

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

MISTY VIOLET ALVAREZ,

Appellant.

No. 38101-0-II

UNPUBLISHED OPINION

Houghton, P.J. — Misty Alvarez (Alvarez) appeals her conviction for second degree assault, arguing trial court instructional error and insufficiency of the evidence. We affirm.

**FACTS<sup>1</sup>**

Misty and Jesus Alvarez<sup>2</sup> are married and have two children. Starting in 2006, Alvarez and Jesus lived separately from time to time. In July 2007, Alvarez learned that Jesus and Brandi Savage were in a romantic relationship.

Alvarez’s younger sister celebrated her birthday on July 13, and Alvarez expected to “have a few drinks with her.” 2 Report of Proceedings (RP) at 163. Because of this, Alvarez planned for the children to stay with Jesus. After Alvarez “had had a few drinks,” Jesus called her to pick

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<sup>1</sup> We derive the facts from the evidence adduced at trial.

<sup>2</sup> For clarification, we refer to Jesus by his first name, intending no disrespect.

up their children at his apartment. 2 RP at 164. Alvarez testified to seeing Jesus outside his apartment with Savage and the two children. Alvarez climbed several steps to meet Jesus. Believing Jesus had “no reason he couldn’t” have kept the children overnight as planned, Alvarez became angry and started arguing loudly with Jesus. 2 RP at 164.

According to Alvarez, Savage stood behind Jesus and Alvarez proceeded to argue with her. When the argument escalated, Jesus went down the stairs to where the children were waiting. Alvarez and Savage argued “[v]ery close” to each other until Alvarez pushed Savage, who pushed her back. 2 RP at 167. Savage and Alvarez fought near the door to Savage’s apartment and both eventually fell into it.

Alvarez testified about punching Savage an unknown number of times in the head with her jewel-ringed hands. Alvarez also testified that Savage pulled her hair and caused her face to hit either the railing or the wall, resulting in a black eye that lasted two weeks.

Jesus broke up the fight and Alvarez walked away. Alvarez testified that she believed she “did get the best of” Savage in the fight, while Alvarez suffered scratches, a scraped elbow, and a scarring laceration on her arm. 2 RP at 180.

Savage’s testimony about the events differed from Alvarez’s. According to Savage, that evening she sat at home and heard a “a couple of pops” outside her apartment.<sup>3</sup> 1 RP at 78.

Jesus, who was in the apartment, left to investigate and told Savage to stay inside the apartment.

Ten minutes later, Savage exited her apartment and stood near her doorway to smoke a cigarette. Savage then saw Alvarez climbing the stairs to her apartment. Savage returned to her

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<sup>3</sup> The sound may have been her car windshield being smashed.

apartment and locked the door with the deadbolt. Savage walked toward the telephone to call Jesus for help. Before she could, the apartment door broke open and she felt someone strike her.

Savage fell on a futon, got up, and received several more blows. She could not see who hit her but believed she was hit about 10 times. She tried to push her assailant away when she heard Alvarez ask her if she “was going to leave her husband alone.” 1 RP at 83. Savage answered “yes.” 1 RP at 83.

Jesus then entered the apartment and broke up the fight. While Jesus escorted Alvarez out of the apartment and back down the stairs, Savage called 911 for help. When police officers arrived, Alvarez had left<sup>4</sup> and Savage sat nursing her wounds with a wet rag. Savage testified that she did not recall ever hitting or scratching Alvarez or calling her names.

The first officer on the scene noticed scratches, abrasions, and bruising on Savage’s face and “a bump.” 1 RP at 106. He also said that the door to Savage’s apartment appeared to have been broken down by force, with door fragments found inside the apartment.

The State charged Alvarez with second degree assault. A jury heard the matter.

At trial, both Savage and Alvarez testified as above. Savage also testified that she had bruises on her ears, that her head swelled, and that she had two black eyes. Savage said her injuries took three weeks to heal.

Savage’s sister, Brittany, testified that Savage was “bruised and lumpy . . . like she got beat up.” 1 RP at 64. She said that Savage’s face was swollen and it took several weeks to heal.

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<sup>4</sup> Alvarez spoke to officers shortly after the incident but told the police she had not fought with Savage. At trial, Alvarez admitted that she lied about this. The detective who interviewed Alvarez stated that he did not recall seeing any marks or bruises on Alvarez.

The trial court instructed the jury on temporary but substantial disfigurement as an element of second degree assault. The jury found Alvarez guilty as charged. She appeals her second degree assault conviction.<sup>5</sup>

## ANALYSIS

### Jury Instructions

Alvarez first contends that the trial court erred in instructing the jury on the definition of “disfigurement.” She asserts that the trial court’s instruction is overly broad and has not been accepted in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008).

We consider jury instructions sufficient if they (1) are supported by substantial evidence, (2) properly inform the jury of the applicable law, and (3) allow the parties to argue their theories of the case. *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

To convict Alvarez of second degree assault, the jury had to find that she intentionally assaulted another, thereby recklessly inflicted substantial bodily harm. RCW 9A.36.021(1)(a). Under RCW 9A.04.110(4)(b), a “temporary but substantial disfigurement” constitutes “substantial bodily harm.”

Here, the trial court instructed the jury that “disfigurement” means “that which impairs or injures the beauty, symmetry, or appearance of a person; that which renders unsightly, misshapen, or imperfect, or deforms in some manner.” Clerk’s Papers at 33. This instruction comports<sup>6</sup> with

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<sup>5</sup> The State filed other charges that the jury convicted Alvarez of that she does not appeal and we do not discuss.

<sup>6</sup> In *Atkinson*, the trial court instructed the jury that “ ‘[d]isfigurement’ means that which impairs or injures the beauty, symmetry, or appearance of a person or thing; that which renders unsightly,

the instruction approved by Division Three in *State v. Atkinson*, 113 Wn. App. 661, 666-67, 54 P.3d 702 (2002).

Alvarez urges us to disagree with Division Three because the instructions have not been “codified” in the Washington Pattern Jury Instructions and because no other appellate court has followed *Atkinson*’s holding. Appellant’s Br. at 9. She claims that pain, not disfigurement, should be the yardstick by which substantial bodily harm is measured. We disagree.

RCW 9A.04.110(4)(b) does not denote Alvarez’s claimed distinction. As the instruction was supported by substantial evidence, properly set forth the applicable law, and allowed the parties to argue their theories, her argument fails.

#### Sufficiency of the Evidence

Next Alvarez claims that the State did not present sufficient evidence to support a conviction for second degree assault.

When analyzing a claim of insufficiency of the evidence, we determine whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence and reasonable inferences in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State’s evidence. *Salinas*, 119 Wn.2d at 201.

Here, both Savage’s and Alvarez’s testimony support the allegation that Alvarez beat Savage. Alvarez admitted she “did get the best of” Savage. 2 RP at 180. Savage testified that Alvarez repeatedly punched her in the face and that she suffered black eyes, bruises, and bleeding

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misshapen, or imperfect, or deforms in some manner.” 113 Wn. App. at 667. The trial court omitted the words “or thing” here, as used in *Atkinson*.

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as a result. The State introduced into evidence photographs and testimony identifying Savage's injuries and showing "temporary but substantial disfigurement." RCW 9A.04-.110(4)(b). Sufficient evidence supports Alvarez's conviction.<sup>7</sup>

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered

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Houghton, P.J.

We concur:

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Bridgewater, J.

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Hunt, J.

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<sup>7</sup> Alvarez also claims that fourth degree assault would have been a more appropriate charge than second degree assault. *But see State v. Ward*, 108 Wn. App. 621, 629, 32 P.3d 1007 (2001) (charging prosecutorial discretion is proper if based on the elements that can be proved or the penalties following conviction), *aff'd*, 148 Wn.2d 803, 64 P.3d 640 (2003).