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DIVISION II

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STATE OF WASHINGTON  
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No. 36803-0-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

JESSIE L. HOVIG,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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## **RESPONDENT'S COUNTERSTATEMENT OF THE CASE**

### **Procedural Background.**

The defendant was charged by Information on April 25, 2007, with Assault of a Child in the Second Degree, RCW 9A.36.130(a). The Information contained a supplemental allegation that the defendant knew or should have known that the child was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b). (CP 1-2). On July 16, 2007, the defendant appeared before the Superior Court and executed a written waiver of trial by jury. (CP 7). The trial was held on September 12, 2007. The defendant was found guilty with Assault of a Child in the Second Degree. The court found aggravating circumstances. Findings of Fact and Conclusions of Law were entered by the court on October 22, 2007. (CP 21-24). The defendant was sentenced to serve a term of confinement of 60 months. (CP 11-18).

### **Factual Background.**

Malachi James Hovig is a minor child whose date of birth is December 23, 2006. The defendant is the child's father. (RP 18). On April 23, 2006, the defendant, the child, the child's mother, Hope Forbes,

and Ms. Forbes' mother were all living in a room at the Thunderbird Motel in Aberdeen, Washington. (RP 18).

During the day, Ms. Forbes, her mother and Ms. Forbes' sister went shopping. The defendant remained at the room where he babysat the child. (RP 19). During the time Ms. Forbes was shopping, she received a phone call from the defendant. The defendant reported to Ms. Forbes that he had left a hickey on the baby's face. She immediately went back to the residence. (RP 20-21). When she arrived back at the room, the defendant was there alone with the child. The mother observed that there was now makeup on the child's cheek. (RP 21). She picked up the child and told the defendant that they were going to her sister's house. The defendant stated that he would be walking to his mother's house. (RP 21).

Once they were in the vehicle, the mother removed the makeup and looked at the child's face. She observed what she described as a "big bite mark." She did not see the injury until she removed makeup that had been placed over it. (RP 22). She took a photograph of the injury using her cell phone. (Exhibit No. 10). The mother drove to the sister's residence and called the police. (RP 23).

Officer Hudson of the Aberdeen Police Department responded. He observed the injury and was shown the cell phone picture that had been taken previously. (RP 4-5). Officer Hudson testified that during the few minutes he was in the presence of the child, the wound actually appeared to be getting deeper. (RP 5). The child was taken to the hospital.

The child was seen by Dr. William Hutton on the morning of April 24, 2006. Dr. Hutton is a pediatrician and member of the American Academy of Pediatrics and the Society for Child Abuse and Neglect. (RP 52-53). Dr. Hutton examined the injury and found it to be a human bite mark that "clearly showed teeth marks as bruises." (RP 53). The age of the injury was found to be consistent with the history provided by the mother. (RP 54). The child had a bruise on the left side of his face as well. (RP 55).

The defendant was interviewed by Detective George Kelley of the Aberdeen Police Department on the evening of April 24, 2006. The defendant explained that he was playing a game with the child that he called "rabid dog." The defendant explained that "I just kind of go g-r-r-r and basically chew on the side of the baby's face." The defendant explained that he must have bitten too hard and that he never left marks on the child's face before. (RP 13-14).

### **RESPONSE TO ASSIGNMENTS OF ERROR**

- 1. The findings of the trial court supported the verdict. (Response to Assignment of Error No. 1)**

The findings of the trial court are clearly supported by the record. The child was four months old at the time of the incident. (Finding of Fact No. 1, RP 18). The defendant was an adult whose date of birth is March 7, 1985. (Finding of Fact No. 2). The defendant intentionally bit the child.

(Finding of Fact No. 8, RP 13-14). The physician identified the injury as a human bite mark that would take a minimum of 7 to 10 days to heal.

(Finding of Fact No. 7, RP 53-55). The defendant is the father of the child and certainly knew that the child was particularly vulnerable and incapable of resistance. (Finding of Fact No. 9, RP 18).

The trial court concluded, based upon the facts as set forth, that the defendant intentionally assaulted the child. (Conclusion of Law No. 2). The trial court further concluded that the intentional biting recklessly inflicted substantial bodily harm on the child. (Conclusion of Law No. 3). These conclusions are determinations made by the court's legal reasoning from the facts in evidence. State v. Niedergang, *infra*. They are supported by ample evidence. Whether you call them Conclusions of Law or Findings of Fact, the court did determine all of the essential elements of the crime had been committed.

The defendant asserts that the conclusions of law entered by the trial court are not supported by a factual basis for the conclusion. Quite to the contrary, the findings are that the defendant bit the child and caused the injury to the child. The defendant is arguing semantics. In any event, a trial court's conclusions of law may be appropriately re-labeled as findings. State v. Niedergang, 43 Wn.App. 656, 658-59, 719 P.2d 576 (1986).

In State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198 (2003) cited by the defendant, the trial court in its findings did not address one of the

elements of the offense. Here, the trial court directly concluded, based upon the evidence, that the defendant intentionally assaulted the child thereby recklessly inflicting substantial bodily harm. The determination of the trial court, although called a Conclusion of Law, culled together all of the facts into a determination by the judge that the ultimate facts as to each element of the crime had been proven. See State v. Alvarez, 128 Wn.2d 1, 18, 904 P.2d 754 (1995).

In any event, if this is considered to be a problem, the matter can be cured by remand to the trial court. The case at hand is comparable to the situation in Alvarez, 128 Wn.2d at 19:

It is apparent from the record that the trial court's not entering finding of ultimate facts was not because the State had not met its burden of proof. It was instead simply the choice of words used in the findings of fact.

Here, the findings of the court as to the ultimate fact were labeled as conclusions of law. Nevertheless, the determination of the trial court was that there was an intentional assault against the minor child committed by the defendant resulting in the reckless infliction of substantial bodily harm.

This assignment of error must be denied.

2. **The State presented proof beyond a reasonable doubt of the defendant's guilt. (Response to Assignment of Error No. 2)**

The United States Supreme Court has set forth the standard which the appellate court must apply when determining whether there has been proof beyond a reasonable doubt. The proper test is whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 661 L.Ed.2d 560, 99 S. Ct. 2781 (1979). The Washington Supreme Court has expressly adopted this standard. State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980). The manner in which this standard is to be applied by the reviewing court is well-known. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992):

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 638 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The elements of Assault of a Child in the Second Degree are: (1) an intentional assault upon a child under the age of thirteen; (2) reckless infliction of substantial bodily harm upon the child. The defendant

concedes that there was an intentional assault. The defendant challenges the sufficiency of the evidence to prove that the injury was recklessly inflicted and that the injury constituted substantial bodily harm. As it will be shown below, there is ample evidence to support proof beyond a reasonable doubt.

An assault is an unlawful touching with criminal intent if it is harmful or offensive. State v. Huepp, 50 Wn.App. 277, 282, 748 P.2d 263 (1988); State v. Garcia, 20 Wn.App. 401, 579 P.2d 1034 (1978).

The physician who examined the child the following day found a "...bite injury that clearly showed teeth marks as bruises" that was administered by an adult. The distance between the teeth marks at the center was some four centimeters. (RP 53). Although the skin was not broken, the teeth marks were clear. The intentional infliction of the injury may be properly inferred from conduct of the defendant where it is plainly indicated as a matter of logical probability. In re Fuamaila, 131 Wn.App. 908, 924-25, 131 P.3d 318 (2006). In short, the injury did not occur accidentally. It occurred because the defendant intentionally bit the child.

Reckless is defined by statute, RCW 9A.08.010(1)(c):

A person is reckless or acts recklessly when he knows of disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

Reckless conduct includes a subjective and an objective component. Whether an act is reckless depends upon what the defendant knew and how a reasonable person would have acted knowing these facts. State v. R.H.S., 94 Wn.App. 844, 847, 974 P.2d 1253 (1999). A trier of fact is permitted to find actual subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists.

Thus, for example, any reasonable person would know that if he or she punched someone in the face that it could result in a broken bone, which would constitute substantial bodily harm. State v. R.H.S., 94 Wn.App. at 847.

The defendant was the father of the child. (RP 18). The child was born on December 23, 2006. The defendant had been living with the mother and the child in Aberdeen since at least February 21, 2006. (RP 18). In short, the defendant knew the age and vulnerability of the child. Any reasonable parent would know that an intentional bite on his child's cheek would cause injury and bruising.

Substantial bodily harm in this context means bodily injury which involves a temporary but substantial disfigurement. RCW 9A.04.110(4)(b). The child had a bite mark on his cheek that was some four centimeters in width. (Ex. No. 1). The officer observed a circular red mark on the cheek of the child. (RP 4). During the time that the officer

was with the child the coloring became deeper. (RP 5). The injury would be expected to last as long as two weeks. (RP 55).

Could a reasonable trier of fact determine that such an injury was a substantial disfigurement? Certainly yes. Such a large bite mark on the cheek of a small child is certainly “substantial.” The defendant would have this court find that no reasonable trier of fact would ever consider such an injury as “substantial.”

In State v. Ashcraft, 71 Wn.App. 444, 455, 859 P.2d 60 (1993), the defendant challenged the sufficiency of the evidence to prove substantial bodily harm. The court found that there was evidence of bruise marks on the child consistent with being hit with a shoe. Such bruise marks were found to be sufficient to constitute substantial disfigurement. Ashcraft, 71 Wn.App. at 455.

This assignment of error must be denied.

**3. The court validly imposed an exceptional sentence.  
(Response to Assignment of Error No. 3)**

The court found beyond a reasonable doubt that the defendant, who was the father of the child, knew that the child, because of the child’s age, was particularly vulnerable and incapable of resistance. (Finding of Fact 9). This is an expressly authorized basis for an exceptional sentence. RCW 9.94A.535(3)(b). This finding is absolutely supported by the record.

This assault occurred on the child’s 4th month birthday. The standard range sentence, given the defendant’s offender score, is 31 to 41

months. Even though one of the elements of the crime is the relative youth of the victim, the court may find an exceptional sentence based upon the extreme youth of the child. State v. Russell, 69 Wn.App. 237, 251-52, 848 P.2d 743 rev. denied, 122 Wn.2d 1003, 859 P.2d 603 (1993).

In order to overturn the sentence imposed herein, this court must find that it is “clearly excessive.” The appropriateness of the length of sentence is measured by an abuse of discretion standard. State v. McAlpin, 108 Wn.2d 458, 467, 740 P.2d 824 (1987).

The sentence is “clearly excessive” when it is “...clearly unreasonable, i.e., exercised on untenable grounds or for untenable reasons or an action no reasonable person would have taken.” State v. Oxborrow, 106 Wn.2d 525, 531, 723 P.2d 1123 (1986), citing to State v. Strong, 23 Wn.App. 789, 794, 599 P.2d 20 (1979).

In Oxborrow, the defendant asked the court to adopt the so-called “Minnesota Rule” which generally limited exceptional sentences to no more than twice the presumptive sentence range. Oxborrow, 106 Wn.2d at 531. Washington has rejected this approach. Even applying such a standard, the sentence herein is less than twice the presumptive standard range.

This defendant would have the sentence overturned simply because he has a different view of the facts and feels that the punishment does not fit the facts. The answer is that the judge made a reasonable and rational sentencing decision. That decision must be upheld.

**CONCLUSION**

For the reasons set forth, the decision of the trial court must be affirmed.

Respectfully Submitted,

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