

67540-1

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NO. 67540-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE KIMMER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRIAN GAIN

BRIEF OF RESPONDENT

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~~COURT OF APPEALS DIV I  
STATE OF WASHINGTON~~  
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**A. ISSUES PRESENTED**

1. Evidence is sufficient to support a conviction if, viewing it in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Here, Kimmer grabbed the victim around the neck with enough force to cause bruising. A day later, while the victim was being treated for stab wounds inflicted by Kimmer, the emergency room physician and a social worker observed marks and bruising on the victim's neck. The physician determined the bruising on the victim's neck was consistent with being choked. Was there sufficient evidence to support the jury's guilty verdict of assault in the second degree?

2. At the time of sentencing, Kimmer had five prior adult non-violent felony convictions. Kimmer also had three current offenses, including the two assault in the second degree "violent offense" convictions from the jury's verdict that counted as two points against the other counts at sentencing. Did the trial court correctly calculate Kimmer's offender score as eight?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

On November 2, 2009, the State charged Michael Kimmer with one count of assault in the second degree - domestic violence. CP 1-5. The State subsequently amended the information to charge two counts of assault in the second degree - domestic violence for trial. CP 8-9. On April 27, 2011, Kimmer was found guilty as charged by jury verdict of two counts of assault in the second degree. CP 38-39. On August 12, 2011, the trial court imposed a standard range sentence of 57 months. CP 65-73.

**2. SUBSTANTIVE FACTS**

On October 30, 2009, Carolyn Bradbury was admitted to the emergency department at Overlake Hospital Medical Center. 4/21/11 RP 8. Dr. Gordon Scott McCreadie was one of the emergency physicians who spoke with Bradbury and provided treatment. 4/21/11 RP 5-8. Dr. McCreadie has been practicing as an emergency room physician for the last 12 years. 4/21/11 RP 6-7. During an average daily shift, Dr. McCreadie treats between 16 and 24 patients. 4/21/11 RP 7.

Social Worker Chandra Kinnee also met with Bradbury that night at the hospital. 4/25/11 RP 14-28. Kinnee has worked at Overlake Hospital as an emergency room social worker for the last six years. 4/25/11 RP 14-15. Kinnee noticed "markings on [Bradbury's] neck and a bruise around her eye." 4/25/11 RP 23. Kinnee testified that "it looked like she'd been choked." Id.

Bradbury testified that she went to Overlake Hospital with her current boyfriend Ty James to get stitches for the stab wounds on her legs. 4/25/11 RP 83-24. However, Bradbury then claimed that she "barely" remembered speaking with a police officer at the hospital and that she did "not remember anything from the hospital." 4/25/11 RP 84-85.

The jury found Kimmer guilty of both counts of assault in the second degree. CP 38-39. At the sentencing hearing on August 12, 2011, the court determined that Kimmer had the following adult prior felony convictions:

<u>Crime</u>	<u>Sentencing Date</u>
CONT SUBS POSSESS	9/14/2007
CONT SUBS POSSESS	9/14/2007
IDENTITY THEFT	6/9/2006
PROTECTION ORDER VIO	6/14/2002
UNLAWFUL POSSESS OF FIREARM	6/14/2002

CP 71. Each of these five prior offenses counted as one point in calculating Kimmer's offender score. RCW 9.94A.525(8).

Kimmer had two current offenses for assault in the second degree from the jury verdicts which are considered "violent offenses." RCW 9.94A.030(54)(a)(viii). Therefore, each conviction for assault in the second degree counted as two points in the calculation of Kimmer's offender score for the other assault in the second degree conviction. RCW 9.94A.525(8).

In addition, by the time Kimmer was sentenced, he had accumulated another conviction for felony violation of a court order in King County Superior Court cause number 11-1-02276-1. This conviction was counted as another current offense toward his offender score. 8/12/11 RP 1-2; CP 66.<sup>2</sup>

At the sentencing hearing, the State advised the court that Kimmer had "an offender score of eight" for the assault in the second degree convictions. 8/12/11 RP 1. The sentencing court inquired, "So, there's no dispute, as to the actual scoring?" Id. Kimmer's defense counsel responded, "That's correct, your Honor."

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<sup>2</sup> Paragraph 2.2 OTHER CURRENT CONVICTION(S) of the Judgment and Sentence states, "Other current convictions listed under different cause number used in calculating the offender score (list offense and cause number): 111022761."

8/12/11 RP 2. Kimmer's standard sentencing range was 53 to 70 months. 8/12/11 RP 1-3; CP 66. The court imposed a sentence of 57 months. CP 68.

**C. ARGUMENT**

**1. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE AND DRAWING ALL INFERENCES IN THE STATE'S FAVOR, THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S GUILTY VERDICT.**

In a prosecution for assault in the second degree under the strangulation prong, the State must prove beyond a reasonable doubt that the defendant assaulted another by strangulation. RCW 9A.36.021(1)(g); CP 60. Strangulation is statutorily defined as "to compress a person's neck, thereby obstructing the person's blood flow or ability to breathe, or doing so with the intent to obstruct the person's blood flow or ability to breathe." RCW 9A.04.110(26); CP 55.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). By

claiming insufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, 119 Wn.2d at 201. All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

Furthermore, when evidence is conflicting, or is of such a character that reasonable minds may differ, it is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact. State v. Gerber, 28 Wn. App. 214, 216, 622 P.2d 888 (1981). Credibility determinations are for the trier of fact and are not subject to appellate review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Deference must be given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, rev. denied, 119 Wn.2d 1011 (1992).

Here, Kimmer argues the evidence is insufficient "to prove he either successfully obstructed her blood flow or ability to breathe or acted with an intent to do so."<sup>3</sup> This argument fails. The State

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<sup>3</sup> Appellant's Opening Brief, page 7.

already proved that Kimmer committed assault in the second degree against the victim when the jury returned the guilty verdict. Now, on appeal, all reasonable inferences must be drawn in favor of the State and interpreted most strongly against Kimmer.

The evidence supporting the conviction includes victim Bradbury's statement to Dr. McCreadie that Kimmer grabbed her around the neck and later stabbed her in the leg, as well as observations of marks and bruising on Bradbury's neck by both Dr. McCreadie and Social Worker Kinnee. Most importantly, the State's evidence includes Dr. McCreadie's opinion as an experienced emergency room physician that the bruising on Bradbury's neck was "consistent with being choked" and "that's what the patient had reported." "Choke" means "to check or block normal breathing by compressing or obstructing the trachea." Merriam-Webster Unabridged Dictionary (2012).

The fact that Kimmer grabbed Bradbury by the neck with so much force that he caused bruising consistent with being choked strongly supports the inference that he obstructed Bradbury's ability to breathe. Dr. McCreadie even testified that "[i]t takes a fair bit of force to create a bruise." With all inferences drawn in favor of the

State and interpreted most strongly against Kimmer, this evidence alone is sufficient to support the conviction on appeal.

Moreover, the evidence supports the inference that Kimmer grabbed Bradbury's neck with the intent to obstruct her ability to breathe. Again, interpreting the evidence most strongly against Kimmer, he had no other reason to grab and squeeze Bradbury's throat than to intend to obstruct her ability to breathe.

Deference must be given to the jury regarding persuasiveness of the evidence. Here, the jury heard the evidence against Kimmer and determined that he had committed assault in the second degree by strangulation. The court should not invade the province of the jury and disregard the deliberated verdict simply because Kimmer disagrees with it.

## **2. THE TRIAL COURT DID NOT MISCALCULATE KIMMER'S OFFENDER SCORE.**

The trial court correctly calculated Kimmer's offender score as eight. As summarized in Appendix B of the Judgment and Sentence, Kimmer's criminal history included five adult felony convictions, and each of these five prior offenses counted as one point in calculating Kimmer's offender score.

At the time of sentencing, there were also three concurrent offenses. These consisted of the two assault in the second degree convictions and one felony violation of a court order conviction in King County Superior Court cause number 11-1-02276-1 that is referenced in Paragraph 2.2 of the Judgment and Sentence. The crime of assault in the second degree is a "violent offense" and counts as two points toward the offender score. The crime of felony violation of the court order is not a "violent offense" and counts as one point toward the offender score.

At the sentencing hearing on August 12, 2011, Kimmer's offender score was calculated as follows:

<u>Crime</u>	<u>Sentencing Date</u>
Assault 2° (two points)	<i>current offense</i>
Felony Violation of Ct. Order (one point)	<i>current offense</i>
Cont Subs Possess (one point)	9/14/2007
Cont Subs Possess (one point)	9/14/2007
Identify Theft (one point)	6/9/2006
Protection Order Vio (one point)	6/14/2002
Unlawful Possess Firearm (one point)	6/14/2002

The trial court correctly calculated Kimmer's offender score as an eight. As such, Kimmer's standard range on each Assault in the Second Degree was correctly calculated as 53 to 70 months, and the court imposed a standard range sentence of 57 months.

D. CONCLUSION

Viewed in the light most favorable to the State, the evidence establishing that Kimmer strangled victim Bradbury is sufficient to support the conviction for assault in the second degree. In addition, the trial court correctly calculated Kimmer's offender score for sentencing.

DATED this 2<sup>nd</sup> day of April, 2012.

Respectfully submitted,

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