No. 31997-1-III

FILED
MAY 19, 2015
Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ALAN ROSS HACKNEY, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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Issue Pertaining to Assignment of Error

A. Was the State's evidence insufficient to support the conviction for second degree assault of a child when it failed to prove intent beyond a reasonable doubt? (Assignment of Error 1).

II. STATEMENT OF FACTS

Alan Ross Hackney was charged by information with one count of second degree assault of a child. (CP 6). The charge arose from a skull fracture suffered by his daughter, SH, when he dropped her on the floor. (CP 3). He voluntarily gave a statement to Detective Marcus Goodwater concerning the incident. (CP 56). Because the defense strategy was to have the statement admitted at trial and to contest its interpretation, no motion to suppress was made. (9/13/13 RP 31-32). The case proceeded to jury trial.

Robyn Herald was the mother of SH, who was born December 5, 2012. (9/17/13 RP 35). Mr. Hackney was the father. (*Id*. at 36). On January 3, 2013, SH was grumpy and possibly had a urinary tract infection. (*Id*. at 40). She needed to go to the

hospital. (*Id*. at 45). When it was determined SH had a skull fracture, Mr. Hackney first told Ms. Herald that he had accidentally dropped the baby from about a foot off the floor. (*Id*. at 47). Ms. Herald said he later told her he had dropped SH from higher when he was standing up. (*Id*.). She said he had accidentally dropped SH on her head. (*Id*. at 52). SH had no bruises prior to January 4, 2013. (*Id*. at 54).

Doctor Karina Dierks, a pediatric hospitalist at Sacred Heart in Spokane, testified SH had a bilateral skull fracture. (9/17/13 RP 58-59). The doctor did not think it happened by SH's hitting her head on the changing table. (*Id*. at 71). She generally saw this type of injury in non-accidental trauma cases. (*Id*. at 72). Doctor Dierks did note the neurosurgeon, Dr. Gruber, said neither the skull fracture nor the intracranial bleed was significant. (*Id*. at 74-75).

Acting on a contact with CPS, Detective Goodwater was assigned to investigate the case on January 7, 2013. (9/17/13 RP 84-85). He asked Mr. Hackney to come to the police station and talk with him. (*Id*. at 87). The jury watched the video of the interview. A transcript of the interview was later entered into the record. (CP 56).

Right after the interview on January 7, 2013, Detective Goodwater contacted Sacred Heart to let them know Mr. Hackney had attempted to reposition part of SH's skull, thus causing bruising. (9/18/13 RP 96). The detective wrote in his summary of the narrative police report that Mr. Hackney "threw [SH] hard to the floor." (*Id*. at 107). Throughout the interview, Detective Goodwater made it clear through his questioning that he believed this was no accident. (*Id*. at 109). On page 4 of the certificate of probable cause, he wrote that Mr. Hackney had lost control over his frustration and threw SH hard to the floor. (*Id*. at 110-11). But as it turned out, Detective Goodwater clarified that Mr. Hackney said no such thing, but had nodded in agreement with his characterization of the incident. (*Id*. at 111).

James Hatley, a CPS investigator, got a referral from the doctors at Walla Walla Hospital about SH. (9/18/13 RP 164). He testified Mr. Hackney confessed in a phone call to him. (*Id*. at 182).

Dr. Michelle Messer, a Sacred Heart pediatric hospitalist and child abuse specialist, evaluated SH on January 6, 2013. (9/18/13 RP 191, 195). She said a baby SH's age could not injure herself. (*Id*. at 202). It took significant force to cause a skull fracture. (*Id*. at

203). Dr. Messer testified the story did not fit the injury. (*Id*.). She also said it took significant force to cause the bruises on SH's head. (*Id*. at 221).

After the State rested, the defense moved to dismiss. (9/18/13 RP 227). The court denied the motion without prejudice. (*Id*. at 236-37).

Mr. Hackney testified in his own defense. After the baby was born, he lived with SH, Ms. Herald, and her mother at her mother's house. (9/18/13 RP 239, 244). Both he and Ms. Herald took care of SH, but he was working and she was not so she did most of the parenting. (*Id*. at 245). Mr. Hackney fed and changed [SH] and got up with her at night. (*Id*. at 246).

Mr. Hackney said he was swaddling SH when he lost his balance, fell to the floor, and she hit the ground on top of her head. (9/18/13 RP 257). He tried to fix her head. (*Id*. at 258). Mr. Hackney did not intentionally drop SH and did not throw her to the ground. (*Id*.). He saw something on her head that did not look right so he tried to fix it. (*Id*. at 259). Looking back, he should have taken her to the doctor. (*Id*. at 262). SH later was more fussy than normal and her head was swelling. (*Id*. at 264-65). They went to

the hospital. (*Id*. at 265).

From Walla Walla General, SH went to Sacred Heart fairly quickly. (9/18/13 RP 266-67). The doctors were questioning the cause of the injury and Mr. Hackney kept quiet. (*Id*. at 269). SH had a bilateral skull fracture to the back of her head. (*Id*. at 269). Mr. Hackney told Ms. Herald, Mr. Hatley, and then Detective Goodwater that he accidentally dropped SH to the floor and it was not intentional. (*Id*. at 273-74, 277).

Dr. Toomas Eisler, a neurologist, testified the force that caused the fracture to SH was insufficient to cause bleeding and damage to the brain itself. (9/18/13 RP 311). Dr. Eisler opined the force was equal to dropping the baby from one meter off the floor. (*Id*. at 314). And there was no evidence of collateral damage. (*Id*.). In his report, the doctor stated:

> Your question was: what type of force could have produced the injury to [SH]?
>
> On a more probable than not basis the medical record findings of injury are consistent with a force associated with dropping of a one month infant onto the vertex of her head. The opinion is supported by the finding of only fractured skull bones which require minimal force in a one month old infant.

> On a more probable than not basis the medical record findings of injury are inconsistent with the force associated with the act of throwing an infant against the floor or other object. This opinion is supported by the absence of any fractures, other than skull bone fractures, to suggest significant force involved in the head injury to [SH] on January 4, 2013. (CP 40).

During deliberations, the jury sent a note asking to see the video of the interview conducted by Detective Goodwater and for a transcript of the trial. With agreement of the parties, the court allowed one viewing of the video and told the jury it would not get a transcript and to rely on their memory. (CP 193). The jury convicted Mr. Hackney of second degree assault of a child with a finding of domestic violence by special verdict. (CP 195, 196). The court sentenced Mr. Hackney to a standard range sentence and stayed it pending appeal. (CP 224).

III. ARGUMENT

A. The State's evidence was insufficient to support the conviction for second degree assault of a child because it failed to show intent beyond a reasonable doubt.

The State must prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90

S. Ct. 1068, 25 L. Ed.2d 368 (1970). As reflected in the to-convict instruction, the State had to prove Mr. Hackney intentionally assaulted SH. (Instruction 12, CP 186). The definition of intent was given in instruction 15. (CP 186). A person acts with intent when acting with the objective or purpose to accomplish a result that constitutes a crime. (*Id*.).

The State failed to prove intent and thus did not establish an essential element of the crime. Indeed, the only evidence as to intent was Detective Goodwater's jaundiced interpretation of what was said, and not said, in the interview with Mr. Hackney:

> I confronted Alan with [SH's] fall to the floor. Alan stated again that it was an accident, and he wouldn't have intentionally thrown [SH]. I told Alan that I didn't believe he meant to throw her, but sometimes when people get upset they do things they regret as soon as it happens. I asked Alan if he had ever thrown something that he hadn't meant to throw. Alan shook his head yes, and stated he had. I told Alan that I believed this is what happened with [SH], that he was upset and even before [SH] left his hands he knew it was a mistake. *While I was saying this to Alan, he was nodding yes*. I asked Alan what happened after he put [SH's] skull back in place. Alan said [SH] went to sleep so he went back to bed himself and slept until 0600 that morning when he was awakened by Robyn. (italics added). (CP 3).

That interview was it for the State's evidence as to intent. And the

purported confession that Mr. Hackney threw his daughter to the floor was, in sum and substance, Detective Goodwater's self-fulfilling prophecy that he was "nodding yes" to what the detective wanted to hear. But that nod could have meant many things, most innocuous and non-incriminating, *e.g.*, an acknowledgment by Mr. Hackney that he heard what the detective was saying. That this was what he actually tried to communicate is reinforced by Detective Goodwater's admitting on the stand that Mr. Hackney did not come right out and tell him he threw [SH] to the floor. (9/18/13 RP 111). Thus, the only evidence of intent was Detective Goodwater's speculation and conjecture as to what a nod meant. That is not evidence beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Even in that light, the evidence fell far short of showing by the requisite quantum of proof that Mr. Hackney had the intent to assault SH. The jury struggled with the same question as reflected in its inquiry to the court asking to see

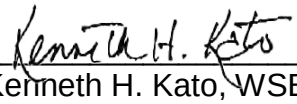
the video of the interview. But intent cannot reasonably be inferred from a single nod by a distraught young man after 70 minutes of brow-beating by a detective who was not getting the answers he wanted. Without it, there is not even circumstantial evidence of any intent to assault.

The existence of facts cannot be based on guess, speculation, or conjecture by the jury. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Yet, that is what the jury impermissibly relied on to find intent. Because the State's evidence was insufficient to prove intent beyond a reasonable doubt, the conviction must be reversed. *Green*, *supra*.

IV. CONCLUSION

Mr. Hackney respectfully asks this court to reverse his conviction of second degree assault of a child and dismiss the charge or remand for new trial.

DATED this 19th day of May, 2015.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on May 19, 2015, I served the brief of appellant by first class mail, postage prepaid, on Alan Hackney, 319 S. Mill St., Milton-Freewater, OR 97862; and by email, as agreed by counsel, on Teresa Chen at tchen@co.franklin.wa.us.