

FILED
FEBRUARY 5, 2015
Court of Appeals
Division III
State of Washington

No. 32730-2-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

A. L.-A. (D.O.B. 6/11/99),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY,
JUVENILE DEPARTMENT

The Honorable Douglas Federspiel

BRIEF OF APPELLANT

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A. INTRODUCTION.

A. L.-A., then fourteen, had a verbal altercation with her older sister, Yesenia. A. was mad because Yesenia was monopolizing the bathroom, and Yesenia was annoyed at A. for leaving condoms on her bed. Eventually A. went to the kitchen and grabbed a knife which she held to her own throat, declaring that she wanted to kill herself. Weeping, she swung the knife wildly in front of herself and told Yesenia she wanted to kill her too, but Yesenia did not believe her. Yesenia pushed A., and A. ran out the back door. Ten to fifteen minutes later, Yesenia noticed that she had a two- to three-inch cut on the outside of her arm, which she assumed she had sustained while A. was swinging the knife. She did not require medical attention and there was no evidence that the injury even caused a scar.

For this conduct, A. was charged and convicted in juvenile court of assault in the first degree.

Assault in the first degree is a class A felony and classified as a “serious violent offense.” It is one of the most serious offenses in our criminal code, and encompasses all conduct more serious than assault in the second degree to that just short of death. As charged and prosecuted here, it required the State to prove that with the intent to inflict great bodily harm, A. assaulted Yesenia with a deadly weapon. Even viewed in

the light most favorable to the State, these facts do not establish first-degree assault. Since the juvenile court acquitted A. of second-degree assault, this Court should reverse A.'s conviction and remand for entry of a conviction for the lesser-included offense of assault in the fourth degree.

B. ASSIGNMENT OF ERROR.

The State presented insufficient evidence to prove the essential elements of assault in the first degree.¹

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

The State bears the burden of proving the essential elements of a criminal offense. As the crime was charged and prosecuted in this case, the State had to prove that, with the intent to inflict great bodily harm, A. assaulted her sister with a deadly weapon. To show it was a deadly weapon, the State had to prove that under the circumstances in which it was used, attempted to be used, or threatened to be used, the knife used by A. was readily capable of causing death or substantial bodily harm. Viewed in the light most favorable to the State, the evidence showed that after an altercation with her sister, Yesenia, A. said she wanted to kill herself and her sister, held a knife to her own throat, and swung it in front of her. Yesenia pushed A. and sustained a minor cut on the outside of one

¹ The juvenile court did not enter written findings of fact and conclusions of law as required by JuCR 7.11(d). Consequently, in this brief, error is assigned only to the sufficiency of the evidence to support the court's adjudication of guilt.

arm. A. then ran away and threw the knife in the back yard. Was the evidence insufficient to prove that A. had the intent to cause great bodily harm or that the knife she used was a deadly weapon?

D. STATEMENT OF THE CASE.

On April 1, 2014, A. L.-A. was fourteen years old and living in her mother's home. RP 106. Several months earlier, her older sister, Yesenia, had moved in with her boyfriend.² This created tension within the home, as they took over A.'s bedroom. RP 107. That day, A. and Yesenia got into an argument. A. was angry because Yesenia was in the bathroom and refusing to open the door so A. could get something. RP 109. According to Yesenia, A. said that if Yesenia did not open the bathroom door, A. would go into Yesenia's room and destroy her possessions. RP 22.

Yesenia telephoned their mother, Carmen Ayala, and told her she needed to come home and control A. RP 23. When Ayala came home, Yesenia opened the bathroom door, told Ayala her that A. had hit their younger brother "for no reason,"³ and said, "another thing I'm not liking is her leaving condoms on my bed." RP 25. According to Yesenia, this last

² The transcript of the testimony of Carmen Ayala, A. and Yesenia's mother, indicates that Carmen testified that at the time of trial, Yesenia was nine years old. RP 86. This appears to be a typographical error. Although Yesenia's age does not appear in the transcript, photographs admitted as exhibits 1 and 2 show that she is a young woman.

³ A. testified that she did not hit their brother. RP 111.

comment made A. “really mad” and A. came over and hit her. *Id.* Ayala described what ensued as a “fistfight” between the two sisters. RP 90.

Yesenia was angry and told Ayala, “you better hit her, or I’m going to hit her or do something to her.” RP 51. According to A., when Yesenia realized that Ayala was not going to physically discipline A., Yesenia took A.’s Xbox games into the kitchen and started pouring water on them. RP 114. A. ran to Yesenia’s closet to look for her sister’s laptop to break it in retaliation. At this point, she claimed, Yesenia hit A. in the back of the head with a frying pan.⁴ RP 115-16.

According to Yesenia, A. threw her television and laptop, breaking them. RP 28. Yesenia then grabbed A.’s Xbox and threw it outside. RP 34. After Yesenia broke the Xbox, A. went to the kitchen with her mother and picked up a knife, which she held to her own throat, crying that she wanted to kill herself, and kill Yesenia.⁵ RP 40, 52, 54. Yesenia overheard A. threaten to kill herself three or four times. RP 54. She was saying she was tired of everything and could not take it anymore. RP 58.

⁴ The juvenile court found Yesenia more credible than A., and rejected A.’s testimony that Yesenia attacked her with a pan, even though Yesenia’s use of a pan to assault her sister was confirmed by Carmen Ayala. RP 97-98, 173, 175.

⁵ Ayala did not recall that A. threatened to kill Yesenia. RP 93.

Ayala became alarmed that A. would in fact kill herself, and called the police. RP 99; Ex. 7.⁶

Yesenia went into the kitchen. She saw A. holding the knife by her head with the blade pointing up. Then she swung it in an outward motion from her body. RP 56. Yesenia was a foot or two away from A. RP 42. Yesenia did not believe that A. actually intended to kill her, but her feelings were hurt. RP 44. Yesenia shoved A. against the counter with both hands.⁷ RP 45. At this point, according to Yesenia, A. swung at her with the knife, which Yesenia believed resulted in her getting a cut on the outside of her arm. RP 45. Yesenia was not certain that this was how she sustained the cut, as she did not even notice it until ten or fifteen minutes later, when she felt it sting.⁸ RP 47, 59. After Yesenia shoved A., A. ran out the back door. RP 48.

The cut that Yesenia sustained was two to three inches long. RP 75. Photographs taken by a police officer who responded to the 911 call show a shallow short cut on the exterior of Yesenia's arm with a thin

⁶ Exhibit 7 is a transcript of Ayala's 911 call, in which she repeatedly states that A. has a knife and will kill herself.

⁷ Yesenia claimed that she pushed A. because she was worried A. might hurt their mother. RP 44-45.

⁸ A. testified that she did not cut Yesenia with the knife. She believed the injury was a fingernail scratch that probably occurred when she was trying to wrest the frying pan from Yesenia's hands. RP 125. The trial court rejected the testimony that the cut was a fingernail scratch, RP 175, but, as A.'s counsel argued, there was nothing about the appearance of the injury that was inconsistent with a fingernail scratch. RP 157.

trickle of blood at one end. Ex. 1, 2. The police referred A. for a consultation with mental health professionals. RP 70. They did not retrieve or attempt to photograph the knife. RP 70, 79-80, 83.

Based on these events, the State charged A. with four criminal counts: assault in the first degree, felony harassment, malicious mischief in the third degree, and assault in the second degree. CP 42-43. Following a fact-finding hearing, the trial court convicted A. of first-degree assault and malicious mischief, and acquitted her of felony harassment and assault in the second degree.⁹ CP 12.

E. ARGUMENT.

1. Due process requires the State to prove the essential elements of a criminal offense beyond a reasonable doubt.

The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the

⁹ Because the second-degree assault charge was an alternative to the assault in the first degree charge, the court did not reach this count in its oral ruling, but in the court's written disposition order, it found A. not guilty of the charge. CP 12.

crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

2. The State did not prove that A. committed the crime of assault in the first degree.

The crime of assault in the first degree, as it was charged and prosecuted by the State, required the State to prove that A., with intent to inflict great bodily harm, assaulted Yesenia with a deadly weapon. RCW 9A.36.011(1); CP 42-43. The juvenile court concluded that the State proved A. committed this offense. But even viewed in the light most favorable to the State, A.'s conduct did not establish the essential elements of first-degree assault. In particular, the State failed to prove (1) that A. had the intent to inflict great bodily harm, or (2) that the knife, "under the circumstances in which it [was] used, attempted to be used, or threatened to be used, [was] readily capable of causing death or substantial bodily harm." A.'s conviction must be reversed and, as set forth below, this case remanded for entry of a conviction for assault in the fourth degree.

a. The evidence did not prove that A. had the intent to inflict great bodily harm.

According to statute, "great bodily harm" is "bodily injury that creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW

9.94A.110(4)(c). “‘Great bodily harm’ ... encompasses the most serious injuries short of death. No injury can exceed this level of harm.” State v. Stubbs, 170 Wn.2d 117, 128, 240 P.3d 143 (2010).

To support A.’s conviction for assault in the first degree, the State thus had to prove that A. actually intended to kill her sister, Yesenia, or that she intended to inflict injuries so serious that they would create a probability of death. The State did not meet this burden.

Yesenia was in the bedroom when A. first picked up a knife in the kitchen. RP 54. She overheard A. threaten to kill herself three or four times. Id. When Yesenia entered the kitchen, A. was holding the knife pointed at her own throat. RP 56. She was saying that she was tired of everything, and that she couldn’t take it anymore. RP 58. Although Yesenia testified that A. said that she wanted to kill Yesenia, Yesenia did not take this threat seriously. RP 44. The court apparently did not believe the threat was serious either, as it acquitted A. of felony harassment.

Nothing about A.’s conduct supports the inference that she actually intended to kill her sister or inflict great bodily harm on her. She did not lunge at Yesenia. She did not hold the knife in a manner that suggested she genuinely intended to hurt Yesenia. She did not engage in or persist in genuinely life-threatening behavior. She swung the knife in front of her in an outward motion from her own body, and, when the altercation

concluded, she ran out through the back door and threw the knife in the yard. RP 48.

Yesenia was not even sure how she sustained the minor cut on the outside of her arm. RP 47, 59. She assumed it happened after she pushed A., but she did not notice the cut until ten to fifteen minutes after the altercation concluded. *Id.* The accidental infliction of injury, even if serious, is not sufficient to prove specific intent to inflict great bodily harm. State v. Elmi, 166 Wn.2d 209, 215, 207 P.3d 439 (2009) (mens rea for assault in the first degree is specific intent to inflict great bodily harm).

The evidence does not establish that A. intended to inflict an injury that would create a probability of death, cause significant serious permanent disfigurement, or cause a significant permanent loss or impairment of the function of any bodily part or organ. The State did not meet its burden of proof regarding this essential element of assault in the first degree.

- b. The State did not prove that the knife, under the circumstances in which it was used, attempted to be used, or threatened to be used, was readily capable of causing death or substantial bodily harm.

For purposes of an assault prosecution, a “deadly weapon”

shall include any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

RCW 9A.04.110(6). “Substantial bodily harm,” in turn, is defined as “bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.” RCW 9A.04.110(4).

In evaluating whether the State mustered sufficient proof that a particular item is a deadly weapon, courts consider its “inherent capacity and ‘the circumstances in which it is used.’” State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995) (quoting statutory language).

“Circumstances” include “the intent and present ability of the user, the degree of force, the part of the body to which it was applied and the physical injuries inflicted.” Id. (citation omitted). Ready capability “is determined in relation to surrounding circumstances, with reference to potential substantial bodily harm.” Id. The instrument must be “*deadly-in-fact* under the circumstances in which [it] is used or threatened to be used.” State v. Carlson, 65 Wn. App. 153, 159, 828 P.2d 30 (1992) (emphasis added).

Finally, “substantial” requires the State to prove more than “something having substance or actual existence.” State v. McKague, 172 Wn.2d 802, 805-06, 262 P.3d 1225 (2011). In McKague, the Supreme

Court appropriately recognized that defining “substantial” in this way “would make practically any demonstrable impairment or disfigurement a ‘substantial’ injury regardless of how minor.” *Id.* at 806. The Court instead held that substantial “signifies a degree of harm that is considerable and necessarily requires a showing greater than an injury merely having some existence.” *Id.* Therefore, for purposes of proving “substantial bodily harm,” an injury must be “considerable in amount, value, or worth.” *Id.*

The State argued that it met its burden of proof with respect to this element because, it contended, the knife caused substantial bodily harm. RP 135. Specifically, the State contended that the minor cut sustained by Yesenia qualified as a “temporary but substantial disfigurement.” Neither the evidence nor case law supports the contention that a minor cut like the one at issue here qualifies as “substantial disfigurement.”

The cut was shallow. Yesenia did not notice it when it was inflicted. RP 47. Yesenia did not seek or require medical intervention, such as stitches or surgical tape. RP 45-47. Indeed, the injury was so insignificant that the police officers who responded to Ayala’s 911 call did not even offer Yesenia medical attention. RP 75 (witness describes injury, but does not testify to offering medical attention). The State also did not present evidence regarding how long it took for the cut to heal, or whether

it left a scar. As noted, to present sufficient evidence of “substantial bodily harm”, the State must prove that an injury is “considerable in amount, value, or worth.” McKague, 172 Wn.2d at 806. Not every injury will meet this standard.

In McKague, the Court held the evidence was sufficient to establish substantial bodily harm where the State proved the victim suffered an accumulation of injuries, specifically: (1) a headache and severe neck and shoulder pain; (2) a concussion; (3) a scalp contusion and lacerations; (4) lacerations on his arm; (5) a possible fracture of the facial bones; (6) severe pain for a week and residual pain for two months; and (7) bruising around the eyes. Id. at 804, 806. Based on similar reasoning, the Court approved Division One’s holding in State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993), that bite marks and multiple bruises on a toddler’s body consistent with having been beaten with a shoe, a cord or rope, and a belt or ruler, qualified as temporary but substantial disfigurement. McKague, 172 Wn.2d at 806 (discussing Ashcraft, 71 Wn. App. at 455). Likewise, the Court agreed with Division Two’s holding in State v. Hovig, 149 Wn. App. 1, 202 P.3d 318, review denied, 166 Wn.2d 1020 (2009), that “a large red, teeth-marked bruise” on the face of a four-

month old infant,¹⁰ which medical testimony established would have caused the child pain and discomfort, and would be visible for seven to fourteen days, qualified as substantial bodily harm. McKague, 172 Wn.2d at 806 (discussing Hovig, 149 Wn. App. at 5, 13).

By contrast, the two-to-three-inch cut here bled a little bit, but it had largely stopped bleeding when it was photographed by Officer Lee. The photographs depict a shallow cut on the outside of Yesenia's arm with a thin trickle of blood coming from one end. Ex. 1, 2. Yesenia did not say that the cut hurt very much. She said she only noticed it when "I felt it, like, sting." RP 47. Yesenia sustained no other injuries, and there was no testimony that the cut affected Yesenia for longer than would be typical for a minor cut, or that it caused a scar. Yesenia's injury was not "considerable in amount, value, or worth." McKague, 172 Wn.2d at 806. It would be a stretch to characterize the cut as "disfigurement," and it certainly does not qualify as "substantial."

¹⁰ The Court of Appeals noted that photos taken by an investigating officer depict a mouth-shaped injury that begins at the base of MH's jaw bone and circles up to the top of his right cheek bone. Individual red and violet teeth-marks line the upper and lower circumference of the injury. MH's entire right cheek is colored with yellow-brown bruising. . . . [T]his large left-cheek bruise appeared to darken in color as [the officer] conducted his investigation.

Hovig, 149 Wn. App. at 5-6.

The trial court agreed that the cut itself would not be sufficient to meet the statutory standard, but found that coupled with A.'s alleged threat to kill Yesenia and her "threatening gestures," the State proved the knife was a deadly weapon. This conclusion is contrary to case law. The knife was not "deadly in fact." Carlson, 65 Wn. App. at 159. As noted, Yesenia did not believe A. actually intended to kill her. RP 44. A.'s lack of intent is borne out by the fact that after Yesenia pushed A., A. ran out through the back door and threw the knife in the yard. RP 48. The court rightly acquitted A. of the felony harassment charge that was based on the alleged threat. RP 44, 177-78.

A.'s gestures with the knife also are insufficient to bootstrap Yesenia's insignificant cut into substantial bodily harm. Even viewed in the light most favorable to the State, without a showing that Yesenia was actually endangered, A.'s action of swinging the knife in front of her does not prove that in the manner in which it was used, the knife was *readily capable* of causing death or substantial bodily harm.

Absent proof that the knife was used or threatened to be used in such a way as to make it "readily capable" of causing substantial bodily harm or death, for an injury as inconsequential as Yesenia's cut to qualify as substantial bodily harm in order to support a conviction for *first-degree assault*—a crime reserved for the most serious assaults short of death—

renders the term “substantial” redundant. The State’s evidence does not establish that the circumstances in which the knife was used prove the knife was a deadly weapon, as statutorily required.

3. The remedy is vacation of the assault in the first degree conviction and remand for entry of a conviction for the lesser offense of assault in the fourth degree.

Where the evidence is insufficient to support a conviction, retrial is prohibited by protections against double jeopardy. Burks v. United States, 437 U.S. 1, 11-12, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); U.S. Const. amend. V. Likewise, an acquittal terminates initial jeopardy, and the defendant cannot be retried. State v. Hescok, 98 Wn. App. 600, 604-05, 989 P.2d 1251 (1999). Here, the evidence is insufficient to support A.’s conviction for assault in the first degree, and the juvenile court acquitted A. of the crime of assault in the second degree. CP 12.

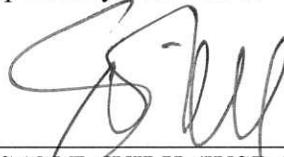
A. conceded, however, that the evidence was sufficient to prove assault in the fourth degree. RP 164; cf., RCW 10.61.003. Therefore, A.’s conviction should be reversed, and this case remanded for entry of a conviction for assault in the fourth degree.

F. CONCLUSION

The evidence was insufficient to prove the essential elements of assault in the first degree. The conviction should be reversed, and this case remanded for entry of an adjudication of guilt of assault in the fourth degree.

DATED this 5th day of February, 2015.

Respectfully submitted:



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 32730-2-III
)	
A.L.-A.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF FEBRUARY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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