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No. 62946-8-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

FILED & CIVIL  
COURT OF APPEALS  
STATE OF WASHINGTON  
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STATE OF WASHINGTON,

Respondent,

v.

RALPH REDMOND, III,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Gregory Canova

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENT OF ERROR**

There was insufficient evidence that the defendant committed the crime charged, requiring reversal.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

1. Was there insufficient evidence that the defendant Ralph Redmond committed fourth degree assault - child abuse - domestic violence, which requires proof beyond a reasonable doubt that the defendant's use of force was not lawful, where the substantive evidence showed that the defendant merely slapped his daughter, hitting her with an open hand?

2. Did the State fail to prove that the force used by the defendant against his daughter was not reasonable, moderate force under the circumstances, for purposes of correcting or restraining the child?

## **C. STATEMENT OF THE CASE**

Ralph Redmond was charged in King County Superior Court with fourth degree assault – child abuse – domestic violence, pursuant to RCW 9A.36.041. CP 1-2. According to the affidavit of probable cause, Mr. Redmond struck his daughter R.M., age 12, and a relative deemed his conduct reportable to the police. CP 4.

The police report stated that R.M. was at her grandmother's home in South Seattle, and her father arrived at the home. Mr. Redmond was angry because he had been calling R.M.'s cellular telephone repeatedly and she had not answered. CP 4-5. Redmond summoned his daughter downstairs, and allegedly punched her in the head, knocking her to the ground. The defendant continued to hit R.M. when she was on the floor. CP 4-5. In the police report, the several witnesses to the alleged incident claim that Mr. Redmond hit R.M. with a closed fist. CP 4-5.

R.M. got up and started to get ready to leave, and Redmond "hit punched" [sic] her in the head again, and again she was knocked down. Mr. Redmond then allegedly began to kick R.M. in the side of her body as she was on the floor. He was yelling at her while assaulting her. CP 4-5.

At trial, Mr. Redmond's jury was correctly instructed that conviction for fourth degree assault as charged required proof that the force used was "not lawful," and that physical discipline of one's child is lawful when it is "reasonable and moderate," and inflicted by a parent for purposes of restraining or correcting the child. CP 33 (Instruction no. 5), CP 35 (Instruction no. 7).

Mr. Redmond testified in his own defense, and explained the discipline problems he had been having with his daughter. RP 86-90, 93-96. He also stated that he had only struck or slapped R.M. with an open hand. RP 99. However, the jury returned a verdict of guilty. CP 24; RP 167-68.

The trial court sentenced Mr. Redmond to a suspended term of jail confinement of 10 days, with credit for time served for the same period. CP 40. In addition, the court imposed 24 months probation with the Department of Corrections, and ordered conditions of probation including a domestic violence treatment evaluation, and compliance with any treatment recommendations. CP 41; RP 204.

Mr. Redmond timely filed a notice of appeal. CP 39.

#### **D. ARGUMENT**

**NOTWITHSTANDING THE JURY'S VERDICT OF GUILTY, THERE WAS INSUFFICIENT EVIDENCE THAT THE DEFENDANT'S USE OF FORCE WAS "NOT LAWFUL," REQUIRING REVERSAL OF MR. REDMOND'S CONVICTION FOR ASSAULT.**

**1. Criminal convictions must be supported by evidence sufficient to allow a trier of fact to find all of the elements of the crime charged beyond a reasonable doubt.** A trial court's

entry of a judgment of conviction, on a criminal offense for which the evidence at trial was legally insufficient, violates the due process guarantee of the Fourteenth Amendment. U.S. Const. amend. 14; Seattle v. Gellein, 112 Wn.2d 58, 768, P.2d 470 (1989) (due process requires that the State bear the burden of proving every element of the crime charged). In such circumstances, the Court of Appeals may, and indeed must, reverse a defendant's conviction, notwithstanding the fact that a jury has found the defendant guilty. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The evidence in a criminal case will be deemed sufficient to convict on a charge only if, considering the evidence in the light most favorable to the State, a rational trier of fact could have found all of the elements of the crime charged, "beyond a reasonable doubt." State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) (citing State v. Green, 54 Wn.2d 216, 616 P.2d 628 (1960)); see also State v. Steele, 58 Wn. App. 169, 791 P.2d 921 (1990).

The Supreme Court's oft-cited decision in State v. Green marked a departure from the Court's earlier view that the proper test for sufficiency was whether the reviewing appellate court was

satisfied that the record contained “substantial evidence” supporting the jury’s finding of guilt. Green was decided in response to Jackson v. Virginia, 443 U.S. 306, 61 L.Ed 2d 560, 99 S.Ct. 2871 (1974), supra, wherein the United States Supreme Court held that the proper test is whether there was sufficient evidence to justify a finding of guilt beyond a reasonable doubt; the federal courts thereafter replacing the substantial evidence standard. See Jackson v. Virginia, 443 U.S. at 312.

A challenge to the sufficiency of the evidence admits the truth of the state's evidence and reasonable inferences that can be drawn from it. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Moreover, in considering the evidence, credibility determinations are reserved for the trier of fact. State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).

**2. The State did not prove that Mr. Redmond hit R.M. with immoderate or unreasonable force, and the State’s trial witnesses effectively recanted their prior police statements claiming that the defendant stuck R.M. with a closed fist.** The prosecution of Mr. Redmond commenced when Seattle Police Detective Donna Stangeland investigated an assault report made

to officers of the East Pecinct, alleging that 12 year old R.M. was assaulted on May 8, 2008. RP 14.

Linda Barron, who made the assault report to the police, testified that on May 8 she was at her home in South Seattle where she took care of her grand-niece, R.M., and other younger child relatives after school. P 14, 18. Barron testified that Mr. Ralph Redmond, R.M.'s 44 year-old father, arrived at the home and called R.M. downstairs to his location. P 43. Redmond was angry because he had called R.M.'s cellular telephone and she hadn't answered. RP 43.

According to Barron, Redmond slapped R.M. “[w]ith an open hand,” and she fell onto the floor. (Emphasis added.) RP 43-44. He slapped R.M. again, and she fell to the floor, whereupon Redmond began to kick R.M. RP 44-45. Ms. Barron recalled that she had told the prosecutor that Mr. Redmond had actually hit R.M. with a closed fist, but at trial, although she stated that this “could have” occurred, she ultimately stated that she could not remember. RP 46.

**3. Washington statute allows corporal punishment for purposes of correction or restraint of a child provided the amount of force used is reasonable and moderate.** All defendants charged with assault must be proved guilty of an unlawful use of force. RCW 9A.16.020, the statute entitled "Use of Force - When Lawful," sets out broad categories of defenses of lawful use of force, such as in self-defense or by a common carrier expelling a passenger. That statute does not specifically enumerate a parental discipline defense. However, Washington statute, RCW 9A.16.100, provides:

It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.

The following actions are presumed unreasonable when used to correct or restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to

cause and which does cause bodily harm greater than transient pain or minor temporary marks. The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive.

RCW 9A.16.100.

Pursuant to this particular statute, a criminal defendant charged with an assaultive crime against his or her child must be proved by the State to have not have been acting in reasonable and moderate parental correction or restraint of the child – this is the “parental discipline defense,” as provided for in the statute and as outlined in State v. Singleton, 41 Wn. App. 721, 723, 705 P.2d 825 (1985).

Mr. Redmond’s jury was properly given the jury instruction which employs this statute to define the scope of lawful use of force in the parental discipline context. CP 35 (Instruction no. 7); see 11 Washington Practice: Washington Pattern Jury Instructions - Criminal 17.07 (2d ed. 1994). Mr. Redmond was entitled to this instruction on lawful disciplinary force because the evidence supported such a determination by the finder of fact. State v. Bennett, 42 Wn. App. 125, 128, 708 P.2d 1232 (1985), review

denied, 105 Wn.2d 1004 (1986).

In State v. Singleton, supra, the Court discusses factors that the trier of fact should consider to determine reasonableness of a defendant's actions.

Several courts have identified the circumstances which the trier of fact should consider in determining reasonableness of the punishment: e.g., the age, size, sex, and physical condition of both child and parent, the nature of the child's misconduct, the kind of marks or wounds inflicted on the child's body, the nature of the instrument used for punishment, etc.

State v. Singleton, 41 Wn. App. at 723-24 (citing Harbaugh v. Commonwealth, 209 Va. 695, 167 S.E.2d 329, 332 (1969)).

Here, the evidence failed to show that Mr. Redmond's conduct was "not lawful." The force used was reasonable. Ms. Barron, in addition to abandoning her earlier contention that R.M. was hit with a closed fist, stated that Mr. Redmond kicked R.M. three times, but that the force of the kicks was "in between hard and soft." RP 50. In addition, Barron saw no visible injuries on R.M. that day, or several days later. RP 55-56. She did not have to go to the doctor and did not ever complain of soreness. RP 56.

The child's grandmother, Helen Jones, also did not testify that Mr. Redmond hit his daughter with a closed fist. RP 65-66.

She specifically stated, "I really don't know" when asked whether he hit her with a fist or an open hand. RP 66.

In his trial testimony, Mr. Redmond admitted that he sometimes used physical discipline on his children. RP 80-81. On the day in question, the child's conduct required punishment in order to correct conduct that put her at greater risk. Mr. Redmond initially was angry with his daughter because she had been on the telephone for an inordinate amount of time when he was trying to reach the family. RP 89-92. However, importantly, R.M. was also disobeying her father's instructions to not speak on the telephone, or text message, with a male who was attempting to get R.M. to send him naked photographs of her. RP 89, 94-95.

After arriving at R.M.'s great-Aunt's home, Mr. Redmond discovered that R.M. had in fact been speaking with the male who was trying to solicit pornographic photographs of her. RP 95. Mr. Redmond became angry at R.M., and went to hit her with his hand, and she moved away and down to the floor. RP 98. Mr. Redmond admitted hitting R.M. several times with an open hand, on her shoulder, buttocks and leg area. RP 99. However, he never used a closed fist. RP 99-101.

Ultimately, perfect parenting skills are not a legal requirement. Moreover, even the best of parents can find a child's conduct exasperating. Here, the child refused to obey rules that the father very reasonably deemed necessary to protect her from harm from a predatory male. In today's realities, the sexual harm threatened by the new technology of cellular telephones in the hands of immature children made Mr. Redmond's conduct reasonable and moderate as correction of the child's behavior.

In summary, the State failed to prove that Redmond's conduct and use of force on R.M. was unlawful under these circumstances, and pursuant to the law of assault and applicable Washington statutes and case law, which require proof beyond a reasonable doubt of an "unlawful" act, his conviction was not supported by sufficient evidence.

**4. Reversal and dismissal is required.** Mr. Redmond's conviction for fourth degree assault must be reversed and the charge dismissed. Because the reversal of the entry of judgment of conviction is premised on the State's failure to prove the charge beyond a reasonable doubt, dismissal is the only proper remedy, as re-trial on the count would violate Mr. Redmond's double

jeopardy rights. State v. Ervin, 158 Wn.2d 746, 757-58, 147 P.3d 567 (2006); State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

#### **E. CONCLUSION**

For all the foregoing reasons and conclusions, Mr. Redmond respectfully requests that this court reverse and dismiss his conviction for assault.

Respectfully submitted this 8 day of July, 2009.

A handwritten signature in black ink, appearing to read "O. R. Davis", written over a horizontal line.

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