

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNY W. STEVENS,

Appellant.

No. 41938-6-II

UNPUBLISHED OPINION

Armstrong, J. — Kenny Stevens appeals his conviction of third degree assault, arguing that his conviction is not supported by sufficient evidence. He also argues that the trial court exceeded its statutory authority when it sentenced him to two years of probation for his misdemeanor malicious mischief conviction. The State concedes error as to his second argument. Concluding that the State presented sufficient evidence to convict Stevens of third degree assault, we affirm his conviction but remand to the trial court for correction of Stevens’s misdemeanor judgment and sentence.¹

FACTS

On November 13, 2010, Stevens’s girlfriend, Leslie Jo Boedeker, was refinishing an apartment in the complex where she and Stevens lived. Boedeker managed the apartment complex. Stevens entered the apartment where Boedeker was working and asked her to purchase cigarettes for him. Boedeker responded that she was busy, but that she would buy the cigarettes “in a minute.” Report of Proceedings (RP) at 22. Stevens left, but returned later and asked for

¹ A commissioner of this court initially considered Stevens’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

No. 41938-6-II

Boedeker's automated teller machine (ATM) card. Boedeker told him she would not give him the ATM card, but again said that she would buy him the cigarettes "in a minute." RP at 22. Stevens then kicked a cabinet and left the apartment, returning to the unit he shared with Boedeker.

Boedeker purchased cigarettes and returned to the apartment where she lived. When she arrived, she heard crashing noises. Walking in, she saw broken coffee cups and spilled coffee. Boedeker also saw a broken vase in the bedroom. Stevens approached Boedeker and put his hands on her neck. The force caused a necklace Boedeker was wearing to break. In response, Boedeker hit Stevens with a hammer she was holding. At some point during the scuffle, Stevens kicked Boedeker in the hand. At the time of the incident, Stevens wore Harley Davidson boots. A worker performing maintenance on another apartment could hear Boedeker screaming for help.

After being kicked, Boedeker called 9-1-1. Boedeker told the operator that Stevens "kicked [her] with his foot" and "just broke [her] hand," and that Stevens "hurt [her] hand so bad." RP at 39, 41, 46. She further said, "I just want him out of here. Oh my God, you have hurt my hand. He comes out here and tries to choke me and threaten me and -- and then he kicked me with his combat boots on." RP at 42.

When police responded to the incident, they noticed that Boedeker was in a great deal of pain. Maneuvering her body to allow the police to take pictures of her injuries caused her to grimace. A responding Vancouver Police Officer, Joann Gibson, noticed that Boedeker's hand appeared swollen.

Four days after the incident, Vancouver Police Officer Michael Day and his supervisor,

Sergeant Davis, arrived at Boedeker's apartment to investigate the incident. When they arrived at Boedeker's apartment, she was wearing an Ace bandage on her right wrist. She told Officer Day she wore the bandage because of the injury Stevens inflicted when he kicked her. Boedeker gave a statement to Sergeant Davis but she could not write because her right hand hurt, so Sergeant Davis wrote the statement and she signed it with her left hand.

The State charged Stevens with second degree felony assault (domestic violence), third degree felony assault (domestic violence), and third degree misdemeanor malicious mischief (domestic violence). At trial, Boedeker testified that she was in pain following the kick to her hand, and that at the time she thought her "thumb had fallen off." RP at 36. She testified that it took "a lot of weeks" for her hand to feel normal again, and that she could not use her hand for "quite a while" following the incident. RP at 37. After a bench trial, the court convicted Stevens of third degree assault (domestic violence) and third degree malicious mischief (domestic violence). The trial court sentenced him to 51 months of incarceration and 9 months of community custody on the conviction for third degree assault. On the malicious mischief conviction, the misdemeanor judgment and sentence stated that the trial court sentenced Stevens to 365 days of confinement. The court also imposed 24 months of probation but failed to check either of two boxes, which would have indicated if the term of incarceration was suspended or deferred.

ANALYSIS

I. Sufficiency of the Evidence of Assault

Stevens contends that the State presented insufficient evidence to convict him of third

degree assault. Evidence is sufficient if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Because it is the trier of fact’s responsibility to resolve credibility issues and determine the weight of the evidence, we defer to it on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Stevens of third degree assault, the State had to prove that he, “[w]ith criminal negligence, cause[d] bodily harm accompanied by substantial pain that extend[ed] for a period sufficient to cause considerable suffering.” RCW 9A.36.031(f). First, Stevens contends that the trial court failed to make a written finding that Stevens acted negligently. However, the court made an oral finding at the hearing for sentencing that Stevens intentionally kicked Boedeker’s hand. Where no inconsistency exists, an appellate court may use the trial court’s oral ruling to interpret written findings and conclusions. *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987). “When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly.” RCW 9A.08.010(2). The trial court’s finding that Stevens acted intentionally in kicking Boedeker satisfies the requirement that he acted with criminal negligence.

Second, Stevens argues that the State put forth insufficient evidence to prove that Boedeker experienced substantial pain for a period sufficient to cause considerable suffering. Boedeker's statements during the 9-1-1 call demonstrate that she was in considerable pain following the kick by Stevens. When the police officers arrived, her hand was visibly swollen. The officers could see that she was in a great deal of pain. When the officers came to investigate the crime four days after the incident, Boedeker's hand was still sufficiently painful to prevent her from writing a statement. The pain took several weeks to subside. When viewed in the light most favorable to the State, the State presented sufficient evidence that Stevens's crime caused bodily harm accompanied by substantial pain for a period sufficient to cause considerable suffering. Therefore, it presented evidence for the trial court to find Stevens guilty of third degree assault under RCW 9A.36.031(1)(f).

II. Probation for Misdemeanor Malicious Mischief

Stevens next argues that the trial court exceeded its statutory authority when it sentenced him to 2 years of probation without having suspended his 365-day jail sentence. RCW 9.95.210(1) defines the superior court's authority to impose probation:

[i]n granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

If a trial court imposes a maximum jail sentence and suspends none of it, it lacks the authority to impose probation. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870 (2009).

The State concedes that if the trial court did not suspend Stevens's jail sentence, it erred in

No. 41938-6-II

imposing the two-year term of probation. We cannot determine whether the trial court suspended or deferred Stevens's jail sentence because it did not check either box on the judgment and sentence. Accordingly, we remand to the trial court to clarify whether it suspended or deferred Stevens's jail sentence and, if it did not, to delete the two-year term of probation.

We affirm Stevens's felony conviction but remand to the trial court to clarify his sentence on the misdemeanor conviction.

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 in accordance with RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Worswick, A.C.J.