

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON, |) | DIVISION ONE |
| |) | |
| Respondent, |) | No. 67540-1-I |
| |) | |
| v. |) | |
| |) | |
| MICHAEL WAYNE KIMMER, |) | UNPUBLISHED OPINION |
| |) | |
| Appellant. |) | FILED: November 13, 2012 |
| _____ |) | |

Dwyer, J. — Michael Kimmer appeals from his conviction of assault in the second degree arising from an incident in which he grabbed his victim around the neck with sufficient force to leave visible marks and bruising. Kimmer contends that the evidence adduced at trial was insufficient for a reasonable finder of fact to determine that he obstructed the victim’s blood flow or ability to breathe (or acted with the intent to do so) and that, accordingly, the evidence cannot support his conviction of assault in the second degree. In addition, Kimmer asserts that his offender score was miscalculated for purposes of sentencing. Because neither contention has merit, we affirm.

I

On October 30, 2009, Carolyn Bradbury was admitted to the emergency department at Overlake Hospital Medical Center. She was bleeding from her

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right leg, the blood having soaked through the fabric of her pant leg. Bradbury told the emergency room physician that she had been stabbed by her ex-boyfriend—later identified as Michael Kimmer—several hours earlier. She explained that the stabbing occurred after Kimmer threw her onto the bed and as she raised her legs to protect herself. The treating physician sutured two two-inch-deep stab wounds on the back of Bradbury's leg.

Bradbury also had bruises on her face, beneath her right eye on her cheekbone, and on her neck. She told the treating physician that she had sustained these injuries during a separate incident also involving Kimmer the previous day. She explained that Kimmer had “grabbed [her] around the neck” during this attack.

Kimmer was thereafter charged by amended information with two counts of assault in the second degree. Count one—which alleged assault by strangulation—was based upon the first incident in which Kimmer grabbed Bradbury around her neck. Count two was based upon the second attack in which Kimmer stabbed Bradbury in the leg.

At trial, the emergency room physician testified that the bruises around Bradbury's neck were “consistent with being choked.” The physician further testified that “it takes a fair bit of force to create” such bruising. An emergency room social worker who interviewed Bradbury at the hospital also testified that she had noticed “markings on [Bradbury's] neck” and that it appeared that

Bradbury had “been choked.”

The jury thereafter found Kimmer guilty as charged. Based upon Kimmer’s offender score, the trial court imposed a standard range sentence of 57 months of incarceration.

Kimmer appeals.

II

Kimmer first asserts that there was insufficient evidence adduced at his trial to sustain his conviction of assault in the second degree by strangulation. We disagree.

The State must prove each essential element of a charged crime beyond a reasonable doubt. State v. Oster, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). In deciding whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State in order to determine whether any rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence. Salinas, 119 Wn.2d at 201. Moreover, “all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” Salinas, 119 Wn.2d at 201. We defer to the finder of fact on “issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Ainslie, 103 Wn. App. 1, 6, 11

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P.3d 318 (2000).

A person is guilty of the crime of assault in the second degree by strangulation where he or she intentionally “[a]ssaults another by strangulation.” RCW 9A.36.021(1)(g). Strangulation is defined by statute 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).

Kimmer does not dispute that he intentionally assaulted Bradbury by compressing her neck. Instead, he asserts only that the evidence adduced at his trial was insufficient for a reasonable jury to find beyond a reasonable doubt that he either actually “obstruct[ed] [Bradbury’s] blood flow or ability to breathe” or that he intended to cause this particular result. RCW 9A.04.110(26).

There was, however, ample evidence presented for a reasonable fact finder to so find. Bradbury told both the emergency room physician and social worker at the hospital that Kimmer had grabbed her around the neck during the assault. There were visible marks and bruising on Bradbury’s neck as the result of this attack. The emergency room physician told the jury that this bruising was “consistent with being choked” and “that’s what the patient had reported.” Moreover, the physician explained that a significant amount of force is required in order to cause such bruising. The social worker who interviewed Bradbury likewise testified that it appeared that Bradbury had “been choked.”

This evidence, which we must view in the light most favorable to the State, was sufficient for a reasonable jury to determine that Kimmer had obstructed Bradbury's ability to breathe. The word "choke" means "to make normal breathing difficult or impossible . . . by compressing the throat with strong external pressure." Webster's Third New International Dictionary 396 (2002). Given the marks and bruising evident on Bradbury's neck, her statements to medical personnel regarding the source of these injuries, and the emergency room physician's testimony that such injuries are likely to arise from being choked, a reasonable jury could determine that Bradbury had been strangled within the meaning of RCW 9A.04.110(26). Accordingly, the evidence adduced at trial is sufficient to sustain Kimmer's conviction of assault in the second degree by strangulation.

III

Kimmer next contends that the sentencing court miscalculating his offender score for purposes of determining the standard sentence range for each of his assault convictions. Again, we disagree.

A criminal defendant's standard sentence range is based upon the seriousness of the offense and the defendant's "offender score." RCW 9.94A.530(1). The offender score is calculated by examining the defendant's criminal history, which is a list of his or her prior convictions. See RCW 9.94A.030(11); RCW 9.94A.525. A prior conviction is "a conviction which exists

before the date of sentencing for the offense for which the offender score is being computed.” RCW 9.94A.525(1). A prior adult felony conviction for a violent offense is counted as two points toward the offender score while a nonviolent adult felony conviction is counted as one point. RCW 9.94A.525(8). Where a person is to be sentenced for more than one offense on the same date, the sentence range for each offense is determined by considering the concurrently sentenced offenses as prior convictions for the purpose of calculating the defendant’s applicable offender score.¹ RCW 9.94A.525(1); RCW 9.94A.589(1)(a).

Here, in determining the standard sentence range for each of Kimmer’s assault convictions, the sentencing court determined that Kimmer’s offender score was eight. As the court correctly noted, Kimmer’s criminal history included five prior adult felony convictions.² Each of these five prior offenses, which were nonviolent in nature, counted as one point toward Kimmer’s offender score for a total of five points.

In addition, because Kimmer was to be sentenced for two current convictions of assault in the second degree, in determining the applicable sentence range for each assault offense, the sentencing court properly utilized the other assault conviction as if it were a prior conviction for purposes of

¹ We review the trial court’s calculation of the offender score de novo. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

² These prior offenses included two convictions of possession of a controlled substance, one conviction of identity theft, one conviction of violation of a protection order, and one conviction of unlawful possession of a firearm.

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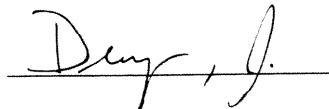
calculating Kimmer's applicable offender score. RCW 9.94A.589(1)(a).

Because assault in the second degree is characterized as a violent offense, RCW 9.94A.030(54)(a)(viii), the sentencing court properly added two additional points to Kimmer's offender score in determining his standard sentencing range for each assault conviction.

Finally, by the time of the sentencing hearing, Kimmer had also been convicted of a felony violation of a court order.³ This conviction, which was nonviolent in nature, added one additional point to Kimmer's offender score, bringing his total offender score to eight.

There was no error in the sentencing court's calculation of Kimmer's offender score and, accordingly, the court did not err by imposing a sentence based upon that score.

Affirmed.

A handwritten signature in cursive script, appearing to read "Dery, J.", is written over a horizontal line.

We concur:

³ See King County Superior Court cause number 11-1-02276-1.

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Grosse, J

Becker, J.