

NO. 34997-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

EDWARD MICHAEL GLASMANN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 04-1-04983-2

State's Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State adduce sufficient evidence that defendant intentionally assaulted Ms. Benson, and thereby, recklessly inflicted substantial bodily harm on her, to support the jury's verdict of assault in the second degree?

B. STATEMENT OF THE CASE.

1. Procedure

On June 21, 2005, the Pierce County Prosecutor's Office charged appellant, EDWARD MICHAEL GLASMANN, hereinafter "defendant," with assault in the first degree against Angel Benson (Count 1), attempted robbery in the first degree (Count 2), kidnapping in the first degree against Ms. Benson (Count 3), and obstructing a law enforcement officer (Count 4) CP 7-9. The matter came on for trial before the Honorable Beverly G. Grant on April 20, 2006. 1RP 1. After hearing the evidence, the jury convicted defendant of assault in the second degree, attempted robbery in the second degree, kidnapping in the second degree, and obstructing a law enforcement officer. (RP9 4-10, CP 86-95).¹

¹ Citations to verbatim reports of proceedings will be cited in accordance with the Appellant's Brief. Trial volumes 1, 2, and 4 through 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. See Brief of Appellant at 2 (footnote 1).

At the sentencing hearing on May 26, 2006, defendant stipulated to an offender score of 9, with a resulting standard sentence range of 63 to 84 months for Count 1, 47 to 63 months for Count 2, and 149 to 198 months for Count 3. SRP 3-4, CP 104-105. The court imposed the high end sentences for these counts. SRP 16, CP 106-119. Additionally, the court imposed a 12 month sentence for Count 4, a misdemeanor. Id. The court ordered the sentences for defendant's felony convictions, Counts 1 through 3, to be served concurrently, and the sentence for defendant's misdemeanor, Count 4, to be served consecutive to the felony sentences. Id. The court ordered defendant to a total of 210 months incarceration. Id. The court also imposed various legal financial obligations. Id.

Defendant timely appealed from this judgment and sentence. CP 123-137.

2. Facts

At the time of this incident, Ms. Benson and defendant were engaged and living with each other. 4/25 RP 67. On the evening of October 22, 2004, defendant and Ms. Benson went out to dinner, and then rented a room at the Budget Inn Motel in Lakewood at the Corner of South Tacoma Way and 100th Street in Tacoma, Washington. 4/25 RP 6-7, 69-70. Defendant and Ms. Benson had been arguing throughout the day and continued arguing in their motel room. 4/25 RP 72. The argument escalated when Ms. Benson tore a necklace that defendant had given her

from her neck and threw it at defendant. 4/25 RP 76. This prompted defendant to begin hitting Ms. Benson. 4/25 RP 77. Defendant curled up into the fetal position on the bed to protect herself from defendant's blows. 4/25 RP 84. Defendant told Ms. Benson that he wanted to go for a ride, and they left the motel room 4/25 RP 76.

Erika Rusk, a motel guest, witnessed defendant and Ms. Benson outside of the motel in the early morning hours of October 23, 2004. 4/25 RP 6-7. Rusk had been watching television in her friend's room at the Budget Inn. Her friend, Ryan, who had briefly stepped outside ran back into the hotel room and told her to call 911, which she did. 4/25 RP 10-11. While on the phone with the 911 operator, Rusk went outside to observe the altercation and to describe it to the operator. Id. Rusk testified that defendant pinned Ms. Benson's neck to the wall with his hand and repeatedly punched her in the face with his free hand. 4/25 RP 13-14. Only her toes were touching the ground. Id. When defendant stopped hitting her and released his grip she fell to her knees. RP 15. Defendant kicked her once or twice in the stomach and then dragged her to the passenger side of his Corvette. 4/25 RP 15, 17. Defendant got into the driver's seat, reached over to the open passenger side door and tried to pull Ms. Benson up into the car by her hair. 4/25 RP 18. Defendant drove forward from the parking stall while Ms. Benson was only partially in the Corvette and thereby running over her leg. 4/25 RP 19. Rusk testified that defendant pulled the vehicle forward, then backed up and drove

forward again apparently driving over Ms. Benson's leg three times. 4/25 RP 19, 21-22.

Ms. Benson testified that she tried to get out of the car while defendant was pulling forward from his parking stall. 4/25 RP 82. She explained that her upper-body was in the car and that she was "holding onto something" and "running backwards" as the car pulled forward. She lost her balance and fell. Her leg went under the Corvette. Ms. Benson testified that defendant drove the vehicle onto her leg and then put the Corvette in reverse to drive off of her leg.

Ms. Benson testified that after running over her leg defendant pulled Ms. Benson into the car by, "reaching over and yanking her in." 6RP 373. Defendant drove out of the Budget Inn parking lot onto South Tacoma Way, at which point Ms. Benson put the Corvette in park and grabbed the keys and ran out of the vehicle to the mini-market adjacent to the motel. 4/25 RP 88. She ran inside of the mini-market and hid behind the counter on the floor. 4/25 RP 92.

Responding to the incident, Lakewood Police Officers Timothy Borchardt and David Butts observed defendant's black Corvette stopped in the roadway on South Tacoma Way near 100th Street. 4RP 42, 45, 46, 47. As the officers drove their patrol car towards the Corvette, they saw Ms. Benson run from the passenger side of the Corvette towards the mini-market. 4RP 48-49. Defendant got out of the driver's side of the Corvette and chased Ms. Benson. Id. Officer Butts immediately got out of the

patrol car and chased defendant and ordered him to stop. 4RP 51. Defendant got into a car parked at the gas pump and attempted to start it. Both officers ordered defendant to show his hands. 4RP 54. Defendant did not show his hands and yelled from the vehicle that he had a gun and then reached inside his jacket. 4RP 54-55. Unable to start the car, defendant got out, and then into the driver's seat of another vehicle parked at the pump. 4RP 57. Defendant kept his hand in his jacket. 4RP 60. Unable to start this vehicle, defendant got out and walked to a third car. 4RP 62. The third vehicle's owner was standing by the driver's door. Id. Defendant shoved the owner in the back, and forced his way into the driver's seat. Id. Officer Butts ran to the open driver side window and sprayed defendant with pepper spray. 4RP 63. Defendant then got out of the vehicle through the passenger door and ran into the mini-market. RP 63, 113-114. Both officers followed defendant into the mini-market. 4RP 63. Defendant ran to the back of the store and continued to yell that he had a gun. 4RP 65.

Sergeant Eakes testified that when he responded to the site he instructed the other officers to evacuate the store and then attempted to initiate a dialogue with defendant. 4RP 116. Defendant repeatedly said, "shoot me. I have a gun. Go ahead and shoot me." Id. Officer Borchardt testified that defendant, from a concealed position, pointed a black object at the officers as if it were a weapon. 4RP 64. Defendant then ran to the front of the store and jumped out of sight behind the cash register counter.

4RP 118. Instantaneously, Ms. Benson “popped up” from behind the counter where she had been hiding. 4RP 118.

Sergeant Eakes testified that defendant grabbed Ms. Benson, putting his arm around her neck in a choke hold. 4RP 118. Defendant held Ms. Benson in front of him, placing her in between himself and the officers, who had their guns drawn. 4RP 119. Officer Borchardt testified that defendant said from behind that counter that he was going to kill Ms. Benson. 4RP 71. Sergeant Eakes testified that he considered this to be a “hostage situation,” and requested the SWAT team respond. 4RP 120. Defendant dropped to the floor and forced Ms. Benson down with him. 4RP 121.

Sergeant Eakes and Officer Borchardt testified that Ms. Benson was able to “wiggle her way down from [defendant’s] body” which gave Officer Hamilton the opportunity to use his tazer on the defendant which enabled the officers to subdue him. 4RP 74, 125-126. After defendant was taken into custody, the officers determined that the object defendant had brandished as a weapon was a stereo remote control. 4RP 141. The officers removed Ms. Benson to safety and requested the Lakewood fire department for medical treatment. 4RP 74, 125-127. Ms. Benson told the officers that defendant threatened to kill her if she did not get into defendant’s Corvette in the motel parking lot. 4RP 83, 88.

Detective Thomas Stewart, the domestic violence detective for the Lakewood Police, met with Ms. Benson to conduct a follow up interview on October 27, 2004. 4RP 163, 165, 167. Detective Stewart examined Ms. Benson's injuries that were not covered by clothing. 4RP 168. Her "entire leg was just black." 4RP 168.

Dr. William Eggebroten, the assistant chief of surgery at Madigan Army Medical center, while working for Tacoma General Hospital treated Ms. Benson on October 23, 2004. 5RP 195, 198. Dr. Eggebroten testified as to Ms. Benson's injuries. "[S]he had obvious contusions and abrasions on her right lower extremity... leg, hip. 5RP 199. She had bruising and contusions on her arms. 5RP 217.

Defendant testified that he did hit Ms. Benson in the motel room, but denied pinning her "against the wall and beating her with [his] other hand," or kicking her in the stomach while she was on her knees. 6RP 370. Defendant testified that he and Ms. Benson walked from the hotel room and "were just talking." *Id.* They walked to the passenger side of the door which he opened for Ms. Benson. Ms. Benson did not want to get into the car, so defendant "pushed her in," and shut the door. 6RP 371. Defendant testified that he then got into the driver's seat and drove forward. *Id.* Ms. Benson tried to get out of the car and the defendant drove the car onto her leg. 6RP 371-372. He testified that as soon as he knew he had driven on to Ms. Benson's leg that he put the car in reverse and backed the car off of her leg. 6 RP 372. He testified that he did not

run over her intentionally and that he did not run over her leg more than once. Id. He testified that after he realized he had driven over her leg, that he pulled Ms. Benson back into the car by, “reaching over and yanking her in.” 6RP 373. Defendant testified it was his intent to take Ms. Benson to the hospital. 9RP 374. Defendant also testified that he was “high” on methamphetamine and ecstasy. 9RP 367, 369.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE TO ENABLE A REASONABLE JURY TO CONVICT DEFENDANT OF ASSAULT IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988).

The applicable standard of review is whether, 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. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993);

State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), and Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)).

Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

Great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

“Circumstantial evidence provides as reliable a basis for findings as direct evidence. A jury may infer criminal intent from a defendant's conduct where it is plainly indicated as a matter of logical probability.” State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

To convict defendant of the crime of assault in the second degree in this case, each of the following elements must be proved beyond a reasonable doubt; (1) that on or about the 23rd of October, 2004, the defendant intentionally assaulted Ms. Benson in the Budget Inn parking lot; (2) that defendant thereby recklessly inflicted substantial bodily harm

on Ms. Benson; (3) and, that the acts occurred in the State of Washington. CP 37-85 (Jury Instruction No. 16).²

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is gross deviation from conduct that a reasonable person would exercise in the same situation. CP 37-85 (Jury Instruction No. 14).

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any body part or organ, or that causes a fracture of any bodily part or organ. CP 37-85 (Jury Instruction No. 15).

Here, the State presented sufficient evidence from which the jury could reasonably infer that defendant intentionally assaulted Ms. Benson

² § 9A.36.021(1). Assault in the second degree.

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

in the Budget Inn parking lot. After dragging Ms. Benson to the passenger side of his vehicle, defendant got into the driver's seat and attempted to pull Ms. Benson up into the vehicle by a "big lock of her hair." 4/25 RP 15, 17, 18. Defendant drove forward while only Ms. Benson's upper body was in the car. 4/25 RP 18, 85. Ms. Rusk demonstrated in court how Ms. Benson's lower body was hanging under the car when defendant drove forward, back and forward again. 4/25 RP 19-21. Ms. Rusk testified that after defendant ran over Ms. Benson's leg that he pulled her all the way into the car as he sped from the parking lot. 4/25 RP 22-23. Defendant, likewise, testified to reaching over from the driver's seat and yanking Ms. Benson into the vehicle after running over her leg. 6RP 373. Defendant's deliberate and violent effort to pull Ms. Benson into the passenger side of his vehicle as he drove the vehicle "plainly indicated" his criminal intent, therefore a reasonable jury could have inferred such intent. Myers, 133 Wn.2d at 38.

Additionally, the State provided evidence from which a reasonable jury could infer that defendant was determined to harm Ms. Benson any way he could, and intended to drive over her leg when the opportunity presented itself. Defendant's actions in beating Ms. Benson in and outside of the apartment, kicking her in the stomach, dragging her to the car, pulling her into the passenger seat by her hair, speeding away while she was partially in the car, choking her in the mini-market, completed with his threat to kill her, all tend to show that defendant was determined to

physically harm Ms. Benson any way he could, and support a finding that defendant intended to assault Ms. Benson.

The jury could have reasonably determined that the action taken by defendant subsequent to running over Ms. Benson, yanking her into the car while speeding away, is not something a reasonable person would have done after “accidentally” running over the leg of his passenger. Defendant’s later act of shielding himself from the officers’ guns with Ms. Benson tends to show the lengths to which defendant was willing to go to harm her. See Myers, 133 Wn.2d 26 at 38 (“The jury was allowed to infer the intent element from all admissible evidence.”).

The State presented sufficient evidence to show defendant, in assaulting Ms. Benson, recklessly inflicted substantial bodily harm on her. Defendant drove forward while Ms. Benson was not fully inside the car. Ms. Rusk testified that defendant by driving forward, back, and forward again could potentially have driven over Ms. Benson’s leg three times. 4/25 RP 19, 21-22. The jury could reasonably infer that a reasonable person would have known of the substantial risk that driving with a person only partially in the car could cause substantial bodily harm, and that the defendant’s conduct was a gross deviation from conduct that a reasonable person would exercise in the same situation. See CP 37-85 (Jury Instruction No. 14).

The State's evidence was sufficient to show that Ms. Benson suffered substantial bodily harm. Dr. Eggebrotten testified that Ms. Benson had obvious contusions and abrasions on leg, hip and arms. 5RP 199, 217. Detective Stewart, who examined Ms. Benson's injuries a day after the incident, testified that her "entire leg was just black." 4RP 168. The State also admitted photographs of Ms. Benson's injuries. 4RP 90, 93, 154. An assault victim's bruises are a temporary but substantial disfigurement under RCW 9A.04.110(4)(b), and are sufficient to prove the substantial bodily harm element of second degree assault. State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993).

Defendant's sole contention in this case is that the State failed to adduce sufficient evidence to prove the defendant intentionally drove over Ms. Benson's leg. Defendant's argument rests on the mistaken assumption that the State had to prove that defendant intended to drive over Ms. Benson's leg in order to enable a jury to convict him of assault in the second degree. While proof that defendant intended to drive over Ms. Benson was necessary to convict defendant of assault in the first degree,³ it was not required to support the jury's verdict of assault in the second degree. The State provided sufficient evidence to prove all elements of assault in the second degree as charged in this case.

³ A person commits the crime of assault in the first degree when, with intent to inflict great bodily harm, he assaults another with any force or means likely to produce great bodily harm or death. CP 37-85 (Jury Instruction No. 7).

While there is evidence from which the jury could conclude that defendant intentionally drove over Ms. Benson's leg, it did not have to make this finding in order to properly convict defendant of assault in the second degree. Rather, the State need only to have adduced sufficient evidence that defendant recklessly inflicted substantial bodily harm as a result of his intentional assault of Ms. Benson to support the jury's second degree verdict. The jury's verdict is supported by sufficient evidence and should not be disturbed on appeal.

D. CONCLUSION.

For reasons stated above, the State respectfully requests this Court to uphold defendant's conviction.

DATED: March 20, 2006.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

Cunningham

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