

Court of Appeals No. 48822-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

MILLISSA KELLOGG-BEAUPRE,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 15-1-01114-4
The Honorable Sally Olsen, Presiding Judge

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Ms. Kellogg-Beaupre of second-degree assault.

II. ISSUE PRESENTED

Did the State present sufficient evidence to convict Ms. Kellogg-Beaupre of second-degree assault where the State's evidence did not establish that Ms. McCall's injuries were caused by Ms. Kellogg-Beaupre?

III. STATEMENT OF THE CASE

A. Factual Background

On the evening of September 25, 2016, Ms. Amber McCall was celebrating her birthday with friends from work.¹ The party started at the apartment of Zachary Peterson between 8 and 9 pm.² The partygoers included Ms. Millissa Kellogg-Beaupre, Christopher Burke, Zachary Peterson, and Megan Shane.³ Mr. Burke is Ms. Kellogg-Beaupre's boyfriend.⁴

Ms. McCall and others began drinking at Mr. Peterson's apartment.⁵ Ms. McCall became very intoxicated and began making loud comments about how she and Mr. Burke used to be in a relationship but

¹ RP 96-97.

² RP 96-97, 121-122.

³ RP 96-97, 148, 150.

⁴ RP 222-223.

⁵ RP 97, 150-151, 224.

that he was still attracted to her.⁶ Ms. McCall began putting herself in Mr. Burke's way and flirting with him.⁷ Ms. Kellogg-Beaupre and Mr. Burke both confronted Ms. McCall at Mr. Peterson's apartment.⁸ Mr. Burke denied he and Ms. McCall had a past relationship and told Ms. McCall that he did not remember dating her.⁹ Ms. Shane told Ms. McCall to stop making the comments because the comments had begun to bother Ms. Kellogg-Beaupre.¹⁰ Ms. Kellogg-Beaupre said that it was "a little awkward" for Ms. McCall to be making the comments, but that she was "okay."¹¹

The party moved to the Rendezvous Tavern, a bar next door to Mr. Peterson's apartment.¹² Ms. McCall had a lot to drink at the bar, "probably more than she should have," and became very drunk.¹³ Ms. McCall was "buzzed" at Mr. Peterson's apartment¹⁴ but became "pretty inebriated" at the bar.¹⁵ Ms. McCall became "loud" and "very mouthy" and continued saying things about Mr. Burke that made Ms. Kellogg-

⁶ RP 169-170.

⁷ RP 226.

⁸ RP 226.

⁹ RP 226.

¹⁰ RP 169-170.

¹¹ RP 170.

¹² RP 97, 151-152.

¹³ RP 99, 152.

¹⁴ RP 150-151.

¹⁵ RP 153.

Beaupre uncomfortable.¹⁶

Ms. Shane told Ms. McCall that her comments were bothering Ms. Kellogg-Beaupre and that Ms. McCall needed to stop.¹⁷ Ms. McCall would stop, but then start again.¹⁸ Ms. Shane told Ms. McCall to stop making comments three or four times.¹⁹ Ms. Kellogg-Beaupre was OK at first, but as the night went on became more and more bothered by Ms. McCall's comments.²⁰

At some point during the evening, Ms. Shane and Ms. McCall went outside the bar to smoke a cigarette.²¹ Mr. Burke was also outside the bar.²² Ms. McCall was so drunk that she almost fell down once but caught herself against a wall and slid to the ground.²³ Ms. McCall then fell forward but Mr. Burke caught her and told her to go back to her friend.²⁴ Ms. Kellogg-Beaupre had walked outside of the bar to smoke and saw Ms. McCall try and put her arms around Mr. Burke.²⁵ Ms. Kellogg-Beaupre decided that she wanted to go home so she went inside the bar, retrieved her belongings, told the people she had been sitting with

¹⁶ RP 153.

¹⁷ RP 153.

¹⁸ RP 153-154.

¹⁹ RP 170.

²⁰ RP 153-154.

²¹ RP 155.

²² RP 155, 227.

²³ RP 208-209, 227.

²⁴ RP 227.

that she was leaving, and left.²⁶

Ms. Shane knew that it was time to get Ms. McCall home, so she asked Mr. Peterson to help her get Ms. McCall to Ms. Shane's car so Ms. Shane could take Ms. McCall to her home and call for Ms. McCall's boyfriend to pick her up.²⁷ By this time Mr. Burke had gone back inside the bar after Ms. Kellogg-Beaupre.²⁸ Ms. Shane and Mr. Peterson each took one of Ms. McCall's arms and began walking her down the alley between the bar and the apartments.²⁹

Ms. Kellogg-Beaupre exited the bar and also began to walk down the alley to go home to her apartment in the apartment complex next to the bar.³⁰ Ms. Kellogg-Beaupre had to walk down the alley to get to her apartment.³¹ When she first entered the alleyway, Ms. Kellogg-Beaupre did not know that Ms. McCall and the others were down the alley.³² Ms. Kellogg-Beaupre heard Ms. McCall, Ms. Shane, and Mr. Peterson before she saw them because they were being loud.³³ Ms. Kellogg-Beaupre just wanted to get home, so she decided to walk past the group and keep

²⁵ RP 269.

²⁶ RP 268.

²⁷ RP 156.

²⁸ RP 156.

²⁹ RP 156.

³⁰ RP 269-270.

³¹ RP 171.

³² RP 259-260.

³³ RP 269.

going.³⁴

When Ms. Kellogg-Beaupre was about 10-15 feet from Ms. McCall, Mr. Peterson twisted his ankle and he and Ms. McCall fell to the ground.³⁵ Ms. McCall fell onto a hard dirt area next to the street she was walking on.³⁶ Ms. McCall fell to the ground but then sat up and sat on the ground.³⁷ After the fall, Ms. McCall said her face hurt.³⁸

As Ms. Kellogg-Beaupre walked past Ms. McCall, Ms. McCall said, “your boyfriend is all over me.”³⁹ Ms. Kellogg-Beaupre told Ms. McCall to “drop it” and asked her why she couldn’t just let things go.⁴⁰ Ms. McCall continued saying things like, “you can’t blame him for still wanting me,” “he’s just a horny guy,” and “he was always all over me and couldn’t get enough of me.”⁴¹ Ms. Kellogg-Beaupre told Ms. McCall, “you are lying and you are a slut.”⁴²

When Ms. Kellogg-Beaupre got within two feet of Ms. McCall, Ms. McCall began kicking at Ms. Kellogg-Beaupre and kicked her hard in

³⁴ RP 254, 257.

³⁵ RP 229-231, 257-258.

³⁶ RP 211.

³⁷ RP 159.

³⁸ RP 212, 238.

³⁹ RP 254.

⁴⁰ RP 240-241, 254-255.

⁴¹ RP 261.

⁴² RP 262.

the upper thigh.⁴³ Ms. Kellogg-Beaupre responded by punching Ms. McCall once in the nose.⁴⁴ After the punch Mr. Burke grabbed Ms. Kellogg-Beaupre and took her home.⁴⁵

Ms. Shane called Ms. McCall's boyfriend, Mr. James McKenzie, and had him come pick Ms. McCall up.⁴⁶ That night Ms. Kellogg-Beaupre sent Ms. McCall text messages and a voicemail apologizing for punching her.⁴⁷

The next day Mr. McKenzie took Ms. McCall to the hospital where she was X-rayed and it was discovered that her jaw was broken in two places.⁴⁸ Ms. McCall ultimately had to have surgery where plates were screwed to her jaw.⁴⁹

B. Procedural Background

On September 29, 2015, Ms. Kellogg-Beaupre was charged with one count of assault in the second degree.⁵⁰

On March 14, 2016, the charge was amended to add the special allegations that Ms. McCall was a particularly vulnerable victim and that

⁴³ RP 214, 231, 240-241, 262.

⁴⁴ RP 232, 262-263.

⁴⁵ 232-233, 262-263.

⁴⁶ RP 96, 122.

⁴⁷ RP 102-106, 263-266.

⁴⁸ RP 102, 188.

⁴⁹ RP 128, 190.

⁵⁰ CP 1-2.

Ms. Kellogg-Beaupre caused excessive injuries.⁵¹

Also on March 14, 2016, the State filed a memorandum of authorities in support of its motion to exclude evidence that Ms. Kellogg-Beaupre acted in self-defense.⁵²

A hearing was held on March 14, 2016, at which Ms. Kellogg-Beaupre was arraigned on the amended information.⁵³ Ms. Kellogg-Beaupre objected to the addition of the special allegations and argued that the seriousness of the injury inflicted could not be the basis of an aggravating factor since it was already considered in determining the degree of the crime charged.⁵⁴ The trial court found that the motion was premature and denied it.⁵⁵

On March 15, 2016, Ms. Kellogg-Beaupre filed a motion to dismiss the special allegations.⁵⁶

On March 16, 2016, the State filed a second amended information that dropped the special allegation that Ms. Kellogg-Beaupre caused excessive injuries.⁵⁷

⁵¹ CP 7-8.

⁵² CP 15-19.

⁵³ RP 3-49.

⁵⁴ RP 4-10.

⁵⁵ RP 10-11.

⁵⁶ CP 44-50.

⁵⁷ RP 52-53; CP 57-58.

Trial began on March 17, 2016.⁵⁸

Ms. McCall testified that she was so drunk that night that she did not remember what happened.⁵⁹ Mr. McKenzie testified that Ms. Shane was the only person who told him anything about how Ms. McCall was injured.⁶⁰ Ms. Shane testified that she saw Ms. Kellogg-Beaupre kicking Ms. McCall in the face, head, stomach, and legs when Ms. McCall was on the ground in the alley.⁶¹ Ms. Shane also testified that Ms. McCall was kicking Ms. Kellogg-Beaupre.⁶²

The State called Dr. Sukhdeep Dhaliwal, the oral maxillo facial surgeon who treated Ms. McCall's injuries.⁶³ Dr. Dhaliwal testified that jaw fractures like those suffered by Ms. McCall could be caused by a fall or an assault and from the x-rays alone it was impossible to determine the mechanism of the injury.⁶⁴ Dr. Dhaliwal testified that he only could tell that the fractures were not caused by a fall on concrete or a hard surface due to the lack of abrasions and contusions on Ms. McCall's skin.⁶⁵

The jury found Ms. Kellogg-Beaupre guilty of second-degree assault and found that the State had proved the special allegation that Ms.

⁵⁸ RP 82.

⁵⁹ RP 99-100.

⁶⁰ RP 135.

⁶¹ RP 163.

⁶² RP 163.

⁶³ RP 187.

⁶⁴ RP 191-193

McCall was a particularly vulnerable victim.⁶⁶

The trial court imposed a standard range sentence of five months.⁶⁷

Notice of appeal was filed on April 4, 2016.⁶⁸

IV. ARGUMENT

The State presented insufficient evidence to convict Ms. Kellogg-Beaupre of second-degree assault where the State failed to establish that Ms. Kellogg-Beaupre caused Ms. McCall's broken jaw.

The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence most favorably to the State, any rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt.⁶⁹

In determining whether the “necessary quantum of proof exists,” the reviewing court must be convinced that “substantial evidence” supports the State’s case.⁷⁰ “Substantial evidence is evidence that ‘would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.’”⁷¹ “Substantial evidence” cannot be based upon

⁶⁵ RP 194.

⁶⁶ CP 90-91.

⁶⁷ CP 95.

⁶⁸ CP 107.

⁶⁹ *State v. Prestegard*, 108 Wn.App. 14, 22, 28 P.3d 817 (2001), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

⁷⁰ *Prestegard*, 108 Wn. App. at 22-23, 28 P.3d 817, citing *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

⁷¹ *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817, quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

“guess, speculation, or conjecture.”⁷²

It is the jury's function to weigh evidence, determine witness credibility, and decide disputed questions of fact; however, the jury's findings must be supported by substantial evidence in the record.⁷³

Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.”⁷⁴

The existence of a fact cannot rest upon guess, speculation or conjecture.⁷⁵

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy.⁷⁶

a. The State's burden.

The State charged Ms. Kellogg-Beaupre with assault in the second degree in violation of RCW 9A.36.021(1)(a).⁷⁷ Under RCW 9A.36.021(1)(a), “A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree...[i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm.”

⁷² *Prestegard*, 108 Wn. App. at 23, 28 P.3d 817.

⁷³ *State v. Snider*, 70 Wn.2d 326, 327, 422 P.2d 816 (1967).

⁷⁴ *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

⁷⁵ *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

⁷⁶ *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

⁷⁷ CP 57-58.

“[S]ubstantial bodily harm means bodily injury that...causes a fracture of any bodily part.”⁷⁸

The State’s burden was, therefore, to demonstrate that Ms. Kellogg-Beaupre intentionally assaulted Ms. McCall and that the assault caused Ms. McCall’s broken jaw.

b. The State’s evidence was insufficient to support an inference that Ms. Kellogg-Beaupre’s actions broke Ms. McCall’s jaw.

Only one witness, Ms. Shane, testified that Ms. Kellogg-Beaupre kicked Ms. McCall. Assuming arguendo that Ms. Kellogg-Beaupre did, in fact, kick Ms. McCall, the State failed to present any evidence establishing that it was any kick delivered by Ms. Kellogg-Beaupre that broke Ms. McCall’s jaw.

Dr. Dhaliwal was the only witness who testified about whether Ms. McCall’s jaw was broken by an assault and his testimony was ambivalent, at best. Dr. Dhaliwal testified that jaw fractures like those suffered by Ms. McCall could be caused by a fall or an assault and from the x-rays alone it was impossible to determine the mechanism of the injury.⁷⁹ Dr. Dhaliwal testified that he could tell only that the fractures were not caused by a fall on concrete or a hard surface due to the lack of abrasions and

⁷⁸ RCW 9A.04.110(4)(b).

⁷⁹ RP 191-193

contusions on Ms. McCall's skin.⁸⁰ This is consistent with Ms. Kellogg-Beaupre's defense that Ms. McCall broke her jaw when she fell on the dirt next to the alley.

The evidence presented at trial was that Ms. McCall fell and landed on area of hard dirt, landed on her face, and said "ow, my face" when she sat up after falling.⁸¹

As stated above, the State had to present "substantial evidence" not based on guess speculation or conjecture that a kick from Ms. Kellogg-Beaupre broke Ms. McCall's jaw. The jury may draw inferences from proven facts, but the proven facts also cannot be based on guess, speculation, or conjecture.

The State may have presented sufficient evidence to support an inference that Ms. Kellogg-Beaupre kicked Ms. McCall, but the State failed to meet its burden of providing substantial evidence that a kick from Ms. Kellogg-Beaupre was the cause of Ms. McCall's broken jaw. Any inference drawn from the evidence introduced at trial that Ms. McCall's broken jaw was caused by Ms. Kellogg-Beaupre would be based on guess, speculation, and conjecture and would be improper and unsupported by the facts established at trial.

⁸⁰ RP 194.

⁸¹ RP 159, 211, 212, 229, 238.

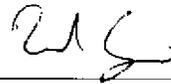
The State presented insufficient evidence to sustain a finding that Ms. Kellogg-Beaupre committed the crime of second-degree assault.

VI. CONCLUSION

For the reasons stated above, this court should vacate Ms. Kellogg-Beaupre's conviction and remand this case back to the trial court for dismissal with prejudice.

DATED this 3rd day of August, 2016.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 3rd day of August, 2016, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Ms. Millissa Kellogg-Beaupre
8739 Whitewood Loop SE
Yelm, WA 98597

And, I mailed a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Kitsap County Prosecuting Attorney's Office
614 Division Street MS-35
Port Orchard, WA 98366

Signed at Tacoma, Washington this 3rd day of August, 2016.



Reed Speir, WSBA No. 36270

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