

NO. 65631-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

LAHRAJ GARRETT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ANN DANIELI

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. To show a due process violation arising out of lost evidence, the appellant must show that the evidence possessed an exculpatory value that was apparent on its face before it was destroyed. If the evidence is found to be only potentially useful, the appellant must show that the State acted in bad faith. Was the trial court's denial of Garrett's motion to dismiss proper when Garrett presented no evidence that the missing surveillance video possessed any exculpatory value or that the State acted in bad faith?

2. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. To prove assault, the State must show that the defendant's contact with another was harmful or offensive. The State presented evidence that Garrett shoved the victim so hard that she fell into the wall. As a result, the victim was shocked and startled. Garrett admitted that he grabbed the victim's hands and that he did not have permission to touch her. Is this sufficient evidence to demonstrate that Garrett's unlawful touching was offensive or harmful?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Lahraj Garrett, born January 13, 1994, was charged on January 3, 2010, in juvenile court, with one count of Assault in the Fourth Degree under RCW 9A.36.041<sup>1</sup> for shoving his teacher, Michelle Jacobsen. CP 1. On the same day, The Honorable Ann Danieli found Garrett guilty as charged at bench trial. 5/10/10 RP 81; CP 3. On May 26, 2010, Judge Kenneth Comstock sentenced Garrett to four months of supervision and 16 hours of community service. 5/26/10 RP 14<sup>2</sup>; CP 23-25.

**2. SUBSTANTIVE FACTS**

Michelle Jacobson has been a teacher for nearly 40 years. 5/10/10 RP 45. She has worked as a teacher at Rainier Beach High School for the past 25 years. 5/10/10 RP 45. While at Rainier Beach High School, she became involved in the Behavior Intervention Program in which Garrett was a student. 5/10/10 RP

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<sup>1</sup> RCW 9A.36.041: A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the Fourth Degree is a gross misdemeanor.

<sup>2</sup> For consistency and convenience to the court, the State has adopted Appellant's version of referring to the verbatim report of proceedings.

46-47. She was his teacher and mentor for over two years.

5/10/10 RP 47, 55.

On November 13, 2009, Michelle Jacobsen observed Garrett returning late from lunch. 5/10/10 RP 48. School policy provides that students are not allowed to immediately go into class if they are late. 5/10/10 RP 48. In an effort to help Garrett get into his next class, Ms. Jacobsen approached him and said "You're late, here's your pass." 5/10/10 RP 48-49. Rather than take the pass and go to class, Garrett told Ms. Jacobsen to "Get the fuck out of my way bitch." 5/10/10 RP 49. He then shoved Ms. Jacobsen so hard she fell against the wall. 5/10/10 RP 49.

After Garrett shoved her, he became cocky in front of his friend and continued walking as if nothing happened. 5/10/10 RP 49. At that point, Ms. Jacobsen refused to allow Garrett in the classroom. 5/10/10 RP 50. In response, Garrett continued to curse at her. 5/10/10 RP 50. Although Ms. Jacobsen did not suffer any injuries, she felt shocked when Garrett shoved her. 5/10/10 RP 50.

At approximately 3:55pm, Seattle Police Officer Eric Beseler responded to the scene. 5/10/10 RP 32. He observed a surveillance video of the incident and spoke with Ms. Jacobsen. 5/10/10 RP 12; CP 31. Although Ms. Jacobsen suffered no

physical injuries, Officer Beseler observed that she appeared shocked and startled by what happened. 5/10/10 RP 33. He then went to Garrett's home twice to speak with him and did an area check for him but was unable to locate him. 5/10/10 RP 33. Officer Beseler went back to the precinct and looked up Garrett's phone number. 5/10/10 RP 33. He spoke with Garrett over the phone. 5/10/10 RP 34. Garrett admitted to having shoved his teacher. 5/10/10 RP 14, 34.

At some point, the school emailed a copy of the surveillance video to Officer Beseler. CP 22. In addition, they sent a hard copy to him. CP 22, 32. The hard copy was faulty and would not play, and the email that was sent to Officer Beseler was auto deleted without his knowledge. CP 22, 32. When Officer Beseler realized he did not have a working copy of the video surveillance, he went back to the school to obtain one; however, a copy could not be retrieved. CP 22, 32.

At trial, Garrett moved to dismiss alleging the State failed to produce the school surveillance videotape at trial. 5/10/10 RP 23. The trial court denied Garrett's motion, finding that the video recording was not in the exclusive control of the police or the State. 5/10/10 RP 27. The court also found that the State did not act in

bad faith noting that the State made every effort possible to recover that video to no avail. 5/10/10 RP 27.

Ms. Jacobsen testified that she did not want to testify against Garrett because "testifying against a student was an anathema to everything that [she] has wanted to do with [her] life at the school." 5/10/10 RP 45. But she said she had to not only because she was legally required to appear but because the assault was by a student against a teacher. 5/10/10 RP 45, 55.

**C. ARGUMENT**

**1. TRIAL COURT PROPERLY DENIED GARRETT'S MOTION TO DISMISS**

Garrett contends that the trial court's failure to grant his motion to dismiss deprived him of his right to due process because the State failed to produce materially exculpatory evidence – recorded surveillance video of the incident. Garrett cannot meet the required showing that the destroyed videotape is exculpatory and that the State acted in bad faith with respect to its destruction.

The State has the duty to both disclose material exculpatory evidence to the defense, and to preserve such evidence for use by the defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994), citing Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194,

10 L. Ed. 2d 215 (1963). If the State fails to preserve “materially exculpatory” evidence, then criminal charges must be dismissed. Wittenbarger, 124 Wn.2d at 475. A trial court's determination that missing evidence is materially exculpatory is a legal conclusion which is reviewed *de novo*. State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

Evidence is deemed “materially exculpatory” only if it meets a two-fold test: (1) its exculpatory value must have been apparent before it was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wn.2d at 475, citing California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).

Garrett argues that the surveillance video is materially exculpatory simply because it would have either confirmed or rebutted the victim's recollection of events. However, a showing that the evidence might have exonerated the defendant, which is essentially all Garrett argues, is not enough. Wittenbarger, 124 Wn.2d at 475. As explained by the Court of Appeals, Division I in Seattle v. Duncan:

In weighing the burdens necessarily imposed on both the defendant and the prosecution, a court should first consider whether there exists a *reasonable possibility* that the missing evidence would have affected the defendant's ability to present a defense. The burden of establishing that "reasonable possibility" rests with the defendant... Lost or destroyed evidence which does not rise to the level of establishing a "reasonable possibility" that it will exculpate a defendant will be deemed insufficiently material to constitute a due process violation.

Duncan, 44 Wn. App. 735, 739, 723 P.2d 1156 (1986).

In Burden, the defendant moved for dismissal during his second trial after key exhibits from his first trial went missing. 104 Wn. App. at 511. The defendant asserted the defense of unwitting possession after police found cocaine inside the jacket that the defendant was wearing at the time of his arrest. Id. at 509. The defendant claimed the jacket did not belong to him and that the fit and appearance of the jacket were important factors in determining who owned the jacket. Id. at 512. At trial, the defendant tried on the jacket for the jury and illustrated that there was a different person's name inside the jacket. Id. at 510. The jury hung. Id. at 511.

When the second trial began, it was discovered that the jacket was lost. Id. The court held that the jacket was materially exculpatory because its exculpatory value was apparent (i.e., the fit

of the jacket on the defendant and the name inside the jacket) before the jacket was lost, and that no other comparable evidence was reasonably available to the defendant. Id. The Court of Appeals affirmed the dismissal. Id. at 514.

Unlike Burden, Garrett fails to show that the surveillance video possessed *any* exculpatory value that was *apparent* before it was destroyed. Other than his own conjecture that the video may have disputed the victim's version of events, Garrett has provided no evidence that the footage would have been material to his defense.

In fact, it is reasonable to conclude that the video was facially apparent as inculpatory. During the pretrial hearing, Officer Beseler testified that he reviewed the surveillance footage of the incident taking place. 5/10/10 RP 12. Garrett later admitted to Officer Beseler that he shoved Ms. Jacobsen, which is consistent with Ms. Jacobsen's testimony. 5/10/10 RP 14, 34. Consequently, Garrett is unable to show that the surveillance video constitutes readily apparent exculpatory evidence.

Garrett asserts that Seattle v. Fettig, 10 Wn. App. 773, 519 P.2d 1002 (1974), in which the court found the evidence to be materially exculpatory, is similar to this case. He is incorrect.

Fettig is distinguishable on the facts of this case and is, in fact, analogous to the facts in Burden. In Fettig, the defendant moved for dismissal during his second DUI trial after a video tape used in his first trial went missing. 10 Wn. App. at 774. The video tape showed the defendant's performance on sobriety tests. Id. at 773.

In his motion to dismiss, the defendant offered the testimony of the judge who heard his first trial in an effort to demonstrate that the video tape was materially exculpatory. Id. The municipal judge testified that while he could not remember if it was the defendant's case he was referring to, he did recall viewing a video tape around the same time as the defendant's trial that negated an impression of intoxication. Id.

The court held that the video was materially exculpatory because a "reasonable possibility that the suppressed video tape tended to rebut the police testimony while corroborating that of the defendant is indicated by the defendant's offer of proof." Id. Unlike the defendant in Fettig, Garrett makes no offer of proof showing a reasonable possibility that the video tape rebuts the victim's version of events or has any exculpatory value.

Since Garrett has failed to make any showing that the evidence possessed any exculpatory value, the motion to dismiss was properly denied.

If evidence is determined not to be materially exculpatory but only "potentially useful" to the defense, the defendant must show that the State acted in bad faith to warrant dismissal. Burden, 104 Wn. App. at 513. In this case, it does not appear the video would be potentially useful to defense because of the reasonable possibility that the tape was inculpatory. Furthermore, Garrett has made no showing that the State acted in bad faith. Officer Beseler indicated that when he attempted to retrieve the video footage from his email it had been auto deleted. CP 22. He then went to the school in an effort to obtain another copy but the video had been destroyed. CP 22. There was a good faith attempt made to retain the video.

As there was no showing of bad faith, the failure to preserve this potentially useful piece of evidence did not constitute a due process violation and the motion to dismiss was properly denied.

**2. SUFFICIENT EVIDENCE SUPPORTS GARRETT'S ASSAULT IN THE FOURTH DEGREE CONVICTION**

Garrett next challenges his Assault in the Fourth Degree conviction and asserts that the State failed to prove beyond a reasonable doubt that Garrett shoving his teacher into a wall amounted to an assault. Viewing the evidence in the light most favorable to the State, Garrett's argument fails. The State produced sufficient evidence to support the conviction.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits *any* reasonable trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). By claiming insufficiency of the evidence, a defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).

"All reasonable inferences from the evidence must be drawn in favor of the State and against the defendant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201). Circumstantial and direct evidence are equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witness, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). A reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

In order to find Garrett guilty of Assault in the Fourth Degree, the State must prove beyond a reasonable doubt that on or about a date certain (1) the defendant assaulted another and (2) the act occurred in the State of Washington. RCW 9A.36.041. An assault is an intentional touching of another person with unlawful force that is harmful or offensive regardless if physical injury results. State v. Stevens, 158 Wn.2d 304, 314, 143 P.3d 817 (2006). A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive. See WPIC 35.50.

Garrett does not challenge the court's conclusion that the touching was intentional and unlawful. Rather, Garrett argues that there is insufficient evidence for a trier of fact to conclude that the intentional touching was harmful or offensive. Testimony from

Ms. Jacobsen and Officer Beseler provide substantial evidence that the touching was both harmful and offensive.

Ms. Jacobsen testified that when she tried to give Garrett a pass, Garrett said "Get the fuck out my way bitch" and shoved her so hard that she fell into the wall. 5/10/10 RP 49. She felt shocked when Garrett shoved her. 5/10/10 RP 50. Officer Beseler also described Ms. Jacobsen as appearing shocked and really startled by what happened. 5/10/10 RP 33. Even though Ms. Jacobsen expressed hesitation about testifying against one of her students, she did so in part because she believed "a student just cannot do that to a teacher." 5/10/10 RP 55. The court found Ms. Jacobsen's testimony credible. 5/10/10 RP 81.

Officer Beseler testified that during his investigation Garrett admitted that he shoved Ms. Jacobsen. 5/10/10 RP 14, 34. At trial, Garrett was inconsistent in his testimony and the court did not find his testimony credible. 5/10/10 RP 81. Based on these facts, a rational trier of fact could have concluded that the touching was harmful or offensive beyond a reasonable doubt.

Garrett's argument that a touch is not harmful unless there is injury is flawed. As noted above, actual physical injury is not necessary to prove fourth degree assault. Garrett also contends

that a touch is not offensive unless the victim finds it offensive. This argument also fails. The focus is not what Ms. Jacobsen found offensive, but that of an *ordinary person*. Looking at the evidence in light most favorable to the State, there is sufficient evidence to support the conclusion that an ordinary person would find being shoved into a wall by a student to be offensive.

Although the court had sufficient evidence to conclude that the touching was harmful beyond a reasonable doubt, Garrett still insists the conviction is not supported because the court did not conclude that the contact was offensive. However, the appellate court may affirm for any basis apparent in the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989). Because sufficient evidence supports both alternatives -- harmful or offensive contact -- this omission does not invalidate Garrett's conviction. The court's oral and written findings of fact support the court's conclusion that Garrett assaulted the victim.

Viewing the evidence in the light most favorable to the State, the State produced sufficient evidence to support Garrett's Assault in the Fourth Degree conviction and this Court should affirm.

D. CONCLUSION

For the above reasons, the State respectfully requests that this court affirm Garrett's assault conviction.

DATED this 27th day of January, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. LAHRAJ D. GARRETT, Cause No. 65631-7-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame  
Name  
Done in Seattle, Washington

1/28/11  
Date 1/28/11