NO. 48393-9

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

TANYA JAMES-BUHL, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Brian Tollefson, Judge

No. 15-1-03708-2

REPLY BRIEF OF APPELLANT

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A. STATE'S REPLY TO ISSUES RAISED BY RESPONDENT

1. Defendant wrongly claims the appeal did not assign error to the challenged order as error was very clearly assigned to the dismissal of her charges based on the misreading of her mandatory reporting requirement under RCW 26.44.030(1)(a).

2. Defendant's unrecognized ignorance of law defense is irrelevant to this court's review of the trial court's legal error in reading an implied course of employment exception into the unequivocal language of the unqualified mandatory duty to report child-sex abuse RCW 26.44.030(1)(a) imposed on her as a (1)(a) professional.

3. The trial defenses defendant argues in this appeal from the pre-trial dismissal of her charges are misplaced for they ask this court to decide facts which can only be properly decided at a trial.

B. ARGUMENT IN SUPPORT OF STATE'S REPLY

1. DEFENDANT WRONGLY CLAIMS NO ERROR WAS ASSIGNED TO THE ORDER ON REVIEW, FOR ERROR WAS CLEARLY ASSIGNED TO THE DISMISSAL OF HER CHARGES BASED ON A MISREADING OF RCW 26.44.030(1)(a)'s MANDATORY REPORTING REQUIREMENT.

Appellate courts "decide ... case[s] on [their] merits, promoting substance over form." ***State v. Olson***, 126 Wn.2d 315, 318-21, 893 P.2d 629 (1995) (citing RAP 1.2(a)). Under RAP 10.3(4)—Assignments of error, appeals must contain: "[a] separate concise statement of each error a party contends was made ..., together with the issues pertaining to the

assignments of error." This rule combines with RAP 10.3(a)(5)'s call for argument in support of the issues presented for review ... with citations to legal authority. ***Olson***, 126 Wn.2d at 320. Together "they stand only for the proposition that when an appellant fails to raise an issue in the assignments of error in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue." *Id.* at 321 (overruling ***State v. Fortun***, 94 Wn.2d 754, 626 P.2d 504 (1980)).

"The narrow rule makes ... sense because in the situation where the issue is not raised at all, the Court is unable to properly consider the issue prior to the hearing and is given no information on which to decide the issue following the hearing. More importantly, the other party is unable to present argument on the issue or otherwise respond, and thereby potentially suffers great prejudice." *Id.* at 321-22.

Nothing supports defendant's claim the State failed to assign error to the challenged order. She presented the order, which was described in the caption and footer as: "ORDER OF DISMISSAL." That identifying description was carried over into the assignment of error, where the order was challenged as based on a misreading of the applicable statute:

> Were defendant's charges for failing to fulfill her obligation to report the sexual abuse of her own daughters wrongly dismissed based on a misreading of RCW 26.44.030(1)(a) that permitted a mandatory reporter—a teacher entrusted to protect children—to keep quiet about child-sex abuse occurring in her own home?

App. at 1. Three legal issues raised by the error were detailed:

> 1. Did the trial court undermine the omnipresent duty to report imposed by RCW 26.44.030(1)(a)'s plain language when it read an implied course of employment exception into the text that confounds the statute's purpose of protecting children?
>
> 2. Was subpart (1)(d)'s more general reporting duty wrongly read as superseding the specific duty (1)(a) places on professionals most likely to discover child abuse and best equipped to protect abused children through timely intervention?
>
> 3. Is the trial court's restrictive reading of (1)(a) at odds with the legislative intent for a statute that has expanded the duty to report rather than exempt from its reach professionals who would prefer not to protect children though timely reporting?

App. at 1-2. The assignment of error, with the three legal issues it raised, were expanded upon in the brief through extensive analysis and citations to supporting authority. There is no merit to defendant's claim.

Defendant secondarily asserts the State fatally failed to assign error to the court's "numerous conclusions of law." Resp. at 8. He knows the

order *he presented* does not have enumerated conclusions of law capable of numeric designation. The State was not required to assign its own numerical tags to the unnumbered conclusions; everything required by the controlling authority defendant neglected to cite was done when the State explained the disputed legal issues underlying the challenged order. Error was not assigned to the undisputed findings of fact. App.at 2; CP 42-46.

Defendant's effort to avoid review of the challenged order through his unfounded vision of draconian pleading requirements for assignments of error is at least ironic as it is irreconcilable with his complete failure to cite so much as one rule, statute or case, or offer more than one conclusory sentence, to support the claim. For such failures to cite relevant authority or provide meaningful analysis are actually claim precluding omissions. ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); ***State v. Elliott***, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); ***State v. Camarillo***, 54 Wn.App. 821, 829, 776 P.2d 176 (1989), aff'd, 115 Wn.2d 60, 794 P.2d 850 (1990); RAP 10.3(a). So, according to the procedural law defendant urges this Court to strictly enforce, it is his challenge to the assignment of error which should be summarily rejected.

2. DEFENDANT'S UNRECOGNIZED IGNORANCE OF LAW DEFENSE IS IRRELEVANT TO THIS COURT'S REVIEW OF THE TRIAL COURT'S LEGAL ERROR IN READING AN IMPLIED COURSE OF EMPLOYMENT EXCEPTION INTO THE UNEQUIVOCAL LANGUAGE OF THE UNQUALIFIED MANDATORY DUTY TO REPORT CHILD-SEX ABUSE THE STATUTE IMPOSED ON HER BECAUSE SHE WAS A (1)(a) PROFESSIONAL.[1]

It is a "universal maxim that ignorance of the law excuses no one." ***Leschner v. Dep't of Labor & Indus.***, 27 Wn.2d 911, 926, 185 P.2d 113 (1947). "[I]t would substitute for a positive rule established by the legislature a variable rule of decision based []on individual ideas of justice conceived by administrative officers as well as by the courts." *Id.* For this reason "a good faith belief ... a certain activity does not violate the law is also not a defense in a criminal prosecution." ***State v. Reed***, 84 Wn. App. 379, 384, 928 P.2d 469 (1997) (irrelevant ignorance of firearm ban).

Defendant responds to the State's analysis of the unqualified duty to report imposed by RCW 26.44.030(1)(a)'s unequivocal language by directing the Court to irrelevant claims about a PowerPoint presented to her by her employer on her employment-related reporting requirement. It

[1] Section No. 2 replies to defense response No. 2-3 as both make arguments in support of her incorrect interpretation of the statute.

became part of the record as an attachment to defendant's motion, yet it was not included as a determined truth in the trial court's findings. CP 42-43. The court did find:

> "The defendant told Detective Tate she was familiar with the laws of mandatory reporting and said she would probably report a similar incident if a kid in her class reported it."

CP 43. Irrespective of information she may or may not have received from her employer, as a licensed teacher it was defendant's responsibility to know what the reporting law required of her due to her privileged status as an RCW 26.44.030(1)(a) professional. No policy purportedly pronounced by the Superintendent of Public Instruction could amend her duty to report under the statute because such power "would substitute for a positive rule established by the legislature a variable rule of decision based upon individual ideas of justice conceived by [that] administrative officer[]." *Id.* Since the Superintendent is "professional school personnel" under RCW 26.44.020(19), by defendant's reasoning the Superintendent by the same PowerPoint presentation narrowed the scope of her own criminal liability for reporting failures under the statute.

The mistake of law defense defendant relies on unsurprisingly was not a basis for the challenged order. Nothing in the order suggests the trial court shared her apparent confusion about how criminal laws are enacted

and amended in the State of Washington. Rather, the trial court responded to its appreciation for the Legislature's power to define the scope of RCW 24.44.030(1)(a) by reading the duty to report imposed by (1)(a) as being qualified by the Legislature through an implied course of employment exception. Dismissal resulted from application of the exception.

That order is problematic in the several respects detailed in the Appeal; to include its derogation from the rule of judicial restraint which precludes courts from "add[ing] ... clauses to an unambiguous statute ...." ***State v. Delgado***, 148 Wn.2d 723, 730, 63 P.3d 792 (2003). Because the training defendant purportedly received is devoid of relevance to the accuracy of the trial court's application of RCW 26.44.030(1)(a) to her charges, one can assume defendant is either mistaken about the capacity of a training PowerPoint to amend the Revised Code of Washington, or it has been offered for some other, illegitimate, purpose like an unspoken request for extra-legal leniency. She has no claim to the Rule of Lenity since the unqualified duty at issue is not at all ambiguous. *See* ***State v. McGee***, 122 Wn.2d 783, 787, 864 P.2d 912 (1992).

Her confusion, if true, is a fact for consideration at sentencing. But defendant asks for far more. To avoid facing accountability, she asks this Court to free every (1)(a) professional in the state—every teacher, nurse, police officer, prosecutor and all others—from the obligation to report

child-sex abuse taking place in their own homes until it causes "significant bleeding, deep bruising, significant ... swelling, bone fracture or unconsciousness." RCW 26.44.030(1)(d). To avoid facing accountability, she further urges this Court to free (1)(a) professionals from the obligation to report physical abuse taking place in their own homes until it becomes severe enough to cause death if untreated. The freedom from mandatory reporting defendant advocates to advance her own interests would surely prove beneficial to (1)(a) professionals with an illegitimate interest in concealing child abuse occurring in their own homes as they masquerade as protectors of children in public. Yet it would do nothing to protect sexually abused children like defendant's daughters.

Thankfully for children like them our Legislature sees the matter differently. "[P]revention of child abuse" is its "highest priority." ***C.J.C. v. Corp. of Catholic Bishop***, 138 Wn.2d 699, 727, 985 P.2d 262 (1999); LAWS of 1985, ch.29. "The reporting statue is designed to secure prompt protection ... of the victims of child abuse." ***Beggs v. State, Dept. Social & Health Services***, 171 Wn.2d 69, 77, 247 P.3d 421 (2011). So contrary to defendant's interpretation of the statute, "it is designed to protect the victims, not the abusers." *Id.* Nowhere in the text or history can a good faith reader find an intent to let the children of (1)(a) professionals endure unreported abuse their (1)(a) caregivers would be obliged to report if

brought to their attention at work. Such a rule would only enable (1)(a) professionals to maintain the façade of being people deserving the special positions of trust bestowed upon them by the public.

3. THE TRIAL DEFENSES DEFENDANT ARGUES IN THIS APPEAL FROM A PRE-TRIAL ORDER DISMISSING HER CHARGES INCORRECTLY CALL UPON THIS COURT TO DECIDE FACTS WHICH CAN ONLY BE PROPERLY DECIDED AT A TRIAL.

Deciding the persuasiveness of direct and circumstantial evidence of a defendant's guilt is the business of a trier of fact. ***In re Melter***, 167 Wn. App. 285, 315, 273 P.3d 991 (2012). "It is a task for which courts of review are unsuited since [they] have only the written record and cannot therefore pass on the credibility of witnesses and necessarily then the persuasiveness of the evidence produced during the trial." *Id.*

Section 4 of defendant's brief does not respond to the legal issues properly before this Court; instead, it inexplicably argues facts from her point of view as if a trial had taken place and the sufficiency of evidence supporting conviction was at issue. But her case was dismissed before trial as a matter of law. If the evidentiary support for the charges was at issue, it would be viewed in a light most favorable to the State, making the inferences she draws in favor of her defense as irrelevant as they are

misplaced in an appeal aimed at correcting a misinterpretation of a statute. ***State v. Henjum***, 136 Wn. App. 807, 810, 150 P.3d 1170 (2007).

Defendant's startling mischaracterization of this case as based on a child's overreaction to "mere cuddling" nonetheless warrants a reply out of respect for the children she refused to protect. Resp. at 21. Despite being a mandatory reporter, a professional entrusted to safeguard our community's children, someone else had to report sexual abuse her daughter M.E.B. first disclosed to her. CP1. M.E.B. reported being molested by defendant's husband Joshua Hodges. CP 1. M.E.B. told defendant Hodges had been touching her. CP 1.

Instead of reporting, defendant kept quiet about abuse she would have "probably" reported if disclosed to her by a student. CP 1-2. M.E.B.'s forensic interview revealed Hodges had been touching her vaginal, anal, and chest area. CP 1, 43. The touching began when she was thirteen. CP1, 43. Most of it occurred in Hodges' room. CP1. That abuse carried on in five month intervals. CP 1-2. Nothing changed after M.E.B. told defendant about it; rather than intervene, she allowed Hodges to be alone with M.E.B. CP 2, 43.

Defendant's eldest daughter B.J-K was also sexually abused in the home. CP 2. Hodges first snuck into B.J-K's room when she was sixteen.

CP 2, 44. B.J-K. told defendant what was happening, told defendant she did not feel safe, but aside from confronting Hodges, defendant made no real changes. CP 2, 44. When defendant's daughter M.M.B. was eleven, she awoke to Hodges rubbing her buttocks under her clothing. CP 2, 44-45. Defendant refused to install the bedroom-door lock M.M.B needed to feel safer. CP 2, 44-45. Defendant's daughter K.B. disclosed Hodges was touching her, to include her vaginal area, once every two or three weeks. CP 3, 45. She told defendant about it, yet again, defendant failed to report the abuse and continued to facilitate Hodges' access to K.B. CP 3, 45. Because of a report made by a third party more protective of defendant's daughters than she was, Hodges is being held accountable. CP 1, 43.

C. CONCLUSION.

There is nothing illegal, unfair or unjust about defendant being held to account for failing to follow through with the mandatory reporting duty attending her status as a licensed teacher entrusted with the welfare of all our community's children, including her own. The trial court misread a course of employment exception into a statute that cannot bear it due to the unequivocal duty to report created by its plain language and intent for (1)(a) professionals to protect all children at all times whenever (1)(a) professionals have reason to believe children are being abused. The order

dismissing defendant's charges should be reversed, so the prosecution can proceed to address her failure to report the sexual abuse she had reason to know her own daughters were experiencing in the home.

RESPECTFULLY SUBMITTED: August 9, 2016.

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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