

FILED
March 14, 2013
Court of Appeals
Division III
State of Washington

NO. 308863-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER LAWRENCE JONES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00278-2

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF FACTS:

On March 8, 2012, George Canada, who lives in apartment H-149 in a complex in Kennewick, Washington, heard his upstairs neighbor, Tanya Ponce, yelling from her apartment, "I'm bleeding. Someone help me." (RP¹ 132, 133, 138). Another neighbor, Dale Zebulski, who lives in apartment H-148, heard her screaming, "Don't hurt me. Don't hurt me. Don't hit me." (RP 87). Mr. Zebulski heard her yelling these things multiple times. (RP 88). Mr. Canada called 911. (RP 134).

Both Mr. Zebulski and Mr. Canada saw the defendant leave the upstairs apartment and start walking toward the mailboxes. (RP 88, 135). After the defendant left the apartment, Ms. Ponce came out of the apartment, still crying, still asking for help. (RP 139).

The police arrived at around this time; Mr. Canada pointed Ms. Ponce out to Officer Zinsli. (RP 93). Zinsli noted that Ms. Ponce was obviously injured; she had a wound to the back of her head which was bleeding onto her neck, and her hair was matted. (RP 97, 99).

Meanwhile, Officer Sneyd contacted the defendant, who was walking away from the apartment complex. (RP 117). The police found blood on the defendant's shirt and on his right sleeve by his cuff. (RP 96,

¹ Unless otherwise stated, "RP" refers to the Verbatim Report of Proceedings, Volumes I and II.

118). The police also searched the defendant and Ms. Ponce's apartment and saw blood on a bedroom door, blood on the side of bedding on the mattress, and blood on top of a comforter on the mattress. (RP 102, 103).

Dr. Kevin Gurney, whose specialty is emergency room medicine, examined Ms. Ponce. (RP 43). He found she had a fracture of her left ulna. (RP 44). Such fractures typically occur from being struck with an object while the patient is raising her arm in a defensive position. (RP 55). Ms. Ponce also had a laceration to the back of her head about four centimeters long. (RP 44).

Ms. Ponce's statements range from that she had been "pushed down and struck," to "I don't remember," to "I fell." (RP 44, 100, 174).

The defendant's statements range from "I did it," to "I shoved her with my feet," to "she fell." (EX. 31 Transcript-Page 3; RP 118, 204).

The trial court found the defendant guilty of Assault in the Second Degree, and this appeal follows. (CP 39; RP 233).

II. ARGUMENT

1. RESPONSE TO DEFENDANT'S FIRST ARGUMENT "The Evidence Was Insufficient To Sustain A Conviction For Assault-Second Degree." (App. Brief at 5).

A. Standard on review for sufficiency of evidence, Findings of Fact and Conclusions of Law:

Sufficient evidence supports a conviction if any rational trier of fact could find each element of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court should draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *Id.* at 201. Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The issues on review of Findings of Fact and Conclusions of Law are whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *State v. Hovig*, 149 Wn. App. 1, 8, 202 P.3d 318 (2009). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

B. The challenged findings are supported by substantial evidence.

1. *Finding No. 25 ("The photos of the scene show that the cup of lemonade referred to by Ms. Ponce was not empty.") is supported with substantial evidence; the defendant even admitted the fact.*

The defendant initially told Officer Sneyd at the scene that the immediate cause of the problem was that Ms. Ponce threw a cup of

lemonade on him. (RP 121-122). The defendant repeated that in the recorded interview. (EX 31 Transcript-Page 3). However, the police found the cup of lemonade in the apartment; rather than the contents having been tossed, the cup was full. (RP 127). The defendant changed his trial testimony from saying that Ms. Ponce threw the lemonade, to saying he was worried that she would throw something hot on him. (RP 204).

First, the cup in the photo was full. (RP 127). It was probably full of lemonade, according to Ms. Ponce. (RP 182). Second, at trial the defendant said Ms. Ponce did not throw the lemonade on him. (RP 204). Third, this finding only affects the defendant's credibility. It had little to do with the verdict. The defendant did not have a right to assault Ms. Ponce whether or not she threw lemonade on him.

2. *Finding No. 26 ("The defendant would have shoved Ms. Ponce with sufficient force to cause her to have a significant laceration on her head.") is supported with substantial evidence.*

The existence of a hypothetical explanation consistent with innocence does not mean that there is insufficient evidence to support a conviction. *State v. VJW*, 37 Wn. App. 428, 433, 680 P.2d 1068 (1984). The defendant is correct: It is possible that Ms. Ponce fell, causing her

head laceration. However, that possibility does not mean the court's finding was not supported.

The trial court had more than substantial evidence to support this finding including:

- If Ms. Ponce had merely fallen, she would not have repeatedly yelled, "Don't hurt me," and "Don't hit me," as the neighbors reported.
- The "Don't hit me" had to be directed at someone, not just a statement that she had fallen and was injured.
- The blood at the scene, including blood on the defendant's shirt, on the apartment door, and on several spots on the mattress is evidence of heavy bleeding.
- Ms. Ponce bled to the extent that her hair was matted.
- The force against Ms. Ponce was sufficient to cause a head wound and to break her forearm.

3. *Finding Number 27 ("The defendant shoved Ms. Ponce intentionally. That intentional act recklessly inflicted substantial bodily harm.") is also supported with substantial evidence.*

The defendant's argument concerns the "recklessly inflicted" portion of the finding. The evidence supporting the recklessness portion

of the finding includes:

- The defendant did cause substantial bodily harm to Ms. Ponce in two ways: by breaking her ulna, and causing the head laceration. The multiple assaults indicate that the defendant was reckless in harming Ms. Ponce. The more often he assaulted her, the more likely she was to sustain substantial bodily harm.
- ER Dr. Gurney testified that the broken ulna was consistent with a defensive wound, indicating a more extensive assault than just a shove with the defendant's feet.
- The neighbors also heard Ms. Ponce calling for help, saying repeatedly "Don't hurt me," and "Don't hit me." This also indicates an extensive assault in which the defendant was reckless about the extent of his victim's injuries.
- The defendant's initial comment to the police was that he did it and should be taken to jail. By saying "I did it," it is reasonable to assume the defendant meant that he assaulted Ms. Ponce numerous times and caused her broken ulna and head laceration.
- The defendant's inconsistent statements throughout the case indicate he knew he had committed a crime. The defendant's attempts to minimize his behavior also indicate that he knew his behavior was reckless.

- Ms. Ponce’s statement to Dr. Gurney—that she was pushed down and struck—indicate at least a reckless, if not intentional, infliction of an injury.
- The defendant argued that Ms. Ponce accidentally fell, due in part to the large number of prescription medicines she took. However, assuming Ms. Ponce was unsteady on her feet, and assuming the defendant only pushed her, it was very reckless since she was more likely to fall and receive greater injuries.

In addition, the defendant argues this is a Conclusion of Law, rather than a Finding of Fact. However, the trial court entered this finding to indicate the defendant’s assault of Ms. Ponce was intentional, rather than accidental. Further, the trial court found as a fact the defendant’s assault of Ms. Ponce recklessly caused her broken ulna and head wound. This is properly included as a Finding of Fact.

4. *Conclusion of Law Number 1 (“The defendant intentionally assaulted Tonya Ponce and thereby recklessly caused her substantial bodily harm.”) is supported by the Findings of Fact.*

The issue regarding a Conclusion of Law is whether the Findings of Fact support the conclusion. Here, the court directly found that the defendant acted recklessly. Those findings support Conclusion of Law

Number 1.

As stated above, Ms. Ponce's cries for help heard by neighbors, her two injuries satisfying the substantial bodily harm standard, and the defendant's contradictory statements all support the trial court's findings.

5. *There is no reason for this Court to direct the trial court to enter a guilty verdict on a lesser offense.*

The State's response to the defendant's argument that recklessness was not proven is addressed above. However, the following points should also be made.

First, there is no direct evidence that the defendant assaulted Ms. Ponce and negligently, rather than recklessly, causes her injuries. The defendant's direct testimony was not that he assaulted Ms. Ponce negligently causing her injuries, but that he did not assault her. His direct testimony was that he may have flinched when Ms. Ponce fell, causing some incidental contact between his feet and her, but that it was not enough contact to move her. (RP 204, 206). Therefore, the trial court could not have found the defendant assaulted Ms. Price and negligently caused her injuries.

The defendant's credibility is weak because he made contradictory statements, initially saying, "I did it" and then saying "I shoved her with my feet." (RP 118; EX 31 Transcript-Page 3). However, the defendant's

own direct testimony does not support his argument on appeal.

Second, the trial court heard evidence from the neighbors that Ms. Ponce suffered multiple assaults as evidenced by her repeated cries, evidence from Dr. Gurney who testified about the broken ulna typically being from a defensive wound, evidence regarding the two different injuries to Ms. Ponce, and the severity of her bleeding. The importance of that testimony and the credibility of the witnesses should be left to the trial court.

2. RESPONSE TO DEFENDANT'S SECOND ARGUMENT "The Trial Court Must Correct The Judgment And Sentence." (App Brief at 12).

The State has already corrected the Judgment and Sentence at a hearing on March 6, 2013, before the trial court. (CP 55²).

3. RESPONSE TO DEFENDANT'S THIRD ARGUMENT "The Imposed Jury Demand Fee Should Be Reversed And The Fee Assigned To Defense Counsel." (App. Brief at 13).

The defendant's argument is not well taken. First, the Court has no authority to assess costs against a defense attorney. As stated in RCW 10.01.160(1), "The court may require a defendant to pay costs." (Emphasis added). Second, the defendant in consultation with his attorney

² The State filed a Supplemental Designation of Clerk's Papers on 03/14/2013, to include the "Order Correcting Judgment and Sentence."

had chosen to proceed with a jury trial. (RP 10). He changed his mind on the day of the trial. (RP 17). Even then, the defendant attempted to make his waiver of a jury contingent upon the Honorable Cameron A. Mitchell hearing the trial. (RP 17, 18.)³

Finally, the defense attorney did not say he would pay the jury fee from his own pocket. Rather he tried to explain to the court why the jury waiver was not done earlier. (RP 21). In any event, the court had the discretion to impose those fees on the defendant, and properly did so. The court had no authority to impose the fees on the defense attorney.

III. CONCLUSION

The trial court's Findings of Fact were supported by substantial evidence. Those findings supported the trial court's Conclusions of Law. The evidence shows that he assaulted his significant other, Tonya Ponce, to the point that she was yelling for help. Her broken ulna was probably the result of Ms. Ponce holding up her arms to protect herself from a beating. The defendant claimed at trial that Ms. Ponce's head wound was the result of an accidental fall. However, the defendant contradicted himself every time he spoke. He also said that he pushed Ms. Ponce,

³ THE COURT: And is it your choice to go without a jury?
THE DEFENDANT: Yes, if you're the judge. (RP 18)

which resulted in the injuries. The “recklessness” element of Assault in the Second Degree was well established.

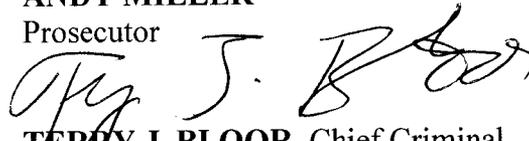
The defendant was correct that the Judgment and Sentence contained a typographical error which indicated an exceptional sentence was ordered. That has been corrected.

The Court has no authority to impose a jury fee on a defense attorney. In this case, the defendant had elected to have a jury trial up to the date a venire was summonsed. The jury fee was properly assessed against the defendant.

RESPECTFULLY SUBMITTED this 14th day of March 2013..

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", is written over the typed name and title of Terry J. Bloor.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

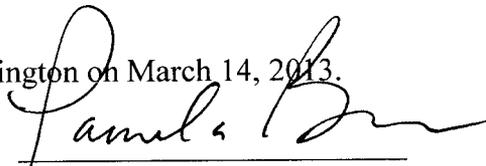
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Signed at Kennewick, Washington on March 14, 2013.



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