76)

According to Benson, she did not want to get into Glasmann's car because he is an unsafe driver when he is angry. (4/25 RP 77, 79) She could not remember how she ended up in

¹ Citations to the verbatim reports of proceedings in this case will be as follows. The trial volumes labeled Volumes 1, 2 and 4 thru 9, will be referred to by volume number. The trial volume for April 25, 2006 will be referred to as 4/25 RP. The sentencing volume will be referred to as SRP.

² The court imposed the maximum amount on each of the three felony charges (assault, attempted robbery, kidnapping), to run concurrently, and 12 months on the misdemeanor obstructing charge, to run consecutive to the felony sentence. (SRP 16; CP 112, 119)

the car and was not sure whether Glasmann forced her into the passenger seat. (4/25 RP 79) She testified that she tried to open the door to get out, but she lost her balance. (4/25 RP 81-82) She felt the car drive up her leg and onto her pelvic bone. (4/25 RP 82) She screamed that the car was on her, and Glasmann backed up and off her leg. (4/25 RP 82-83) Glasmann got Benson back into the car, told her he was taking her to the hospital, and drove out of the parking lot. (4/25 RP 86-87)

Other hotel guests saw these events unfolding and one of them, Erika Rusk, called the police. (04/25 RP 10-11) Rusk watched the incident while she spoke on a cordless telephone to a 911 operator. (4/25 RP 12) She testified that Glasmann held Benson against a wall and punched her repeatedly. (4/25 RP 12-13) Glasmann then tried to drag her towards his car, which was backed into a nearby parking space. (4/25 RP 12, 15, 18-19)

According to Rusk, who was standing some distance away on the driver's side of the car, Glasmann tried to push Benson into the passenger seat, then he went to the driver's side and got into the car. (4/25 RP 15, 17, 36, 37) Glasmann grabbed Benson's hair and tried to pull her into the car with him. (4/25 RP 18) Glasmann then started the car and pulled out of the parking spot. As he did

so, he drove over Benson's right leg, which was still hanging out of the passenger side of the car. (4/25 RP 19) Rusk saw Glasmann stop, back up, then pull forward again. (4/25 RP 21) She thought he might have run over Benson's leg each time. (4/25 RP 19, 21-22) Rusk then observed Glasmann drive out of the parking lot onto South Tacoma Way, and saw a patrol car pull up behind his car. (4/25 RP 24)

Lakewood Police Officers Timothy Borchardt and David Butts were on patrol that evening, and saw Glasmann's car stopped on South Tacoma Way. (RP5 227) They pulled up behind him to investigate, and saw Benson get out and run away, followed shortly thereafter by Glasmann. (RP4 46, 48, 49; RP5 228-29) The officers saw Glasmann and Benson run towards the AM/PM mini-market/gas station kitty-corner from the Budget Inn. (4/25 RP 7, RP4 48) The officers chased after them, and yelled at Glasmann to stop. (RP4 50-51; RP5 230)

When Glasmann reached the AM/PM lot, he climbed into one car, then another, then another, hoping to find one he could start and drive away. (RP4 52-54, 57-58, 60-62; RP5 231, 236; RP6 376) During this time, the officers had guns drawn and yelled orders to Glasmann, but he refused to comply. (RP4 54, 59; RP5

235-36) Glasmann told the officers he had a gun. (RP4 54; RP5 234) After Glasmann pushed a man aside to get into the third car, Officer Butts approached and sprayed capstun through an open window and into Glasmann's eyes. (RP4 63; RP5 238, 239-40)

Glasmann climbed out the opposite side of the car, and ran inside the AM/PM store. (RP4 63; RP5 240) By that time, several law enforcement units had arrived, and a group of officers entered the AM/PM after Glasmann. (RP4 66; 114-15; RP6 300)

Benson was already inside when Glasmann entered. Glasmann saw her crouched behind the counter, and went to her. (RP6 380) According to the officers, he grabbed her, put her in a choke-hold, pulled her body in front of his, and threatened to kill her. (RP4 118-19, RP5 245, 246)³ Lakewood Police Officer Ryan Hamilton eventually applied a tazer to Glasmann, which caused him to release Benson and fall to the ground. (RP4 74, 126; RP6 307, 308) Officers then pulled Benson to safety and took Glasmann into custody. (RP4 74-75, RP6 308)

Responding medics transported Benson to Tacoma General Hospital, where Dr. William Eggebrotten examined and treated her.

³ The State played a video of the incident recorded by the AM/PM surveillance cameras. (4/25/RP 61; Exh. 72)

(RP4 78; RP5 198) He noted numerous contusions (bruises) and abrasions (cuts) on her right leg and hip. (RP5 198-99) She suffered no fractures or internal injuries, and was released after a few hours. (RP5 202, 216, 222)

Glasmann testified on his own behalf. He admitted that he pushed Benson into the car, but said she was completely inside and he was able to close the door after her. (RP6 371) He started to pull out of the parking space, but Benson opened the door and tried to get out of the car. (RP6 371) That is when the car drove onto her leg. (RP6 371) He immediately stopped and backed up so the car would come off her leg. (RP6 372) He was not trying to run over her with his car. (RP6 372) He pulled her back into the car so he could drive her to a hospital. (RP6 373-74)

Glasmann admitted that he entered the three cars parked at the AM/PM station because he was hoping he could drive one away. (RP6 377) He told the jury that he was scared of the police. (RP6 375, 379) He also testified that he did not grab Benson to hold her as a hostage; rather, he was hugging her and trying to calm her down. (RP6 380, 382, 385-86)

III. ARGUMENT & AUTHORITIES

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” *City of Tacoma v. Luvone*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

To convict Glasmann of second degree assault, as instructed in this case, the State had to prove that he “intentionally assaulted” Benson with his Corvette. (CP 19) See also RCW 9A.36.021. A person acts with intent when he or she acts with the objective or purpose to accomplish a result constituting a crime. RCW 9A.36.011(1)(a). A jury is permitted to infer criminal intent from the conduct of the defendant “where it is plainly indicated as a matter of logical probability.” *State v. Myers*, 133 Wn.2d 26, 38,

941 P.2d 1102 (1997). However, a fact finder is permitted to make that inference only so long as it is rationally related to proven facts. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999).

In this case, the State failed to establish beyond a reasonable doubt that Glasmann intended to run over Benson's leg with his car. The State argued that Glasmann pulled forward over Benson's leg, then backed up and over her leg a second time, then drove forward over the leg for a third time, all on purpose and intentionally. (RP 449-50) However, the evidence does not support the State's theory.

Both Glasmann and Benson testified that Benson stumbled getting out of the car, that the car accidentally ran onto her leg, and that Glasmann immediately stopped and backed up so that the car would drive off of her leg. (4/25 RP 81-82; RP6 371-72) Benson testified the car did not run over the leg a second and third time; rather, the car drove up her leg onto her pelvis, then stopped and backed up and off her leg. (4/25 RP 81-82, 83)

Rusk, who was the only other witness, testified that the car partially blocked her view because she was standing some distance away on the driver's side. (4/25 RP 19) Rusk was not certain about Benson's position, and could only see that Benson's leg was

hanging out of the car when Glasmann pulled out. (4/25 RP 19)

Rusk believed that the car probably went over the leg three times, but testified:

And he proceeded to pull forward, I believe over her leg. I'm not exactly positive, but I think that's what I saw because her legs were still hanging under the car.

....

I know that he'd initially pulled forward and pulled back once, because I'm not sure if he knew what he had run over or not, but he then pulled forward again and left.

....

I'm not exactly sure if [the car] was on top of her leg for any length of time. It could have been simply that he was trying to get the car into gear[.]

(4/25 RP 19, 21-22) Rusk simply was not certain, and was not in a position to say, whether the Corvette in fact ran over Benson's leg three times or just once, or whether Glasmann even knew he was running over the leg.

The State also relied on the testimony of Dr. Eggebroten to support its theory of the case. The State asserted that the doctor noted injuries above the knee, on the knee, and below the knee, thereby supporting a conclusion that the car ran over the leg three times rather than once. (RP8 449) But that is not what Dr. Eggebroten testified. He testified that there were injuries, cuts and bruises, all the way up and down Benson's leg, from below the

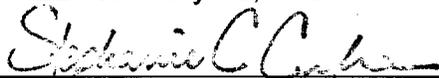
knee up through her thigh and hip. (RP5 198-99, 210, 211) He never testified that there were three distinct injuries. His testimony actually support's Benson's description of the incident, which was that the car ran up her leg and onto her pelvis. (4/25 RP 81-82)

The evidence presented by the State simply does not establish that Glasmann knew when he pulled forward that he was going to run over Benson's leg, or that he purposefully ran over it more than once. Because of this, there were no proven facts from which the jury could infer intent. *Bencivenga*, 137 Wn.2d at 707.

IV. CONCLUSION

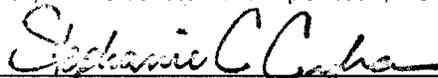
The State failed to establish the element of intent when it convicted Glasmann of second degree assault. Accordingly, this conviction must be reversed.

DATED: January 16, 2007


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CERTIFICATE OF MAILING

I certify that on 01/16/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Edward M. Glasmann, #905293 D-436, Monroe Correctional Complex-WSR, P.O. Box 777, Monroe, WA 98272-0777.


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