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No. 71141-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

TYLISHA B.,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The convictions for two counts of assault in the fourth degree violate due process because the evidence was insufficient to allow any rational trier of fact to find the elements of each count beyond a reasonable doubt.

2. Substantial evidence does not support the trial court's following findings of fact: three, four, and five; the remaining findings fail to justify the required conclusions of law.

3. The trial court abused its discretion when it admitted testimony that the school official responsible for student discipline interacted daily with Tylisha¹ and had regular contact with her parents.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to support these assault convictions based on principal liability where the witness testified as to only a minimal touching and

¹ Because appellant and most individuals involved in this incident are juveniles, they are referred to by their first names only throughout this brief.

never indicated that it was harmful or offensive? Was there insufficient evidence to support these convictions based on accomplice liability where there was no evidence that Tylisha encouraged any other person to commit a crime?

2. A trial court must enter written findings and conclusions that state the ultimate facts as to each element of the crime and the evidence upon which the trial court relied in reaching its decision. Findings of fact must be supported by substantial evidence, which means evidence sufficient to persuade a fair minded, rational person of the finding's truth. Are findings of fact three, four, and five unsupported because there is insufficient evidence in the record to establish their truth? Do the remaining factual findings fail to justify the trial court's conclusions of law?

3. The trial court allowed testimony from a school administrator responsible for student discipline that she interacted daily with Tylisha and also had regular contact with her parents. Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination more or less probable. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Evidence of prior misconduct is not

admissible to prove a person's character and show that the person acted in conformity with that character. Did the trial court abuse its discretion when permitting testimony emphasizing Tylisha's behavioral problems at school, which were wholly unrelated to the assault allegations and highly prejudicial?

C. STATEMENT OF THE CASE

Despite the fact that the video of the altercation that occurred on October 1, 2012 at the South Park Community Center showed two other individuals engaging in a physical fight with Marie and Shaylea,² the trial court found Tylisha guilty of two counts of assault in the fourth degree. 10/21/13 RP 32, 38, 90.

As Marie was leaving the South Park Community Center with her friend Shaylea, they were confronted by Aushinae³ and

² This individual is referred to as "Sheiliya" throughout the verbatim report of proceedings. She is referred to as "Shayla" in the findings of fact and conclusions of law. CP 31. She is referred to as "Shaylea" in the certification for determination of probable cause. CP 2. She will be referred to as "Shaylea" throughout this brief.

³ This individual is referred to as "Ashanya" throughout the verbatim report of proceedings. She is referred to as "Aushunage" in the findings of fact and conclusions of law. CP 32. She is referred to as "Aushinae" in the certification for determination of probable cause. CP 2. She will be referred to as "Aushinae" throughout this brief.

Tyquwanjia.⁴ 10/21/13 RP 28. Aushinae said to Marie, “I want to fight you.” 10/21/13 RP 53. Marie, Shaylea, Aushinae, and Tyquwanjia then proceeded to a grass area at the community center and lined up facing one another. 10/21/13 RP 30. There were four or five other individuals present who did not participate in the subsequent altercation. 10/21/13 RP 30-31.

Marie testified at trial that Aushinae then grabbed her hair and punched her. 10/21/13 RP 32. Marie could not remember any additional details regarding the incident. 10/21/13 RP 32. According to Marie, Aushinae was angry with Marie and appeared to be acting on her own when striking her. 10/21/13 RP 49. Marie did not know how the fight started between Shaylea and Tyquwanjia. 10/21/13 RP 47.

Earlier that day, prior to engaging in the physical altercation with Aushinae, Marie had a conversation with Tylisha at the South Park Community Center. 10/21/13 RP 21. Tylisha explained to Marie that she was angry with Marie and Shaylea for showing some people where Tylisha lived. 10/21/13 RP 25. Marie initially testified that Tylisha

⁴ This individual is referred to as “Tykwajenay” throughout the verbatim report of proceedings. She is referred to as “Tyquwanajia” in the findings of fact and conclusions of law. CP 32. She is referred to as “Tyquwanjia” in the certification for determination of probable cause. CP 2. She will be referred to as “Tyquwanjia” throughout this brief.

said she was going to fight them. 10/21/13 RP 26. She later admitted that Tylisha never said that she wanted to fight. 10/21/13 RP 51. After this conversation, Tylisha and Marie went their separate ways but both remained at the South Park Community Center. 10/21/13 RP 27.

Marie was later confronted by Aushinae as previously described. Marie did not observe Tylisha speaking to Aushinae before this altercation. 10/21/13 RP 53. Marie never heard Tylisha instruct anyone to engage in a fight. 10/21/13 RP 51. Tylisha did not go to the grass area with the other individuals. 10/21/13 RP 30. Marie did not recall Tylisha saying anything while the confrontation with Aushinae took place. 10/21/13 RP 30. During the fight, Tylisha was standing apart from the group video recording the incident with a cell phone. 10/21/13 RP 31. An unnamed male was also video recording the altercation. 10/21/13 RP 57.

Marie initially testified that she could not remember whether Tylisha physically touched her at any point that day. 10/21/13 RP 32. She later testified that Tylisha “like tried to push us so we could fight.” 10/21/13 RP 35. Marie could not recall where this had occurred. 10/21/13 RP 35. Marie testified that Tylisha never hit her, struck her,

acted like she was going to hit her, threw her down, pulled her hair, or threatened her. 10/21/13 RP 50.

The video of the physical encounter between Marie, Aushinae, Shaylea, and Tyquwanjia was played multiple times during trial. 10/21/13 RP 39, 70. The trial court commented that the video was difficult to understand because of the distorted sound and indistinguishable voices. 10/21/13 RP 40. Marie was unable to identify any voices heard on the video. 10/21/13 RP 52. The video showed Marie, Aushinae, Shaylea, and Tyquwanjia in the grass area; Tylisha is not depicted in the video. 10/21/13 RP 37-39.

The only witness other than Marie called by the State at trial was Roxanna Amaral, an administrator at Denny International Middle School. 10/21/13 RP 61-62. Ms. Amaral had located a video of the incident that had been posted on a social media website. 10/21/13 RP 66. Ms. Amaral made a recording of this video, which was the one admitted into evidence at trial. 10/21/13 RP 42, 67. The video showed Aushinae physically fighting with Marie and Tyquwanjia physically fighting with Shaylea. 10/21/13 RP 32, 38, 40.

Ms. Amaral testified that she is responsible for handling student discipline at Tylisha's school. 10/21/13 RP 62. In this capacity, Ms.

Amaral was required to interact daily with Tylisha during the short time Tylisha attended Denny International Middle School. 10/21/13 RP 62-63. Because her primary focus was student discipline, Ms. Amaral also had regular contact with Tylisha's parents. 10/21/13 RP 63. This testimony was admitted over the defense's objection. 10/21/13 RP 64. Ms. Amaral identified one of the voices heard on the video as belonging to Tylisha. 10/21/13 RP 69.

In its written findings, the trial court indicated that Tylisha had ordered Marie and Shaylea to fight Aushinae and Tyquwanjia. CP 32. The trial court found that Tylisha can be heard on the video recording telling the individuals to fight. CP 32. The trial court concluded that the State had proven beyond a reasonable doubt that Tylisha had "nonconsensual contact or as an accomplice liability did have nonconsensual contact" with both Marie and Shaylea and entered guilty verdicts on both counts. 10/21/13 RP 88, 90.

D. ARGUMENT

1. These convictions violate due process because there was insufficient evidence for any rational trier of fact to find the elements of assault beyond a reasonable doubt.

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, it allows any rational trier of fact to find all of the elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). This standard of review ensures that the trial court fact finder rationally applied the constitutional standard required by the due process clause of the Fourteenth Amendment, which allows for conviction of a criminal offense only upon proof beyond a reasonable doubt. *Jackson*, 443 U.S. at 317-18; *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The trial court is required to enter written findings and conclusions in a juvenile case that is appealed. JuCR 7.11(d); *State v. Commodore*, 38 Wn. App. 244, 249-50, 684 P.2d 1364 (1984). These

findings must state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. JuCR 7.11(d); *Commodore*, 38 Wn. App. at 250. The purpose of written findings is to allow the reviewing court to determine the basis on which the case was decided and to review the issues raised on appeal. *In re Woods*, 20 Wn. App. 515, 516, 581 P.2d 587 (1978).

The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). First, the trial court's findings of fact must be supported by substantial evidence in the record. *Id.* If the findings are supported by substantial evidence, then the appellate court must decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986).

- a. The trial court's findings of fact are not supported by substantial evidence.⁵

"A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." *Leschi Improvement Council v. Wash.*

⁵ The trial court's findings of fact and conclusions of law are attached as Appendix A.

State Highway Comm'n, 84 Wn.2d 271, 283, 525 P.2d 774 (1974) (quoting *NLRB v. Marcus Trucking Co.*, 286 F.2d 583, 590 (2d Cir. 1961)). Findings of fact are reviewed under a substantial evidence standard. *Pardee v. Jolly*, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). “Substantial evidence” is evidence sufficient to persuade a fair minded, rational person of the finding’s truth. *State v. Hill*, 123 Wn.2d 641, 644, 87 P.2d 313 (1994).

Reviewing courts give deference to the fact finder and consider the evidence and reasonable inferences therefrom in the light most favorable to the prevailing party. *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995). A trial court’s erroneous determination of facts, unsupported by substantial evidence, will not be binding on appeal. *Hill*, 123 Wn.2d at 647 (citing *Nord v. Eastside Ass’n Ltd.*, 34 Wn. App. 796, 798, 664 P.2d 4 (1983)).

- i. *There was not substantial evidence to support the findings regarding the conversation between Tylisha and Marie.*

Finding of fact three reads:

The respondent was upset with [Marie] and [Shaylea] because three weeks prior they told some girls w[h]ere the respondent lived. The respondent stated it was disrespectful to show people where she lives.

CP 31. Evidence supporting portions of this finding was not presented at trial. Marie testified that Tylisha “was angry because me and [Shaylea] showed some people where her house –;” at that point, the court instructed Marie to speak louder while testifying. 10/21/13 RP 25. Marie then repeated that Tylisha was angry because Marie and Shaylea had told some people where Tylisha’s house was located. 10/21/13 RP 26.

There was no additional testimony throughout the remainder of the trial regarding the reason Tylisha may have been displeased with Marie or Shaylea to support the assertions in finding of fact three. There was no evidence presented that this prior incident occurred three weeks earlier. There was no testimony that Tylisha stated that it was disrespectful to show people where she lives. Thus, there was insufficient evidence to persuade a fair minded, rational person of this finding’s truth.

- ii. *There was not substantial evidence to support the findings that Tylisha said she was too old to fight or that she ordered Marie and Shaylea to fight Aushinae and Tyquwanjia.*

Finding of fact four reads:

The respondent was angry and told [Marie] and [Shaylea] that she wanted to fight them but she was too old. The respondent

ordered [Marie] and [Shaylea] to fight [Aushinae] and [Tyquwanjia], the respondent's sister.

CP 32. First, there was no testimony that Shaylea was present during the conversation between Marie and Tylisha. Initially, Marie testified that another person was present during the conversation, but she could not recall who it was. 10/21/13 RP 26. Marie later testified that no one was present when Tylisha was explaining that she was angry:

Q: The only thing she indicated was she was angry with you, and when she said that it was a conversation just between you and her, no one else was present?

A: Yeah.

Q: Because everybody else was back inside the Community Center?

A: Yeah.

10/21/13 RP 51.

Second, there was no evidence introduced at trial that Tylisha stated she was too old to fight Marie and Shaylea. There was also no testimony that Tylisha ordered anyone to fight. Rather, Marie testified that she never heard Tylisha instruct anybody to engage in a physical confrontation. 10/21/13 RP 51. Marie did not observe Tylisha do anything that would cause Aushinae to be angry with Marie. 10/21/13 RP 51. Because there was no evidence that Tylisha ordered anyone to

fight or that she indicated she was too old to fight, these findings are also not supported by substantial evidence.

iii. *There was not substantial evidence to support the findings that Marie and Shaylea refused to fight or that Tylisha pushed them toward Aushinae and Tyquwanjia.*

Finding of fact five reads in relevant part:

The respondent told [Marie] and [Shaylea] to fight [Aushinae] and [Tyquwanjia]. [Marie] and [Shaylea] refused to fight [Aushinae] and [Tyquwanjia]. The respondent pushed [Marie] and [Shaylea] towards [Aushinae] and [Tyquwanjia]. [Marie] and [Shaylea] still refused to fight.

CP 32. As previously discussed, there was no testimony elicited during trial that Tylisha orchestrated this fight. 10/21/13 RP 51. Tylisha did not proceed to the grass with the other individuals, but was standing over near the community center. 10/21/13 RP 31. Marie never testified that Tylisha ordered her to fight and that she refused. Marie testified at trial that she did not want to fight, but never indicated that she expressed a refusal to fight at any time during the incident. 10/21/13 RP 36. On the contrary, Marie went to the grass with the other individuals. 10/21/13 RP 30. There is insufficient evidence to persuade a rational fact-finder of the truth of this finding that Tylisha was deciding who should fight who and instructing individuals accordingly.

Moreover, Marie never testified that Tylisha pushed her towards any other individuals. Marie initially testified that she was unsure whether Tylisha ever actually touched her that day. 10/21/13 RP 32. After reviewing a transcript of a prior interview, she testified that “she tried to like push us.” 10/21/13 RP 35. She clarified, “She tried to like push us so like we could fight.” 10/21/13 RP 35. She could not recall where this push occurred and she never testified that she was pushed toward anyone, let alone Aushinae or Tyquwanjia. 10/21/13 RP 35. These findings are unsupported by the evidence.

iv. *The “finding” that Tylisha encouraged the others to fight is a conclusion of law mischaracterized as a finding.*

Finding of fact ten reads:

The respondent encouraged [Marie] and [Aushinae] to fight [Marie] identified [sic] [Shayla].

CP 32. This “finding” addresses whether Tylisha instructed, commanded, encouraged, or requested anyone involved to fight. CP 32. If a term carries legal implications, a determination of whether it has been established is a conclusion of law. *Para-Medical Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 397, 737 P.2d 717 (1987); *see, e.g., Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980) (whether defendant’s rescinded earnest money agreement is a

conclusion of law because the term rescission carries legal implications); *Casterline v. Roberts*, 168 Wn. App. 376, 383, 284 P.3d 743 (2012) (determination that individual breached fiduciary duty was legal reasoning and thus a conclusion of law).

“Conclusions of law are determinations made by a process of legal reasoning from the facts in evidence.” *Casterline*, 168 Wn. App. at 382-83 (citing *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986)). Whether Tylisha’s statement, “Okay, fight” as heard on the video makes her an accomplice because she is “solicit[ing], command[ing], encourage[ing], or request[ing]” another person to commit a crime is a question of law. RCW 9A.08.020(3)(a)(i). A conclusion of law erroneously described as a finding of fact is reviewed as a conclusion of law. *Woodruff*, 95 Wn.2d at 396. Therefore, finding of fact ten should be reviewed de novo because it contains a conclusion of law mislabeled as a factual finding. The erroneous nature of this conclusion is addressed below.

- b. There was insufficient evidence to justify the trial court’s conclusion that Tylisha acted as the principal in an assault against either Marie or Shaylea.

A trial court’s findings must justify its conclusions of law.

Hegwine v. Longview Fibre Co., 162 Wn.2d 340, 353, 172 P.3d 688

(2007). To prove assault in the fourth degree, the State must establish that under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, a person assaults another. RCW 9A.36.041(1). The term “assault” is not defined in the criminal code and therefore courts use common law to define the crime. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681 (1942); *State v. Krup*, 36 Wn. App. 454, 457, 676 P.2d 507 (1984).

Three definitions of assault are recognized in Washington: (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009).

The trial court found Tylisha guilty as a principal based on “nonconsensual contact” (i.e., an unlawful touching). 10/21/13 RP 90. There was no evidence presented that any assault was committed by attempted battery or by placing another in apprehension of bodily harm. A touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive. *State v. Thomas*, 98 Wn. App. 422, 424, 989 P.2d 612 (1999) (citing *State v.*

Garcia, 20 Wn. App. 401, 403, 579 P.2d 1037 (1978)). A touching or striking is harmful or offensive if it would offend an ordinary person who is not unduly sensitive. WPIC 35.50. Bodily contact is offensive if it offends a reasonable sense of personal dignity. Restatement (Second) of Torts, § 19 (1965). It must be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted. *Id.*

Here, Marie testified that Tylisha “like tried to push” her. 10/21/13 RP 35. Maria clarified that Tylisha did actually touch her person. 10/21/13 RP 35. However, there was no testimony regarding whether this push was harmful. Similarly, there was no testimony that this touching in any way offended Marie’s personal sense of dignity. This contact was so unmemorable to Marie that she initially could not recall that it occurred at all; once her memory was refreshed, she still could not recall where this contact occurred. 10/21/13 RP 32, 35.

There was insufficient evidence to establish that this touching was harmful or offensive. Moreover, there was no testimony that Tylisha ever actually touched Shaylea. 10/21/13 RP 35. After Marie stated that Tylisha “like tried to push us,” Marie clarified that Tylisha actually touched her. 10/21/13 RP 35. Marie never testified that

Tylisha actually touched Shaylea. There was insufficient evidence to establish that Tylisha unlawfully touched either Marie or Shaylea in a manner that was harmful or offensive and thus the trial court erred when it found Tylisha guilty of both counts of assault as a principal.

- c. There was insufficient evidence to justify the trial court's conclusion that Tylisha was an accomplice to an assault against either Marie or Shaylea.

A person is legally accountable for the conduct of another person when he is an accomplice of that other person in the commission of the crime. RCW 9A.08.020(2)(c). A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the crime, he (1) solicits, commands, encourages, or requests that other person to commit the crime, or (2) aids or agrees to aid that other person in planning or committing the crime. RCW 9A.08.020(3)(a)(i)-(ii).

- i. There was insufficient evidence to establish that Tylisha solicited, commanded, encouraged, or requested anyone to commit an assault before the four individuals went to the grass area.

“Encourage” means to instigate, incite to action, embolden, and help. Black’s Law Dictionary (9th ed. 2009). Marie never observed Tylisha even talking to Aushinae prior to Aushinae confronting Marie, let alone instructing her. 10/21/13 RP 51, 53. There was absolutely no

evidence admitted during trial to establish that Tylisha in any way encouraged Aushinae's decision to challenge Marie to fight her. There was similarly no evidence that Tylisha in any way influenced Tyquwanjia's decision to engage in a physical altercation in the grass area.

Thus, there is insufficient evidence for any rational trier of fact to find beyond a reasonable doubt to find that Tylisha solicited, commanded, encouraged, or requested anyone to commit an assault prior to the four individuals going to the grass area to fight. Tylisha's comment heard on the video was made after Marie, Aushinae, Shaylea, and Tyquwanjia were already on the grass and is discussed below.

ii. *There was insufficient evidence to establish that Tylisha aided or abetted Aushinae or Tyquwanjia.*

“One does not aid and abet unless, in some way, he associated himself with the undertaking, participates in it as something he desires to bring about, and seeks by his action to make it succeed.” *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting *State v. J-R Distributions, Inc.*, 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)). Mere presence at the scene of a crime, even when coupled with assent to it, is not sufficient to prove complicity. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). The State is required to prove that a

defendant was ready to assist in the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *Wilson*, 91 Wn.2d at 491.

Even though a bystander's presence alone may encourage the principal actor in his or her criminal conduct, that presence does not itself make the bystander a participant and thus criminally liable. *Wilson*, 91 Wn.2d at 492. Something more than mere presence plus knowledge of ongoing activity must be shown to establish the intent required for a finding of accomplice liability. *Id.*

The State's evidence was insufficient to prove that Tylisha possessed the mental state required of an accomplice. Based on the fact that Tylisha was video recording the incident, she was aware that the four individuals in the grass area were going to engage in a physical altercation. 10/21/13 RP 31. However, the video admitted at trial established that Tylisha in no way participated in this altercation or engaged in any behavior to make it succeed. Rather, Tylisha was in a different area, by a window of the community center, recording the altercation. 10/21/13 RP 31. Once the altercation began, Tylisha's actions did not in any way demonstrate an intent to assist anyone involved. Tylisha's comment on the video recording shows her

presence and knowledge, but is inadequate on its own to prove Tylisha was an accomplice.

It is not a crime to be indifferent to criminal activity and the law does not require an individual to make an effort to prevent delinquent acts. *Wilson*, 91 Wn.2d at 491. There is no evidence that Tylisha sought to promote or facilitate any crime. Because the State only produced evidence that Tylisha was present with knowledge that the four other individuals intended to engage in a physical altercation, there is insufficient evidence to establish the requisite intent to find that Tylisha aided or abetted any crime.

d. Because these convictions violate Tylisha's due process rights, this Court should reverse and dismiss.

This court should reverse because there was insufficient evidence to find beyond a reasonable doubt that Tylisha was either the principal or an accomplice in any assault. Tylisha was convicted without proof beyond a reasonable doubt in violation of the Fourteenth Amendment to the United States Constitution. A defendant whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed.

2d 30 (1981)). Consequently, this Court should reverse and dismiss both counts with prejudice.

2. The trial court's admission of testimony that the school official responsible for student discipline interacted daily with Tylisha was manifestly unreasonable.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

a. Testimony regarding Ms. Amaral's duty to discipline students and her frequent interactions with Tylisha and her parents was not relevant.

Evidence that is not relevant is not admissible. ER 402. To be relevant, evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case. *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011). This definition includes facts which offer direct or circumstantial evidence of any element or defense. *Id.*

Here, the fact of Ms. Amaral's contacts with Tylisha were relevant to the limited foundational purpose of establishing that she was able to recognize Tylisha's voice, which she subsequently identified on the video admitted into evidence. 10/21/13 RP 69. However, the testimony went beyond illustrating Ms. Amaral's familiarity with Tylisha's voice. Ms. Amaral testified that she was the administrator at Denny International Middle School that "does all the student discipline." 10/21/13 RP 62. Ms. Amaral testified that Tylisha only went to Denny for a short period of time, but that she interacted with Tylisha on a daily basis. 10/21/13 RP 62-63. Ms. Amaral also explained that as the administrator in charge of discipline, she likewise had regular contact with Tylisha's parents. 10/21/13 RP 63.

This testimony was admitted over the defense's objection, with counsel noting that Ms. Amaral's job duties and the fact that she met multiple times with Tylisha's parents were immaterial to her ability to recognize Tylisha's voice. 10/21/13 RP 63-64. Tylisha's prior disciplinary problems and thus the necessity to have contact with Ms. Amaral were not relevant to whether Tylisha assaulted Marie or Shaylea or whether she was an accomplice to any assault. As such, its admission violated ER 402.

- b. Testimony that led to the obvious inference that Tylisha had extensive behavioral problems at school should have been excluded because of its prejudicial nature.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. In doubtful cases the scale should be tipped in favor of the defendant and exclusion of evidence. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (2003) (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

This evidence is prejudicial because it emphasized Tylisha's behavioral and disciplinary problems at school. It illustrated Tylisha's tendency to break rules and engage in troublesome activities, thereby establishing her as a person habitually disposed to wrongdoing and likely to be a bad influence on others. As previously discussed, the reasons for Ms. Amaral's contacts with Tylisha are not relevant. The prejudicial effect of allowing evidence of the nature of Tylisha's interactions with Ms. Amaral (i.e., regulation and correction of unacceptable conduct) is significant and greatly outweighs any

probative value of this testimony. Therefore, this testimony's admission violated ER 403.

c. Testimony pertaining to Tylisha's prior misconduct violated ER 404(b), which prohibits propensity evidence.

Tylisha also objected to the admission of this evidence on ER 404(b) grounds. 10/21/13 RP 63. "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). This rule has no exceptions. *Id.* at 421. Accordingly, the State bears a "substantial burden" to show admission of prior misconduct is appropriate for a purpose other than propensity. *State v. DeVincentis*, 150 Wn.2d 11, 18-19, 74 P.3d 119 (2003).

Evidence of a prior act may be admissible for purposes other than propensity, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). Before a trial court admits evidence of prior misconduct under ER 404(b), it must (1) find by a preponderance of the evidence that the prior misconduct occurred,⁶ (2) identify the purpose

⁶ Tylisha does not dispute that nature of her contacts with Ms. Amaral have been established by a preponderance of evidence.

for admitting the evidence, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value of the evidence against its prejudicial effect. *E.g.*, *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009); *DeVincentis*, 150 Wn.2d at 17. Close cases must be resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008).

The trial court articulated that the purpose for admitting this evidence was to establish that Ms. Amaral could recognize Tylisha's voice. 10/21/13 RP 64. However, as previously discussed, Ms. Amaral's job duties (i.e., student discipline) and her meetings with Tylisha's parents were not relevant to whether she was familiar with Tylisha's voice. It was thus no relevant to proving any element of the crimes charged. The prejudicial effect of signaling to the fact finder Tylisha's propensity for causing trouble greatly outweighed any probative value. Admission of this testimony violated ER 404(b).

- d. The admission of the nature of Ms. Amaral's contacts with Tylisha and her parents was prejudicial error and requires reversal.

As discussed, Ms. Amaral's testimony was improperly admitted under ER 402, ER 403 and ER 404(b). Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010).

Here, this evidence improperly informed the fact finder that Tylisha had misconduct problems at school, which created an undue tendency to suggest that she was guilty of the crimes with which she was charged. This evidence established that Tylisha was disposed to wrongdoing. With the paucity of evidence admitted during trial, the influence of this prejudicial evidence was substantial and merits reversal.

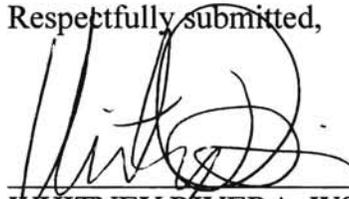
E. CONCLUSION

This Court should reverse and dismiss Tylisha's convictions because there was insufficient evidence in violation of her due process

rights. Alternatively, this Court should reverse and remand for a new trial because the admission of irrelevant and prejudicial testimony was manifestly unreasonable.

DATED this 12th day of May, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Whitney Rivera', written over a horizontal line.

WHITNEY RIVERA, WSBA No. 38139
Washington Appellate Project
Attorneys for Appellant

APPENDIX A

The Honorable Judge J. Wesley Saint Clair
Hearing Date: November 21, 2013 at 10:00 am
Hearing Location: Courtroom 3

FILED
KING COUNTY, WASHINGTON

NOV 21 2013

SUPERIOR COURT CLERK
BY EDWARD P. CHESVICK
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs.

TYLISHA BROWN AKA
TYLISHA-LAKISHA BROWN,
B.D. 12/23/97,

Respondent.

No. 13-800059-0

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) and JuCR
7.11(d)

THE ABOVE-ENTITLED CAUSE having come on for fact finding on October 21, 2013, before the Honorable Judge J. Wesley Saint Clair in the above-entitled court; the State of Washington having been represented by James Daniels; the respondent appearing in person and having been represented by George Eppler; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On October 1, 2012, Marie Davis was at South Park Community Center. South Park Community Center is located in Seattle, which is in King County.
2. Ms. Davis was at the community center with Shayla Pilarski and Jahleaha Bell. Tylisha Brown, the respondent approached Ms. Davis. Ms. Davis knew Tylisha Brown from Denny Middle School.
3. The respondent was upset with Ms. Davis and Ms. Pilarski because three weeks prior they told some girls where the respondent lived. The respondent stated it was disrespectful to show people where she lives.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 1

Daniel T. Satterberg, Prosecuting Attorney
Juvenile Court
1211 E. Alder
Seattle, Washington 98122
(206) 296-9025, FAX (206) 296-8869

- 1 4. The respondent was angry and told Ms. Davis and Ms. Pilarski that she wanted to fight them
2 but she was too old. The respondent ordered Ms. Davis and Ms. Pilarski to fight, Aushunage
Washington and Tyquwanajia Duren. Ms. Duren is the respondent's sister.
- 3 5. Ms. Davis had not had any problems in the past with the respondent or Ms. Brown and did
4 not want to fight. Ms. Davis, Ms. Pilarski, and Ms. Bell left the community center and
5 walked outside. The respondent and other were at the edge of the community center
6 property. They were approached by the respondent. The respondent told Ms. Davis and Ms.
7 Pilarski to fight Ms. Washington and Ms. Duren. Ms. Davis and Ms. Pilarski refused to fight
8 Ms. Washington and Ms. Duren. The respondent pushed Ms. Davis and Ms. Pilarski toward
9 Ms. Washington and Ms. Duren. Ms. Davis and Ms. Pilarski still refused to fight.
- 10 6. The respondent was recording the incident on a cellphone video camera. The respondent can
11 be heard on the video telling the girls to fight and then Ms. Washington and Ms. Duren go
12 toward Ms. Davis and Ms. Pilarski. Ms. Washington pulled Davis's hair and hit Ms. Davis.
13 Ms. Duren hit Pilarski.
- 14 7. Denny Middle School administrator Roxana Amaral located a video of the incident on
15 facebook. Ms. Amaral identified; Ms. Washington, Ms. Duren, Ms. Davis and Ms. Pilarski
16 on the video. Ms. Amaral knew them from Denny Middle School.
- 17 8. Ms. Amaral knew the respondent from Denny Middle school. Ms. Amaral has had an
18 estimated 30 conversations with the respondent in the past. The length of those
19 conversations has ranged from very brief to an hour. Ms. Amaral recognized the
20 respondent's voice on the facebook video, state's exhibit one.
- 21 9. The respondent can be heard on the video telling Ms. Duren and Ms. Washington to fight.
22 Ms. Davis watched the cellphone video and identified; Ms. Washington, Ms. Duren, Ms.
23 Pilarski and herself on the video. Ms. Davis identified Ms. Pilarski as the girl standing next
24 to her. Ms. Davis identified Ms. Duren and Ms. Washington as the girls that were standing
across from them on the video and who came toward them.
10. The respondent encouraged Ms. Duren and Ms. Washington to fight Ms. Davis identified
Ms. Pilarski .
11. The Court finds Marie Davis's testimony to be credible. The Court finds Roxana Amaral's
testimony to be credible.

CONCLUSIONS OF LAW

I.

The above-entitled Court has jurisdiction of the subject matter and of the Respondent in the above-entitled cause.

II.

The following elements of Assault in the Fourth Degree in violation of RCW 9A.36.041, have been proven by the State beyond a reasonable doubt:

- (1) That on or about October 1, 2012, the respondent intentionally assaulted S.P. (DOB 2/23/99); and

1 (2) That the acts occurred in the State of Washington.

2 In making these findings, the Court relied upon the testimony of witnesses.

3 III.

4 The following elements of Assault in the Fourth Degree in violation of RCW 9A.36.041,
5 have been proven by the State beyond a reasonable doubt:

6 (1) That on or about October 1, 2012, the respondent intentionally assaulted M.D. (DOB
7 10/29/98); and

8 (2) That the acts occurred in the State of Washington.

9 In making these findings, the Court relied upon the testimony of witnesses.

10 IV.

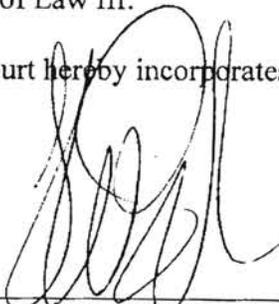
11 The Respondent is guilty of two counts of the crime of Assault in the Fourth Degree as
12 charged in the Amended Information.

13 IV.

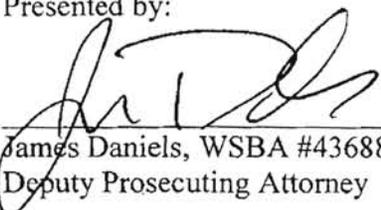
14 Judgment should be entered in accordance with Conclusion of Law III.

15 In addition to these written findings and conclusions, the Court hereby incorporates its
16 oral findings and conclusions as reflected in the record.

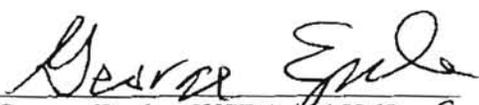
17 DONE IN OPEN COURT this 21 day of November, 2013.

18 
19 THE HONORABLE JUDGE J. WESLEY SAINT CLAIR

20 Presented by:

21 
22 James Daniels, WSBA #43688
23 Deputy Prosecuting Attorney

24 Approved as to form:

25 
26 George Eppler, WSBA #115268 *Subject to objection made.*
27 Attorney for Respondent

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) - 3

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71141-5-I
v.)	
)	
TYLISHA B.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] T.B. 756 S KENYON ST SEATTLE, WA 98108	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF MAY, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
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☎ (206) 587-2711