

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KRYSTA MARIE USKOSKI,

Appellant.

No. 39790-1-II

UNPUBLISHED OPINION

Johanson, J. — Krysta Marie Uskoski appeals her conviction for malicious prosecution of a felony. After an evening of drinking, Uskoski claimed that a police officer sexually assaulted her. The next morning, she recanted her claim. On appeal, Uskoski argues that the record contains insufficient evidence to support her conviction, that the prosecutor committed misconduct, and that the prosecutor denied her right to confrontation. Because we agree that the record contains insufficient evidence to sustain her conviction and reverse on this ground, we do not consider the remaining issues. We reverse.

FACTS

To celebrate signing a lease on a new apartment, Uskoski and her boyfriend set out one evening to drink alcohol and watch basketball. Over the course of the night, Uskoski had several drinks and became severely intoxicated.

Around 2:00 am the next morning, Officer Janisch was on patrol when he was dispatched

to the Columbia Apartments because a female, who he later identified as Uskoski, was pounding on the door of an apartment whose tenants did not know her. When Officer Janisch arrived, he saw Uskoski urinating on the porch to the apartment. Uskoski could not stand well and was having trouble communicating. Officer Janisch determined that she was severely under the influence of alcohol.

After leaving her briefly, Officer Janisch rejoined Uskoski and noticed that her attitude had changed from being cooperative to being angry and hostile. Uskoski began kicking, screaming, and cursing. For her safety, Officer Janisch handcuffed Uskoski and placed her in the back of his patrol car. He did not think that the circumstances warranted taking her to jail, so he called Uskoski's mother, Kerry Crow, to see if she could come get Uskoski. Uskoski went berserk when Officer Janisch called Crow, who agreed to come get her.

While in the car driving home, Uskoski was distraught and crying. Crow was concerned about why she was upset, and Uskoski said, "He raped . . . he tried to rape me." II-B Verbatim Report of Proceedings (VRP) at 287. Crow asked, "Who? What are you talking about?" II-B VRP at 386. Uskoski responded by saying that the officer tried to rape her.

Crow genuinely felt as though something had happened to Uskoski that night and wanted to take her to the police station. Uskoski just wanted to go home. Crow persisted and refused to take her home, saying, "Krysta, this isn't something you should just let go. If something happened to you tonight, you need to report it." II-B VRP at 388.

Crow drove to the police station, but Uskoski refused to leave the car and repeated that she wanted to go home. Crow said, "Look . . . I'm worried about you. If something happened to you . . . we need to find out what's going on." II-B VRP at 388. Uskoski then left the car and

began walking down the road. Crow called 911 to ask for assistance, and she was advised to go to the sheriff's station.

Crow eventually got Uskoski back into the car, and Uskoski repeated, "Just take me home. Just take me home." II-B VRP at 389. But Crow persisted, "I don't think this is something that should just be ignored." II-B VRP at 389.

Crow drove Uskoski to the sheriff's station. When they arrived, Uskoski said, "I just want to go home, I want to go buy a pack of cigarettes, and I want to go home." II-B VRP at 288. Ultimately, Uskoski reluctantly went into the sheriff's station.

It was around 3:00 am when Deputy Sheriff Sergeant Michael McCabe interviewed Uskoski. Sgt. McCabe observed that Uskoski was intoxicated and that she exhibited a wide array of emotions, switching between angry and sad. Despite her intoxication, Sgt. McCabe thought Uskoski was still fit to answer questions related to the investigation of her alleged sexual assault. Uskoski sat on the floor, slumped down in the corner of the room. Eventually, she started to talk about the alleged rape and said, "A police officer tried to put his penis in me. . . . A police officer tried to stick his penis in my butt. He tried—he tried to penetrate my orifices." I VRP at 78, 116.

Uskoski was asked to make a written statement. She wanted to sober up and deal with the situation in the morning, but Crow told Uskoski that she had to make a statement before she could go home. Eventually, Uskoski made the following written statement:

"The man that pulled me over outside of my new apartment, pushed me against the back of the vehicle. The officer pulled out his erect penis and attempted to place it—

. . .

—"in my orifice. At first in the front, then the back, eventually calling my mother from the car.

"When I was in the vehicle, the other officer asked me to step out and asked to see my breasts."

I VRP at 126 (Uskoski's statement being read aloud at trial). Uskoski was emotional while writing the statement and remembered "slamming the pencil down five or six times, telling them I wanted to leave, I could do this tomorrow, and them telling me, 'Just finish it and you can go home. Just—just write it down and you can go home.'"¹ II-B VRP at 291.

After leaving the sheriff's office around 6:00 am, Uskoski went home and slept until 12:00 pm or 1:00 pm. Meanwhile, Deputy Sheriff Detective Kevin Harper was assigned to investigate her allegations.

Detective Harper visited Crow's house to interview Uskoski around 5:00 pm. The first thing that Uskoski told Detective Harper was that she needed to clear something up: the officer did not rape her, did not ask to see her breasts, and did not expose himself. Although she remembered accusing the officer of raping her, she told Detective Harper that, in fact, a stranger had raped her. Uskoski told the story several more times, adding what she remembered along the way. According to Uskoski, she accused the officer of raping her because he was the last face she had seen before her mother came to get her.

The State charged Uskoski with malicious prosecution of a felony, to wit, third degree rape or indecent liberties with forcible compulsion. A jury found her guilty, and the trial court sentenced her to 60 days work release and imposed 24 months of community custody.

¹ Deputy McCabe testified that he never told Uskoski that she could not leave the interview. Deputy McCabe also testified that he did not *recall* Crow telling Uskoski that she could not leave or that she had to make a statement; however, Uskoski testified that Crow told her that she must finish the statement before she could go home. We do not interpret this as a conflict in testimony, though, because Deputy McCabe could not remember one way or the other, whereas Uskoski's testimony was not uncertain. Thus, Uskoski provided undisputed testimony that Crow told her to finish the statement before going home.

ANALYSIS

Uskoski argues that the prosecutor presented insufficient evidence to sustain her conviction for malicious prosecution. We review a claim of insufficient evidence for “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). We review the evidence in the light most favorable to the State. *Drum*, 168 Wn.2d at 34. An appellant challenging the sufficiency of evidence necessarily admits the truth of the State’s evidence and all reasonable inferences that can be drawn from that evidence. *Drum*, 168 Wn.2d at 35. Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

A person is guilty of malicious prosecution under RCW 9A.04.110 if the person maliciously and without probable cause therefore, causes or attempts to cause another to be arrested or proceeded against for any crime of which he or she is innocent. “‘Malice’ and ‘maliciously’ shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty.” RCW 9A.04.110(12).

The record contains insufficient evidence to convict Uskoski of malicious prosecution. It was Uskoski’s mother who insisted that she go to the police department and report the rape;

Uskoski just wanted to go home. Uskoski continued to signal that she did not want to report the rape by refusing to get out of the car and by attempting to walk home. But Uskoski's mother continued to insist that they go to the police.

Reluctantly, Uskoski went into the sheriff's station and said that an officer had raped her. The deputies requested a written statement, which Uskoski did not wish to write. She wanted to sober up and deal with it in the morning. But, again, her mother insisted that she report the incident, telling her that she had to give the written statement before she could go home.

Uskoski acquiesced and gave a written statement that described an officer's sexual assault. Five or six times while writing the statement she asked to leave and to finish the statement in the morning.

The next day, when Detective Harper came to interview her, the first thing Uskoski said was that the officer did not rape her, did not expose himself to her, and did not ask to see her breasts. When Detective Harper asked Uskoski why she specifically accused Officer Janisch of sexually assaulting her, Uskoski responded that it was because "he was the last face she had seen that evening." II-A VRP at 207.

There is insufficient evidence that Uskoski maliciously attempted to have the officer charged with a crime. To the contrary, Uskoski evidenced her intent not to prosecute the sexual assault by refusing to get out of the car, refusing to report it to the police, and refusing to make a statement. Although Uskoski eventually acquiesced by describing an officer's sexual assault and by writing a written statement of the same, Uskoski made the statements only after her mother's continued insistence, which culminated in controlling when Uskoski could leave the sheriff's station. Further, when Uskoski was contacted by Detective Harper, she immediately recanted her

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statement. Based on the foregoing evidence, the State failed to prove that Uskoski committed the crime of malicious prosecution. There is insufficient evidence for any rational trier of fact to find that Uskoski maliciously and without any probable cause attempted to cause Officer Janisch to be arrested or proceeded against.

Reversed.

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.

Johanson, J.

We concur:

Armstrong, P.J.

Quinn-Brintnall, J.