

NO. 35894-8-II  
Cowlitz Co. Cause NO. 06-1-01517-4

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Respondent,

v.

**TODD JACOB ALBRIGHT,**

Appellant.

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**BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

	<b>Page</b>
<b>RESPONSE TO ASSIGNMENT OF ERROR.....</b>	<b>1</b>
<b>1. TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE SINCE THERE WAS NO EVIDENCE THAT DEFENDANT’S ENTRY WAS LAWFUL.1</b>	
<b>2. TRIAL COURT DID ERR IN SENTENCING THE DEFENDANT TO 365 DAY IN JAIL AND 24 MONTHS COMMUNITY CUSTODY ON ASSAULT IN THE FOURTH DEGREE. ....</b>	<b>1</b>
<b>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>1. WAS EVIDENCE PRESENTED AT TRIAL THAT WOULD SUPPORT A CLAIM THAT DEFENDANT’S ENTRY INTO THE RESIDENCE WAS LAWFUL? .....</b>	<b>1</b>
<b>2. DID TRIAL COURT EXCEED ITS AUTHORITY BY IMPOSING 365 DAYS JAIL IN ADDITION TO 24 MONTHS COMMUNITY CUSTODY ON A GROSS MISDEMEANOR OFFENSE?.....</b>	<b>1</b>
<b>STATEMENT OF THE CASE.....</b>	<b>1</b>
<b>ARGUMENT.....</b>	<b>3</b>
<b>I. THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE SINCE THERE WAS NO EVIDENCE THAT THE DEFENDANT’S ENTRY WAS LAWFUL.....</b>	<b>3</b>

**II. DEFENDANT'S SENTENCE OF 24 MONTHS  
COMMUNITY CUSTODY FOR ASSAULT IN THE FOURTH  
DEGREE IS ERRONEOUS, AND SHOULD BE REMANDED  
FOR RE-SENTENCING. .... 4**

**CONCLUSION ..... 4**

**TABLE OF AUTHORITIES**

Page

**STATUTES**

RCW 9A.52.010(3)..... 3

### **RESPONSE TO ASSIGNMENT OF ERROR**

- 1. TRIAL COURT DID NOT ERR IN REFUSING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE SINCE THERE WAS NO EVIDENCE THAT DEFENDANT'S ENTRY WAS LAWFUL.**
- 2. TRIAL COURT DID ERR IN SENTENCING THE DEFENDANT TO 365 DAY IN JAIL AND 24 MONTHS COMMUNITY CUSTODY ON ASSAULT IN THE FOURTH DEGREE.**

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. WAS EVIDENCE PRESENTED AT TRIAL THAT WOULD SUPPORT A CLAIM THAT DEFENDANT'S ENTRY INTO THE RESIDENCE WAS LAWFUL?**
- 2. DID TRIAL COURT EXCEED ITS AUTHORITY BY IMPOSING 365 DAYS JAIL IN ADDITION TO 24 MONTHS COMMUNITY CUSTODY ON A GROSS MISDEMEANOR OFFENSE?**

### **STATEMENT OF THE CASE**

The State agrees with the Statement of the Case included within Defendant's brief pages 2-6, with the exception of the last sentence of the Statement on page 6, having to do with whether the resident of the home, Nathan, would have been "fine" with defendant entering the house for

a peaceable purpose. While Nathan testified he would have been “fine” with the defendant entering if he didn’t “yell and punch us”, he still would have thought it was weird.” (See Defendant’s brief at page 10.) Furthermore, Nathan testified that there had never been an understanding between the two that the defendant could enter his home without permission, and in fact, Nathan testified he didn’t even really know the defendant that well. 3 RP 96. Nor did the defendant testify that he had permission to enter the residence. 3 RP 144.

In fact, as a group, the testimony indicated that the young men had gone to Nathan’s house to get away from the defendant and allow things to calm down. 3 RP 40 – 41, 66, 81. Moreover, shortly after arriving at Nathan’s house, the defendant called his brother Dustin. 3 RP 41. Dustin testified that while on the phone with the defendant, the defendant became angry and threatened “he [the defendant] was gonna run over there [to Nathan’s residence] and beat all our asses.” 3 RP 41.

## **ARGUMENT**

### **I. THE TRIAL COURT DID NOT ERR IN ITS REFUSAL TO INSTRUCT THE JURY ON THE LESSER-INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE SINCE THERE WAS NO EVIDENCE THAT THE DEFENDANT'S ENTRY WAS LAWFUL.**

RCW 9A.52.010(3) states in pertinent part:

A person “enters or remains unlawfully” in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.

Despite the defendant's claim on appeal, there was no evidence that the defendant had permission to enter Nathan's house. Although Nathan testified that he may not have been upset enough to call police had the defendant entered peaceably, the defendant clearly did not have an open invitation into Nathan's home. Instead, Nathan testified that he would have thought that it was weird had the defendant entered his home without permission for any purpose, since he did not know the defendant very well. But clearly, under the circumstances presented in this case, the defendant's entry was unlawful. The defendant had been in a physical altercation earlier that night with one of Nathan's

guest, he had also called and threatened to come over to Nathan's and assault them. Simply, it cannot be said that the defendant entered Nathan's house lawfully. Accordingly, the court properly denied the defendant's request for a lesser included instruction.

**II. DEFENDANT'S SENTENCE OF 24 MONTHS COMMUNITY CUSTODY FOR ASSAULT IN THE FOURTH DEGREE IS ERRONEOUS, AND SHOULD BE REMANDED FOR RE-SENTENCING.**

The State concedes this issue and agrees the matter should be remanded for re-sentencing on the Assault in the Fourth Degree charge.

**CONCLUSION**

For the above stated reasons, defendant's conviction should be affirmed, but the matter remanded for re-sentencing on count II, Assault in the Fourth Degree.

Respectfully submitted this 5th day of October,  
2007.

SUSAN I. BAUR, WSB# 15221  
Prosecuting Attorney

By   
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Deputy Prosecuting Attorney  
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	NO. 35894-8-II
	)	Cowlitz County No.
Appellant,	)	06-1-01517-4
	)	
vs.	)	CERTIFICATE OF
	)	MAILING
TODD JACOB ALBRIGHT,	)	
	)	
Respondent.	)	
	)	

I, Audrey J. Gilliam, certify and declare:

That on the 5 day of October, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals	Lisa E. Tabbut
950 Broadway, Suite 300	Attorney at Law
Tacoma, WA 98402	P. O. Box 1396
	Longview, WA 98632

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

Dated this 5 day of October, 2007.

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Audrey J. Gilliam