

FILED

SEP 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

30319-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENT R. DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED

SEP 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

30319-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KENT R. DAVIS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1
ISSUE PRESENTED.....1
STATEMENT OF THE CASE.....1
ARGUMENT.....1
CONCLUSION.....7

TABLE OF AUTHORITIES

WASHINGTON CASES

BURKE V. PEPSI-COLA BOTTLING CO., 64 Wn.2d 244, 391 P.2d 194 (1964).....	2
STATE V. ASHCRAFT, 71 Wn. App. 444, 859 P.2d 60 (1993).....	6
STATE V. BONISISIO, 92 Wn. App. 783, 964 P.2d 1222 (1998), <i>review denied</i> 137 Wn.2d 1024 (1999).....	2
STATE V. BRIGHT, 129 Wn.2d 257, 916 P.2d 922 (1996).....	1
STATE V. DELMARTER, 94 Wn.2d 634, 618 P.2d 99 (1980).....	2
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	2
STATE V. HOVIG, 149 Wn. App. 1, 202 P.3d 318, <i>review denied</i> , 166 Wn.2d 1020, 217 P.3d 335 (2009).....	6
STATE V. JOY, 121 Wn.2d 333, 851 P.2d 654 (1993).....	2
STATE V. MEWES, 84 Wn. App. 620, 929 P.2d 505 (1997).....	2
STATE V. MYLES, 127 Wn.2d 807, 903 P.2d 979 (1995).....	2
STATE V. RANDECKER, 79 Wn.2d 512, 487 P.2d 1295 (1971).....	3

STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	2
STATE V. SMITH, 106 Wn.2d 772, 725 P.2d 951 (1988).....	2

I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support Kent Raymond Davis' convictions of two counts of second degree assault.

II.

ISSUES PRESENTED

- A. Was there sufficient evidence to support the jury's verdicts?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

"There is sufficient proof of an element of a crime to support a jury's verdict when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that element beyond a reasonable doubt." *State v. Bright*, 129 Wn.2d 257, 266 n. 30, 916 P.2d 922 (1996). "A claim of insufficiency admits the truth of the State's evidence and all

inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The relevant question 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. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1988); *State v. Myles*, 127 Wn.2d 807, 816, 903 P.2d 979 (1995). The defendant does admit to the truth of the State’s evidence and the viewing of the State’s evidence in a light most favorable to the prosecution.

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999). Even if an appellate court is convinced that a verdict is incorrect, that court will not gainsay the verdict of the jury. *Burke v. Pepsi-Cola Bottling Co.*, 64 Wn.2d 244, 391 P.2d 194 (1964).

Factual questions are not retried by this court. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997). The fact that a trial or appellate

court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict. *State v. Randecker*, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

As is not uncommon, witnesses with familial relationships, recanted their initial statements to police and others.

ER Doctor Kevin Innes testified that he treated Raylene Davis who told the doctor that she had been assaulted by her brother. RP 104. Ms. Davis related that she was punched, kicked, choked, thrown against a wall and bitten by a dog. RP 104. Ms. Davis had a large contusion in the center of her forehead, an abrasion on the bridge of her nose with swelling of the tissues around her nose. RP 105. She also had a broken blood vessel in her eye. RP 105.

The doctor described the eye injury's potential to cause blindness or decreased vision, but typically these injuries heal on their own. RP 105. The doctor testified that Ms. Davis' eye was injured. RP 105.

Dr. Innes also treated Judith Long. She reported to the doctor that she had been attacked by her boyfriend, punched kicked and choked. RP 108. The doctor stated that in pictures of Ms. Long he could see marks that would be consistent with contusions and hematoma indicating pressure had been applied around the neck or perhaps blunt force to the neck. RP 109-10. The witness claimed that the

marks were from a “hickey.” According to Dr. Innes, the injuries were not consistent with a “hickey.” RP 110.

Ofc. Holton Widhalm spoke with Ms. Long at the ER and she stated that she had been assaulted by Kent Davis. RP 88-89. She told the officer that she was punched on the left side of her face when she tried to help Ms. Raylene Davis. RP 89. She stated to Ofc. Widhalm that while she was trying to help Ms. Davis, the defendant grabbed her by the neck and choked her until she lost consciousness. RP 89.

Ofc. Widhalm then interviewed a crying Ms. Davis. Ms. Davis told the officer that she was punched by the defendant then backed into a wall and pushed into a baby seat. RP 90. Ms. Davis stated that the defendant smashed her head into a counter, a freezer and a wall. RP 91. Ofc. Widhalm noted a large red mark on her forehead and some scratches. RP 90. Ms. Davis confirmed that she had been assaulted by the defendant. RP 90.

The defendant argues that there was “...no testimony from any eyewitness, police officer or the victim that Mr. Davis compressed Ms. Long’s neck...” to the extent required by jury Instruction No. 9. Brf. of App. pg. 7.

It is not clear why the defendant chose to ignore the testimony of Ofc. Widhalm regarding the choking incident. As mentioned above, Ms. Long told Ofc. Widhalm that the defendant choked her to unconsciousness and the next thing she remembered was waking up on the ground. RP 89.

The defendant simply left out the part of the transcript that negates his argument. There was testimony that would allow a trier of fact to conclude that the defendant assaulted Ms. Long by choking. The physical sequella were consistent with strangulation according to Dr. Innes.

The defendant attempts to argue against his conviction for assault on Ms. Davis. The defendant makes an error by forgetting that in a sufficiency of the evidence argument, all of the State's evidence is considered true and all inferences are resolved in favor of the State. Yet, the defendant starts his argument here by stating: "The State did not prove beyond a reasonable doubt that Mr. Davis assaulted his sister, who testified she was injured while roughhousing with him." Brf. of App. pg. 8. This sentence has several errors. In a sufficiency of the evidence argument, the State has no requirement to prove anything beyond a reasonable doubt. The defendant launches into a series of claims based on the recanted testimony of Ms. Davis. That is not a proper analysis for an insufficient evidence argument. As noted above, the State's evidence is considered true and all inferences are resolved in favor of the State. The fact that the defense cross-examined Ms. Davis and obtained recantation stories is of no moment to this argument.

Ms. Davis told the doctor she was assaulted by the defendant and she told Ofc. Widhalm that she was assaulted by the defendant. The victim's recantation

stories are certainly relevant to the jury's ultimate decisions, but they are not relevant to an argument on sufficiency of the evidence.

The defendant's last argument is based on a claim that there was insufficient proof of substantial bodily harm.

Inst. No. 12 reads:

Substantial bodily harm means bodily injury that involves a temporary but substantial disfigurement, or that means causes [sic] a temporary but substantial loss or impairment of the function of any bodily part or organ, or that causes a fracture of any bodily part.

Inst. No. 12.

The cases do not agree with the defendant's positions. *State v. Hovig*, 149 Wn. App. 1, 5, 13, 202 P.3d 318, *review denied*, 166 Wn.2d 1020, 217 P.3d 335 (2009) (red and violet teeth marks lasting up to two weeks constituted substantial bodily injury); *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruises from being hit by shoe were temporary but substantial disfigurement). The State was unable to find any case that requires a fracture to any body part to show "substantial bodily harm." A fracture *would* constitute substantial bodily harm, but the reverse is not true.

As for the eye injury, it does not take extreme powers of deduction to recognize that in the normal condition of the human eye, the eye does not contain blood from a broken blood vessel. The defendant attempts to distinguish the eye injury from a substantial bodily harm by claiming that Dr. Innes did not testify

that there was a substantial loss or impairment of the eye. The State responds that if a bruise is enough to constitute substantial bodily harm, an eye containing blood from a broken blood vessel would surely present the jury with a decision to make on the issue.

In any event, the bruises found on the victim's body are legally sufficient to constitute substantial bodily harm. Whether the eye injury legally constituted substantial bodily harm is not crucial to the outcome of this analysis.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 18th day of September, 2012.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent