No. 100828-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

I.S.,

Petitioner.

ANSWER TO PETITION FOR REVIEW

ADAM CORNELL
Prosecuting Attorney

SETH A FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals decision.

III. ARGUMENT

A. THE SUFFICIENCY OF THE STIPULATED RECORD IN THIS CASE DOES NOT WARRANT REVIEW.

This case presents only one real issue: whether the evidence at the stipulated trial supports the defendant's conviction for third degree assault. That issue involves an interpretation of the police reports that were entered into evidence in this case. Such an issue does not warrant review by this court.

The Court of Appeals' analysis of this issue was also correct. An assault can be committed by an "actual battery", which means "an intentional touching or striking of another person that is harmful or offensive." State v.

Cardenas-Flores, 189 Wn.2d 243, 266 ¶ 40, 401 P.3d 19 (2017). A police report indicated that "[I.S.]'s resisting eventually pulled [him and two police officers] to the ground." CP 122. A reasonable fact-finder could determining that "pull[ing] [someone] to the ground" is an intentional and offensive touching. Review is not warranted to determine how an established legal definition applies to the facts set out in the police reports in this case.

B. SINCE BOTH PARTIES AGREE THAT THE COURT OF APPEALS APPLIED THE CONSTITUTIONALLY-REQUIRED STANDARD FOR REVIEW OF BENCH TRIAL FINDINGS, THAT ISSUE DOES NOT WARRANT REVIEW.

The petitioner nonetheless asks this court to consider the standard of review for bench trial findings. In criminal cases, the standard of review is whether a "rational trier of fact could have found proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

This court has specifically applied that standard in reviewing a conviction at a stipulated trial. State v. Drum, 168 Wn.2d 23, 34-35 ¶ 22, 225 P.3d 237 (2010). This standard is more intensive than a review for "substantial evidence." See State v. Green, 94 Wn.2d 216, 222, 616 P.2d 628 (1980).

In one case, however, this court used potentially-confusing language to describe the standard of review for a non-stipulated bench trial:

> To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. Specifically, following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.

State v. Homan, 181 Wn.2d 102, 105–06 ¶ 7, 330 P.3d 182 (2014) (citations omitted). This language seems to

suggest that the "substantial evidence" standard is the same as the Jackson standard. Under prior case law, this is incorrect. "Substantial evidence" is a lesser standard, which is constitutionally insufficient. See Green, 94 Wn.2d at 222.

In the present case, the Court of Appeals applied the Jackson standard. Slip op. at 4-5. The defendant does not contend that this standard was wrong. Nor could he, since that standard is more favorable to him than the "substantial evidence" standard. Notwithstanding any confusing language in Homan, the Court of Appeals applied the correct standard. This issue does not warrant review.

C. SINCE THE DEFENDANT'S CONVICTION WAS NOT BASED ON HIS ATTEMPT TO SPIT ON A POLICE OFFICER, THIS COURT NEED NOT DECIDE WHETHER SUCH AN ATTEMPT CONSTITUTES AN ASSAULT.

The defendant asks this court to determine whether spitting at another person constitutes "assault." That issue

is not presented by this case. The Court of Appeals did not affirm the conviction on the basis of the spitting. Rather, the court relied on the defendant's action in pulling the officers to the ground. Slip op. at 10. Whether the spitting also constituted an assault is therefore irrelevant to the outcome of this case.

The defendant suggests that law enforcement authorities need "guidance" on whether an unsuccessful attempt to spit on someone is an assault. It is clear, however, that such an attempt is a criminal act. Intentionally spitting on someone is an actual battery, which constitutes an assault. State v. Humphries, 21 Wn. App. 405, 408, 586 P.2d 130 (1978). An attempt to commit an actual battery constitutes the crime of attempted assault. State v. Hall, 104 Wn. App. 56, 64, 14 P.3d 884 (2000). Law enforcement authorities are thus justified in arresting and prosecuting a person for that act. The severity of the crime can be determined in a case

where it makes a difference. Since it makes no difference in the present case, the issue does not warrant review.

D. BECAUSE ILLEGAL POLICE CONDUCT IS NOT A DEFENSE TO A CHARGE OF ASSAULT, THE LEGALITY OF POLICE CONDUCT HERE IS NOT AN ISSUE WARRANTING REVIEW.

Finally, the defendant asks this court to review whether the police entry into his apartment was justified by exigent circumstances. This issue as well is irrelevant. A person may not use force to resist a police officer's unlawful conduct, unless the person is threatened with physical injury. State v. Valentine, 132 Wn.2d 1, 935 P.2d 1294 (1997). Here, there is no claim that the defendant believed that he was in physical danger from the officers.

As a result, the legality of the police conduct makes no difference. If the defendant assaulted the officers, he is guilty of third degree assault—even if the police were engaging in unlawful conduct. Conversely, if the defendant's actions did not constitute an assault, he is not

guilty of that crime—even if the police were engaging in lawful conduct.

The defendant claims that the Court of Appeals decision is inconsistent with State v. D.E.D., 200 Wn. App. 484, 402 P.3d 851 (2017). There, the court held that passive resistance to an investigatory detention does not constitute the crime of obstructing a public servant. Id. at 496 ¶ 25. This holding was based on the absence of a statutory duty to cooperate with a police investigation. Id. at 495 ¶ 22. The holding did *not* turn on the legal or illegal nature of the investigation. Id. at 494 ¶ 20.

Since the defendant in D.E.D. was not charged with assault, the court had no occasion to decide whether the defendant's actions constituted that crime. Moreover, the defendant's actions in the present case went beyond "passive resistance." There is no inconsistency between the present case and D.E.D.

If the legality of the entry were an issue, the evidence supports the trial court's conclusion that the entry was lawful. CP 100. According to the trial court's findings, police responded to a report of an assault. CP 98, Finding no. 2. Witnesses told the officers that the people involved in the fight had gone into a particular apartment. Id., Finding no. 9, On approaching that apartment, police heard screaming coming from inside. Id., Finding no. 12. When they contacted the occupant (the defendant's mother), she was "highly agitated, screaming and yelling." CP 99, Finding no. 21. She said something about her son being assaulted. Id., Finding no. 22. The defendant did not assign error to any of these findings. Brief of Appellant at 1-2. Under these circumstances, the police properly entered the apartment "to deter a possibly ongoing assault, ensure safety, provide help and prevent a suspect fleeing." CP 100, Conclusion no. 4.

Ultimately, however, the correctness of this conclusion is immaterial. As the Court of Appeals correctly held, any illegal police conduct would not justify exclusion of the evidence of a subsequent assault. Slip op at 11, citing State v. Mierz, 127 Wn.2d 460, 475, 901 P.2d 286 (1995); see D.E.D., 200 Wn. App. at 292 ¶ 15. Consequently, any issue concerning that lawfulness of the police entry does not warrant review.

IV. CONCLUSION

The petition for review should be denied.

This Answer contains 1318 words (exclusive of title sheet, table of contents, table of authorities, certificate of service, and signature blocks).

Respectfully submitted on May 12, 2022.

ADAM CORNELL
Snohomish County Prosecuting Attorney

By: _____
SETH A FINE, WSBA #10937
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON Respondent, I.S., Petitioner.	No. 100828-7 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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SIGNED IN SNOHOMISH, WASHINGTON, THIS 12th DAY OF MAY, 2022.

DIANE K. KREMENICH
APPELLATE LEGAL ASSISTANT
SNOHOMISH COUNTY PROSECUTOR'S OFFICE

SNOHOMISH COUNTY PROSECUTOR'S OFFICE

May 12, 2022 - 10:28 AM

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Appellate Court Case Title:	State of Washington v. I.J.S.
Superior Court Case Number:	20-8-00130-9

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