

NOT DESIGNATED FOR PUBLICATION

No. 125,306

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ERNEST LEE POKE,
Appellant.

MEMORANDUM OPINION

Appeal from Leavenworth District Court; GERALD R. KUCKELMAN, judge. Opinion filed August 4, 2023. Affirmed.

Kristen B. Patty, of Wichita, for appellant.

Steven J. Obermeier, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before ATCHESON, P.J., MALONE and PICKERING, JJ.

PER CURIAM: Ernest Lee Poke appeals his conviction of one count of misdemeanor battery stemming from a bar fight in downtown Leavenworth. Poke's defense at trial was that his conduct was justified to defend his friend who was also engaged in the fight. His only claim on appeal is that the State presented insufficient evidence to support the conviction. Finding there was sufficient evidence presented at trial to support Poke's conviction, we affirm the district court's judgment.

FACTS

In the early morning hours of July 7, 2019, a fight broke out in a Leavenworth bar called Our Place. Several members of the Knight family were at the bar celebrating Kimmy Knight's 21st birthday. Kimmy suffered from a heart condition and began feeling unwell, so she sought shelter in the restroom along with another family member. Her fiancé waited outside the restroom for her, and eventually went in to check on her.

Laura Cunningham, another patron of the bar, was waiting to use the restroom. When Laura saw Kimmy's fiancé enter the restroom, she marched over to the restroom and kicked the door. Upon seeing Laura kick the door, Robert Knight Jr. went to check on Kimmy and tried to explain the situation to Laura. But rather than defusing the situation, Laura and Knight Jr. began to argue and yell at each other.

Laura's husband, Jeff Cunningham, quickly stepped in and confronted Knight Jr. The argument soon turned physical. Jeff and Knight Jr. began throwing punches and grappling. Other members of the Knight family joined the tussle. Jeff's friend, Poke, also intervened. Jeff and Knight Jr. eventually fell to the ground beside the pool table, with Knight Jr. ending up under Jeff. Robert Knight Sr. tried to pull Jeff off Knight Jr., while Michael Knight, Laura, and Poke threw punches at the bodies in the pile. Poke ended up connecting with Michael's face, leaving him with a laceration over his eye.

Eventually, Jeff got off Knight Jr. and the fight died down, although there was still some jostling. Knight Jr. went back to his table, and Knight Sr. got up from the floor. Poke then walked around the group and punched Knight Sr. twice in the head, knocking him out. Knight Sr.'s arms were at his side, and he never saw Poke throw the punches. When Knight Sr. hit the ground, Laura walked over and stomped on his face. Knight Jr. was told that his father was unconscious on the floor and began screaming at Poke, who promptly left the bar. The entire incident was recorded on the bar's security camera.

Officer Matthew Phillips of the Leavenworth Police Department was called to respond to the scene. Knight Sr. regained consciousness soon after Phillips arrived, but declined to go to the emergency room because he did not have insurance. About a week later, Knight Sr. began suffering from headaches, dizziness, loss of balance, nausea, and trouble concentrating. A doctor later diagnosed him with a concussion.

A grand jury indicted Poke on one count of aggravated battery under K.S.A. 2019 Supp. 21-5413(b)(1)(B), alleging that he knowingly caused bodily harm to Knight Sr. in any manner whereby great bodily harm, disfigurement, or death could be inflicted. The case proceeded to a jury trial, and the State's evidence included a videotape of the entire bar fight. A physician testified about the extent of Knight Sr.'s injuries. Poke testified in his own defense, explaining that he only joined in the bar fight because he believed it was necessary to come to Jeff's defense. That said, Poke conceded that it was unnecessary for him to punch Knight Sr. to protect Jeff. After hearing the evidence, the jury found Poke guilty of the lesser included offense of misdemeanor battery.

The district court sentenced Poke to a 6-month jail sentence, which it suspended, and ordered him to serve 12 months of probation. Poke timely appealed his conviction.

DID THE STATE PRESENT SUFFICIENT EVIDENCE TO SUPPORT POKE'S CONVICTIONS?

Poke's only claim on appeal is that the State presented insufficient evidence to support his conviction of misdemeanor battery. He argues that his conduct was justified to defend his friend from the imminent use of unlawful force in the bar fight. The State points out that the jury rejected Poke's defense at trial and maintains that ample evidence supports the jury verdict.

When a defendant challenges the sufficiency of the evidence to support a conviction, an appellate court must examine the evidence in a light most favorable to the

State and determine whether a rational fact-finder could have found the defendant guilty beyond a reasonable doubt. In making this determination, an appellate court will not reweigh evidence, resolve conflicts in the evidence, or pass on the credibility of witnesses. *State v. Aguirre*, 313 Kan. 189, 209, 485 P.3d 576 (2021).

Here, the evidence the State presented at trial supports Poke's misdemeanor battery conviction. To prove that Poke committed the crime, the State needed to prove that he knowingly caused bodily harm to another person. See K.S.A. 2019 Supp. 21-5413(a)(1). The security footage from the bar shows Poke's knock-out blows. Poke admitted that he punched Knight Sr. in the face. As a result of Poke's punches, Knight Sr. experienced concussion symptoms such as headaches, dizziness, loss of balance, nausea, and trouble concentrating.

On appeal, Poke argues that he was justified in hitting Knight Sr. because he was acting in defense of another. "A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force." K.S.A. 2022 Supp. 21-5222(a). Poke presented this exact argument to the jury, and it did not avail him. He testified that he only got involved in the brawl because he was concerned that Jeff would get injured in the bar fight. When several of the bar patrons including Poke were throwing punches in a pile, Poke connected with Michael Knight, leaving him with a laceration over his eye. The State did not charge Poke with battery for striking Michael.

The State charged Poke for aggravated battery of Knight Sr. Poke did not strike Knight Sr. until the bar fight was winding down. Knight Jr.—the person who was tangled up with Jeff during the fight—had stopped fighting and already went back to his table. It did not reasonably appear that Jeff was in imminent danger of injury when Poke struck Knight Sr. The videotape shows that Knight Sr. got up from the floor and was standing

with his arms at his side when he was blind-sided by Poke's punches to his head. Poke admitted that Knight Sr. was not choking or hitting Jeff when he decided to punch him. Poke admitted that it was unnecessary to hit Knight Sr. when he threw the punches.

The district court instructed the jury on Poke's defense of another theory, noting that Poke's use of force would be permitted so long as he reasonably believed it was necessary to defend another person from the imminent use of unlawful force. Thus, the jury was tasked with making a credibility determination between the various witnesses in deciding whether Poke was justified in using force against Knight Sr. In arguing his conviction should be reversed because his use of force was justified, Poke is asking this court to second guess the jury's determination to the contrary. But appellate courts do not reweigh evidence or pass on the credibility of witnesses. *Aguirre*, 313 Kan. at 209.

Ultimately, the jury found Poke guilty of misdemeanor battery instead of aggravated battery. Battery is knowingly causing bodily harm to another person while aggravated battery is knowingly causing bodily harm to another person in any manner whereby great bodily harm, disfigurement or death can be inflicted. Compare K.S.A. 2022 Supp. 21-5413(a)(1) with K.S.A. 2022 Supp. 21-5413(b)(1)(B). The jury's guilty verdict of battery instead of aggravated battery reflects that some of the jurors may have had a reasonable doubt about the degree of harm caused by the battery or the extent of Knight Sr.'s injuries. But the verdict does not cast any doubt on the jury's rejection of Poke's defense of another theory. Based on our standard of review, we conclude the State presented sufficient evidence to support Poke's conviction of misdemeanor battery.

Affirmed.