

64579-0

64579-0

NO. 64579-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

T.K.,

Appellant.

REC'D

APR 12 2010

King County Prosecutor  
Appellate Unit

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COURT OF APPEALS DIVISION ONE  
STATE OF WASHINGTON  
FILED

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

The Honorable Leroy McCullough, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's assault conviction.

2. The trial court erred when it entered conclusions of law II(a) and II(b), which indicate that appellant caused the requisite bodily harm, pain, and suffering for Assault in the Third Degree.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. The trial court found appellant guilty of Assault in the Third Degree, which requires that the defendant cause bodily harm accompanied by substantial pain extending for a period of time sufficient to cause considerable suffering. The trial evidence, however, revealed that appellant did not cause this harm. Must appellant's conviction therefore be reversed?

2. Despite the absence of sufficient evidence, two of the trial court's conclusions of law indicate that appellant caused the requisite harm for the charge. Where the evidence does not support these conclusions, are they erroneous?

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<sup>1</sup> The trial court's written trial findings and conclusions are attached to this brief as an appendix.

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged juvenile T.K. with one count of Assault in the Fourth Degree. CP 1. That charge was later amended to a felony, Assault in the Third Degree. CP 4. The case was tried before the Honorable Leroy McCullough, who found T.K. guilty and imposed local sanctions. CP 5, 8-10, 13-19.

Evidence at trial revealed that on June 14, 2009, K.F. was walking in Lake Meridian Park with her brother (C.F.), her new boyfriend (Michael), and one of Michael's friends. RP 19-22. M.S., whom Michael had previously dated, arrived at the park accompanied by three friends, one of whom was T.K. M.S. confronted Michael and K.F., who were holding hands. RP 22-23.

According to K.F., M.S. threatened to beat her up, punched her on the left side of the jaw, and then punched her on the right side of the jaw. RP 22-23. K.F. pushed M.S. and M.S. fell on top of a dog that belonged to one of the girls with her. The dog was injured, and all four girls then began assaulting K.F. RP 23-25, 37-38.

There was a temporary pause in the fray, but it started again near a park restroom as K.F. was calling 911. The girls followed K.F. to the restroom, where M.S. knocked the phone from her hand, and all the girls began punching and kicking her again. A friend came to K.F.'s aid, and the four girls left. RP 24-26, 39-40.

Police arrived and located the four girls at a nearby bus stop. RP 75-76. They were detained until K.F. was taken to their location and identified them. RP 26-27, 79-81, 87-88. A responding officer noticed that K.F. was speaking as if her jaw was sore, she appeared to have swelling in the area, and she was complaining that it hurt. RP 86. K.F. went to the hospital. She had some head and scalp contusions, but her greatest injury was to the left side of her jaw, where she was hit more than once. RP 29, 34, 36, 43; exhibits 2-5. For a few weeks to a month, K.F. could only eat soft foods and, even by the time of trial, eating certain foods still caused pain. RP 31, 49-51.

Notably, K.F. testified that T.K. only hit her in the stomach. She did not hit her anywhere near the face. RP 38-39, 42. K.F.'s brother, C.F., also testified that T.K. hit K.F. "around her stomach area." RP 63. A police officer responding to the scene testified that K.F. indicated M.S. had punched her and the other girls, including

T.K., had kicked her. RP 92-93.

C.F.'s testimony was similar to that of his sister regarding how the fight began. He testified that M.S. started it by hitting K.F. K.F. then pushed M.S. on to the dog, and all four girls then attacked K.F. RP 57-58, 63-65.

K.F.'s best friend, L.K., was not present for the fight, but testified that she saw T.K. and M.S. afterward and T.K. warned her that if she got involved in the dispute, she would end up like K.F. RP 73.

Defense witnesses provided a different version of events. M.S. testified that she approached K.F. and Michael, wanting to speak with Michael. K.F. let go of Michael's hand and took a step toward M.S., making her believe K.F. was about to hit her. RP 98, 103. She and K.F. ended up fighting on the ground. RP 99, 103. At one point, she was able to get up, but K.F.'s brother punched her, causing her to fall on the dog. RP 98. M.S. testified she did hit K.F., but only as the two struggled on the ground. RP 99. She denied hitting K.F. by the restroom. She had headed toward the restroom not to follow K.F., but to speak with Michael, who ended up throwing her on the ground. RP 99. She never saw T.K. hit K.F. RP 100.

T.K.'s sister, C.M., was the girl walking the dog. RP 106-107-109. She testified that K.F. raised her hand toward M.S., causing M.S. to flinch. RP 110. K.F.'s brother then tackled M.S. on top of the dog and hit her multiple times. T.K. got the brother off of M.S. and everyone ran away, except M.S., who chased after K.F. Michael then tackled and punched M.S. RP 107-112. C.M. never saw T.K. hit or kick K.F. RP 109.

T.K. testified in her own defense. She explained that M.S. was upset to see K.F. with Michael in the park. M.S. told Michael to let go of K.F.'s hand. K.F. pulled away from Michael and stepped toward M.S., M.S. also stepped forward, and the two started fighting. RP 115, 122. K.F.'s brother was trying to stop the fight and, in trying to intervene, pushed M.S. to the ground on top of the dog. RP 115. T.K. tried to get K.F.'s brother off of M.S. and the dog. RP 116. Everyone dispersed and then she saw M.S. and Michael fighting by the restrooms. RP 117-118. She denied ever hitting, kicking, or touching K.F. RP 118, 124, 126.

During closing arguments, the prosecutor argued that T.K. was guilty of Assault in the Third Degree because she had personally committed every act necessary for conviction. RP 129.

Defense counsel argued that if the court accepted the State's evidence as true, T.K. was guilty of no more than Assault in the Fourth Degree based on the punch in the stomach. RP 130-132. Counsel also argued that even if T.K. kicked K.F., the only injury sufficient for Assault in the Third Degree was to K.F.'s jaw, and the only clear source of that injury was the punches from M.S. RP 133.

Judge McCullough asked the parties about accomplice liability. RP 133, 136. Based on that inquiry, the prosecutor argued that all four girls should be held equally responsible regardless of who caused the greatest injury. RP 133-135, 137-138. Defense counsel argued the evidence did not support an accomplice theory. RP 136-37.

Ultimately, Judge McCullough did not enter a finding – oral or written – indicating he was finding T.K. guilty as an accomplice. See RP 138-140; CP 8-10. The written findings indicate that T.K. hit K.F. while K.F. was on the ground and hit her again by the restroom. CP 8-9. They also indicate K.F. sustained contusions to her head and injury to her jaw. CP 9. The court's conclusions indicate that T.K. caused bodily harm to K.F., that this bodily harm was accompanied by substantial pain that caused considerable suffering, and that T.K. acted with criminal negligence. CP 9-10.

T.K. timely filed her Notice of Appeal. CP 6-7.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT T.K.'S ASSAULT CONVICTION.

In every criminal prosecution, due process requires the State to prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

T.K. was charged with Assault in the Third Degree. CP 4. A person is guilty of that offense if, “[w]ith criminal negligence, [she] causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f). There is no doubt K.F. was assaulted and experienced the requisite pain and suffering based on the injury to her jaw. But there is no evidence that T.K. caused that pain and

suffering.

Rather, the evidence affirmatively shows that T.K. did not cause that injury. K.F. expressly testified that T.K. only hit her in the stomach and did not hit her anywhere near the face. RP 38-39, 42. K.F.'s brother, C.F., confirmed this, testifying only that T.K. hit K.F. "around her stomach area." RP 63. There was some evidence that T.K. also kicked K.F. RP 25, 37-38, 92-93. But there is nothing to indicate she kicked K.F. anywhere near her head or face.

Therefore, conclusions of law II(a) and II(b), in which Judge McCullough found that T.K. had caused the bodily harm accompanied by substantial pain and considerable suffering, are erroneous. See State v. Madarash, 116 Wn. App. 500, 509, 66 P.3d 682 (2003) (conclusions of law must be supported by findings of fact, which must be based on substantial evidence in the record).

In response, the State may argue that T.K. can be found guilty under a theory of accomplice liability, i.e., because she was involved in the assault, she is responsible for the injury to K.F.'s jaw despite the fact it was caused by another participant. See RCW 9A.08.020(3) (a person is guilty of a crime as an accomplice if she knowingly aids another in the commission of that crime).

But arguments for and against that theory were made below and, based on the absence of any finding of accomplice liability, Judge McCullough rejected that theory. The court's findings after a bench trial are designed to apprise the appellate court of "what questions the trial court decided and the theory for that decision." Backlund v. University of Washington, 137 Wn.2d 651, 657 n.1., 975 P.2d 950 (1999). Based on the findings in this case, T.K. was convicted as a principal. CP 9-10 (finding that T.K. caused the bodily harm that led to substantial pain and considerable suffering).

Moreover, it would be inappropriate for this Court to make a finding of accomplice liability on appeal. This Court may not weigh the evidence below or otherwise act as the trier of fact. State v. Naranjo, 83 Wn. App. 300, 303, 921 P.2d 588 (1996), abrogated on other grounds, State v. Head, 136 Wn.2d 619 (1998); State v. BJS, 72 Wn. App. 368, 372-73, 864 P.2d 432 (1996), abrogated on other grounds, State v. Lorenz, 152 Wn.2d 22, 93 P.3d 133 (2004); see also Stringfellow v. Stringfellow, 56 Wn.2d 957, 959, 350 P.2d 1003, 353 P.2d 671 (1960) (appellate court may not substitute its judgment for that of the trial court).

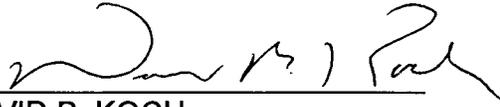
D. CONCLUSION

There is no evidence and there are no findings to support the trial court's conclusions that T.K. caused the requisite harm for Assault in the Third Degree. T.K.'s assault conviction should be reversed and dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficient evidence is dismissal with prejudice).

DATED this 12<sup>th</sup> day of April, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY  
JUVENILE DIVISION

STATE OF WASHINGTON,	)	
	)	
	)	Plaintiff, ) No 09-8-02545-4
	)	
vs	)	
	)	FINDINGS OF FACT AND
TYRA KUSACK	)	CONCLUSIONS OF LAW
B D 11/2/91,	)	PURSUANT TO JuCR 7 11(d)
	)	
	)	Respondent
	)	
	)	

THE ABOVE-ENTITLED CAUSE having come on for fact-finding on September 29, 2009, before Judge LeRoy McCullough, in the above entitled court, the State of Washington having been represented by Rule 9 Intern Kyle Daly & Deputy Prosecuting Attorney Jeremy Lazowska, the respondent appearing in person and having been represented by her attorney Brian Beattie, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On June 14, 2009, Kierstyn Frederick was walking with her brother Cody Frederick in Lake Meridian Park in Kent, King County, Washington She was approached by a group of individuals including the respondent, the respondent's sister Candice Mercer, and the respondent's friends Margarita Saldana and Nicole St Clair
- 2 After a hostile exchange of words Saldana attacked Frederick and punched her in the jaw Frederick attempted to defend herself, at which point several other individuals, including the respondent, began attacking Frederick as well The respondent hit Frederick while she was on the ground

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO JuCR7 11(d) - 1

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ORIGINAL

- 1 3 When Frederick attempted to flee, several individuals, including Saldana and the
- 2 respondent, followed her and continued to hit her near the bathroom of the park. The
- 3 respondent and her friends then left the park and walked eastbound on Kent Kangley Rd to
- 4 a bus stop nearby.
- 5 4 Kent Police Officer Matthew Lorette responded to the area and spotted a group of youths
- 6 matching the description of the suspects he had received from dispatch at a bus stop. He
- 7 noticed that the respondent was sweating. He engaged the respondent and her friends in
- 8 conversation. Soon thereafter Kent Police Officer Jeffrey Kluzak arrived, spoke briefly with
- 9 Lorette, and then drove to the park to investigate further.
- 10 5 Frederick's brother, Cody, arrived at the bus stop and informed Officer Lorette that the girls
- 11 at the bus stop were the ones who beat his sister. Officer Lorette then detained the
- 12 respondent, Saldana, Mercer, and another of the respondent's friends, Nicole St. Clair.
- 13 6 Officer Kluzak arrived at the park bathroom to find Kierstyn Frederick sitting down and
- 14 crying. Her face was red and her jaw appeared to be swelling. He transported Frederick to
- 15 the bus stop to conduct a show-up identification. Frederick positively identified all four
- 16 girls, including the respondent, as the ones who attacked her.
- 17 7 Later that day Frederick's friend, Lacey Kibbsgard, was at another bus stop in Kent when
- 18 she was approached by the respondent and her friends. The respondent told Kibbsgard that
- 19 her friend Kierstyn had just been beaten up and that if Kibbsgard said anything to the police
- 20 the same would happen to her.
- 21 8 As a result of the beating, Frederick sustained contusions to her head and an injury to her
- 22 jaw. She was unable to open her mouth or eat solid foods comfortably for more than a
- 23 week.

And having made those Findings of Fact, the Court also now enters the following

CONCLUSIONS OF LAW

I

The above-entitled court has jurisdiction of the subject matter and of the Respondent, TYRA KUSACK, who was born 11-2-1991, in the above-entitled cause

II

The State has proven the following elements of Assault in the Third Degree, contrary to RCW 9A 36 031(1)(f), beyond a reasonable doubt

- a That on or about the 14<sup>th</sup> day of June, 2009, the respondent Tyra Kusack caused bodily harm to Kierstyn Frederick,

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO JuCR7 11(d) - 2

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- b That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering,
- c That the respondent acted with criminal negligence,
- d That the act occurred in King County, Washington

In making these findings, the court relied upon the testimony of witnesses and evidence introduced at trial

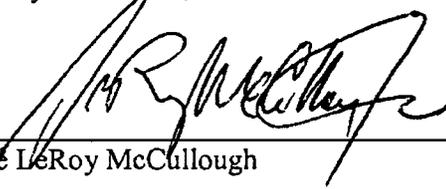
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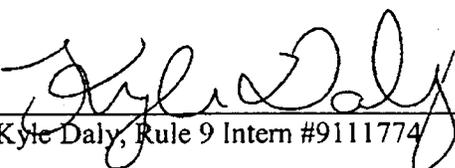
The respondent is guilty of Assault in the Third Degree

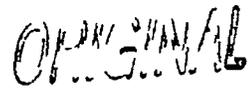
IV

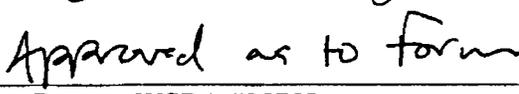
Judgment should be entered in accordance with Conclusion of Law II In addition to these written findings and conclusions, the Court hereby incorporates its oral findings and conclusions as reflected in the record

DATED this ~~16~~ <sup>8th</sup> day of ~~October~~ <sup>December</sup>, 2009

  
\_\_\_\_\_  
Judge LeRoy McCullough

  
\_\_\_\_\_  
Kyle Daly, Rule 9 Intern #9111774



  
\_\_\_\_\_  
Brian Beattie, WSBA #35753  
Attorney for Respondent Tyra Kusack

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64579-0-1
	)	
T.K.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYRA KUSACK  
507 L STREET SE  
AUBURN, WA 98002

**SIGNED** IN SEATTLE WASHINGTON, THIS 12<sup>TH</sup> DAY OF APRIL, 2010.

x *Patrick Mayovsky*