ORIGINAL

NO. 37754-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DASAN V. BERRIOS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-8-00052-8

BRIEF OF RESPONDENT

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James L. Reese, III 612 Sidney Avenue Port Orchard, WA 98366	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED November 6, 2008, Port Orchard, WA Julie S. Myette **Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. SHOULD THE TRIAL COURT'S FINDING THAT THE APPELLANT WAS ON SCHOOL GROUNDS DURING SCHOOL HOURS BE UPHELD WHERE THERE IS SUBSTANTIAL EVIDENCE IN THIS CASE TO SUPPORT IT?
2. SHOULD THIS COURT FIND THAT THE JUVENILE WAS PROVIDED DUE PROCESS OF LAW EVEN THOUGH THE TERM "SCHOOL HOURS" WAS NOT DEFINED?
3. SHOULD THE TRIAL COURT'S FINDING OF FACT IV BE UPHELD WHERE THERE IS SUBSTANTIAL EVIDENCE IN THIS CASE TO SUPPORT IT?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On January 22, 2008, the Appellant was charged with one count of Criminal Trespass in the Second Degree. CP 1. He was accused of knowingly entering or remaining unlawfully in or upon the premises of Armin Jahr Elementary School in Bremerton, Washington, on January 9, 2008. On December 17, 2007, the Appellant had been issued a Notice of Trespass which prohibited him from entering, re-entering, or being found within or upon the school's premises during school hours for the duration of the 2007-2008 school year. CP – Ex.1. The Appellant was found guilty after an adjudication hearing held on May 7, 2008. The Appellant filed a Notice of Appeal on May 20, 2008. CP 34.

B. FACTS

On January 9, 2008, the Appellant was seen on the Armin Jahr Elementary School premises by a school employee, William Warren. RP 33, 34. Mr. Warren's responsibilities included assisting with clearing off the school back lot and getting everyone onto their buses at the end of the day. RP 31. Mr. Warren "was getting the children off the area for the buses to come in" at the end of the day when he saw the Appellant. RP 32. The school bell had already rung. RP 36. He saw the Appellant walking behind the dumpster area after a school bus driver told Mr. Warren that the Appellant and another youth had been throwing snowballs. RP 33. Mr. Warren took the Appellant to his office, asked him to write down his name, and told him to leave the school premises. RP 35.

On December 17, 2007, the Appellant had been issued a Notice of Trespass, by Michael Sellars, the principal of Armin Jahr Elementary School, and Jerry Wilson, the Appellant's principal at MountainView Middle School. CP - Ex. 1, RP 39. The Notice of Trespass ordered the Appellant not to enter, re-enter, or be found within or upon any premises of Armin Jahr Elementary School during school hours. CP – Ex. 1. The Notice of Trespass was in effect for the 2007-2008 school year. Id.

At the time that the Notice of Trespass was given to the Appellant, Mr. Sellars told the Appellant that he was serving him with the Notice

because he had been "on my campus and disrupting school operations during our school day". RP 15. Mr. Sellars also told the Appellant that "he and an associate were observed in our locked bike rack during our school day and appeared to be trying to take a bike out of the bike rack, and that, for those reasons, that he was no longer welcome at Armin Jahr and that I was serving the trespass notice on him and what that meant was that if he were on campus, that we would call the police." Id. Mr. Sellars further told the Appellant that the school had security cameras, and that if he were on campus and they did not see him, but he was recorded on those cameras, he could still be held accountable. RP 16.

The Appellant did not ask any questions, RP 16, and he signed the Notice of Trespass. CP – Ex. 1, RP 38. Mr. Sellars believed that the Notice of Trespass would be reasonably understood by the Appellant. RP 29. The Appellant did not express any concern to Mr. Sellars about when he could be on campus or when he could not be. Id. The Appellant discussed the Notice of Trespass with his mother later and they discussed that he was not to be on the school property during school hours. RP 40.

Mr. Sellars testified that the term "school hours" is used frequently in the school district policy manual, but the term is not specifically defined. RP 24, 25. As a school official, he defines "school hours" as operational hours, which "includes the time when students are arriving on campus and

supervised and then time after school where students are supervised and staff are present to do such." RP 25, 26. When the trial court examined Mr. Sellars regarding the meaning of "school hours" as that term was used in the Notice of Trespass, it asked, "[s]o the reasonable time of 'school hours' are the time that you expect the children to be on campus either preparing to start school or winding down from school?" RP 29. Mr. Sellars responded affirmatively. Id. Mr. Sellars testified that the term "school hours" as used in Policy 3124, Removal or Release of Students During School Hours, and Policy 3416, Medication at School, means the time that classes are in session. RP 20,21.

III. ARGUMENT

A. THE TRIAL COURT'S FINDING THAT THE JUVENILE WAS ON SCHOOL GROUNDS DURING SCHOOL HOURS SHOULD BE UPHELD BECAUSE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT.

The Appellant argues that the trial court erred when it ruled that he was on school grounds during school hours. See, Brief of Appellant, page 8; ff. V. The Appellant claims there was not substantial evidence to support the entry of Finding of Fact V. See, Brief of Appellant, page 8-9. However, it is clear from the record that there was substantial evidence to support the court's finding, and there was sufficient evidence to find the Appellant guilty.

Evidence is sufficient to support a finding of guilt in a juvenile case if any rational trier of fact, after viewing the evidence in a light most favorable to the state, could have found guilt beyond a reasonable doubt. State v. Echeverria, 85 Wn.App 777, 782, 934 P.2d 1214 (1997). "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. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). On appeal, the trial court's findings of fact are reviewed and must be supported by substantial evidence. State v. Black, 100 Wn.2d 793, 802, 676 P.2d 963 (1984). Where there is conflicting evidence, the reviewing court determines only whether the challenged findings are supported by the evidence which was most favorable to the prevailing party. Id.

School Hours

In the present case, the evidence most favorable to the state was substantial and supported the trial court's finding that the Appellant was on campus during school hours in violation of the Notice of Trespass. The evidence was sufficient to find the Appellant guilty of Criminal Trespass in the Second Degree.

The Appellant does not dispute that he was observed by a member of

the Armin Jahr staff on campus while school buses were being loaded at the end of the school day on January 9, 2008. CP 31-32, ff. I. The Appellant does not dispute that he had been issued and signed a Notice of Trespass on December 12, 2007 which stated he was not to enter the premises of the elementary school during school hours for the 2007-2008 school year. CP 32, ff. III, CP – Ex. 1.

The only real dispute with Finding of Fact V has to do with how "school hours" is defined. Michael Sellars provided a substantial amount of testimony about the meaning of "school hours", and his "operational hours" definition was accepted by the court.

Mr. Sellars testified that, as a school official, he defined "school hours" as operational hours. RP 25. He went on to describe operational hours as including "the time when students are arriving on campus and supervised and then time after school where students are supervised and staff are present to do such." RP 26.

The trial court specifically asked Mr. Sellars what "school hours" means as that term is used in the Notice of Trespass. RP 28. He responded that it is the time when students are present. Id. He went on to explain that, because a lot of parents pick their kids up from school if they don't ride the bus, the buses have to be routed on to the playground to provide space in the

parking lot for parents. Id. Staff help get the bus riding students in their lines and monitor safe movement of the buses back off the school grounds. RP 29. When the court summed up Mr. Sellars' testimony by asking "[s]o the reasonable time of 'school hours' are the time that you expect the children to be on campus either preparing to start school or winding down from school?", Mr. Sellars agreed. RP 29.

Mr. Sellars also testified about the Bremerton School District Policies and Procedures. He testified that the term "school hours" is referenced in the policies, but the term is not defined. RP 24. He testified that the definition of "school hours" as that term is used in School District Policy 3124, Removal or Release of Students During School Hours, and Policy 3416, Medication at School, is the time that classes are in session. RP 19-21.

The Appellant was present on the Armin Jahr campus after the final bell had rung, but while the children were waiting for their buses. RP 36. The court clearly made its finding that he was there during school hours based on the "operational hours" definition provided by Mr. Sellars.

The Appellant argues that the standard of "school hours" was applied in an ad hoc manner. See, Brief of Appellant, page 10. In support of this argument, the Appellant recites Mr. Sellars' testimony regarding school hours, implies that a number of different definitions were provided in that

testimony, and concludes that the court failed to identify which of these definitions of "school hours" the Appellant violated. Id., page 10-11.

The standard of "school hours" was not applied in an ad hoc manner. Mr. Sellars testified consistently about operational hours and specifically that this definition applied to the term "school hours" as it was used in the Notice of Trespass. He did not "broaden" his definition in response to questions from the court as alleged by the Appellant, see Brief of Appellant, page 11, but rather further explained his previous answer. The "leading question" proposed by the court did not contain yet another definition of "school hours" as argued by the Appellant, see Brief of Appellant, page 11, but rather was a summation of all of Mr. Sellars' testimony about operational hours.

The only other definition that Mr. Sellars testified about was in relation to the two school district policies. He agreed that the definition of "school hours" as applied in policies 3124 and 3416 is the time that classes are in session.

When the court found that the Appellant was present on the school campus during school hours in violation of the Notice of Trespass, it clearly was relying on the "operational hours" definition of school hours rather than the "time that classes are in session" definition.

The court's reliance on the "operational hours" definition rather than

the more limited "time that classes are in session" definition was supported by substantial evidence. Mr. Sellars testified that the reason he issued the trespass notice to the Appellant was that he had been disrupting school operations by looking in classroom windows, and he had been observed in the locked bike rack and appeared to be trying to take a bike out. RP 15. If the court accepted the "time classes are in session" definition, the Notice of Trespass would be largely ineffectual in accomplishing its goal of protecting the students and their property, as well as preserving order in school operations. The Appellant could go on to the school premises as kids arrived in the morning and disturb bikes in the bike racks, so long as the first bell had not yet rung. Or, he could go on to the school grounds on a snowy afternoon and throw snowballs at buses as they entered a playground where students were waiting to board, as the Appellant apparently did in this case.

Taking the evidence in the light most favorable to the state, together with the appropriate inferences, the record supports the court's finding that the Appellant was on school grounds during "school hours".

Public Premises Defense

The Appellant challenges the sufficiency of the evidence with regard to the trial court's rejection of his public premises defense. See Brief of Appellant, page 12. The Appellant argues that if he was on the school

grounds "after classes were in session", then he had a legitimate public premises defense to being on campus. Id. at 13. The evidence was sufficient, however, for a trier of fact to find beyond a reasonable doubt that the Appellant failed to comply with the lawful conditions imposed on access to the school campus.

It is a defense to criminal trespass if the premises were open to members of the public at the time, and the actor complied with all lawful conditions imposed on access to or remaining on the premises. RCW 9A.52.090(2). The State has the burden of proving beyond a reasonable doubt that the Appellant failed to comply with the lawful conditions of access to or remaining on the premises. State v. Finley, 97 Wash.App. 129, 138, 982 P.2d 681 (1999).

The public premises defense only applies when the premises were open to members of the public at the time. It does not appear from the evidence introduced at trial that the school was open to the public at the time the Appellant was present. Mr. Sellars was asked during cross examination "is there any limit on the public's use outside of school hours other that the trash you just listed, the trash, fenced in by a receptacle?" He replied, "no." RP 23. The question was couched in terms of "school hours", and that term was later defined by Mr. Sellars to mean the time when students are present, including before and after the school bell rings. RP 25, 26, 28, 29.

Even if, arguendo, the premises were open to members of the public at the time the Appellant was present, he did not comply with all lawful conditions imposed on his access to the premises. Principal Sellars issued a Notice of Trespass to the Appellant which prohibited him from entering the school grounds during school hours. RP 15, CP – Ex. 1. This was a lawful condition imposed on the Appellant's access to the premises. Mr. Sellars testified that the meaning of school hours as that term was used in the Notice of Trespass was "operational hours". The court accepted this definition when it made Finding of Fact V, and that finding was supported by substantial evidence as discussed above.

The evidence was sufficient to support the trial court's rejection of the Appellant's public premises defense. A reasonable trier of fact could conclude beyond a reasonable doubt that the Appellant failed to comply with the lawful conditions of access to the Armin Jahr campus on January 9, 2008.

B. THE APPELLANT WAS NOT DENIED DUE PROCESS BASED ON THE LACK OF A DEFINITION OF THE TERM "SCHOOL HOURS".

The Appellant next claims that he was denied due process of law because the term "school hours" in the Notice of Trespass was not defined. See, Brief of Appellant, page 13, 14. However, the Appellant has failed to show that the alleged error was manifest and has failed to meet his burden of

proving beyond a reasonable doubt that the trespass statute was void for vagueness as applied in this case.

RAP 2.5 (a), Errors Raised for First Time on Review, is an exception to the general rule, and as such is not meant to provide criminal defendants with a means of obtaining a new trial any time they can identify a constitutional issue which was not raised before the trial court. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An alleged error must be manifest. Id. The facts necessary to adjudicate the claimed error must be in the record on appeal, or no actual prejudice is shown, and the error is not manifest. Id.

A statute is presumed to be constitutional, and when a person makes a challenge to a statute on vagueness grounds, they bear the heavy burden of proving vagueness beyond a reasonable doubt. State v. Coria, 120 Wn.2d 156, 163, 839 P.2d 890 (1992). The challenger overcomes the presumption of a statute's constitutionality only in exceptional cases. City of Seattle v. Eze, 111 Wn.2d 22, 28, 759 P.2d 366 (1988).

The due process clause requires statutes to provide fair notice of the conduct they proscribe. State v. Watson, 160 Wn.2d 1, 6, 154 P.3d 909 (2007). A statute fails to provide such notice when it forbids conduct in terms so vague that men of common intelligence must guess at its meaning

and differ as to its application. Id. A statute is not unconstitutionally vague, however, merely because a person cannot predict with complete certainty the exact point at which his actions would be considered prohibited conduct. State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1993)). Because some degree of vagueness is inherent in the use of language, mathematical certainty is not required. Id.

The alleged error here, that the Appellant was denied his due process rights because the term "school hours" in the Notice of Trespass was not defined, was not manifest. The facts necessary to adjudicate this claimed error are not in the record.

The Appellant argues that the term "school hours" was not defined and that several different meanings were given for the term during the trial. See, Brief of Appellant, page 14. However, the Appellant never testified, and there was no other evidence presented, that he did not understand what "school hours" meant in the context of the Notice of Trespass, or that he was confused due to the term having numerous interpretations.

Even if the error is manifest, the Appellant has not met his burden of proving beyond a reasonable doubt that the trespass statute is unconstitutionally vague as applied in this case. A person of common intelligence would not have to guess whether he violated the terms of the

Notice of Trespass and therefore committed the crime of Criminal Trespass in the Second Degree under the facts of this case.

Mr. Sellars issued the Appellant a Notice of Trespass which ordered him not to enter the Armin Jahr campus during school hours. RP 15, CP – Ex. 1. Mr. Sellars explained to the Appellant at that time that he was no longer welcome on the Armin Jahr campus because he had disrupted school operations and he had been observed in the locked bike rack area apparently trying to take a bike. RP 15. A person of common intelligence would not have to guess about whether he was violating the terms of the Notice of Trespass when he later entered on to the school grounds and threw snowballs at school buses as they arrived to pick up waiting students at the end of the school day.

Clearly the intent of Mr. Sellars in issuing the trespass notice was to prevent the Appellant from coming on to the school grounds and disrupting school operations again, and this was communicated to the Appellant. This is consistent with Mr. Sellars' testimony about the operational hours definition of "school hours".

The statute is not unconstitutional as applied in this case. The Appellant has failed to meet his burden of proving beyond a reasonable doubt that the statute in unconstitutionally vague as applied in this case.

C. THE TRIAL COURT'S FINDING OF FACT IV SHOULD BE UPHELD BECAUSE THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT.

The Appellant next claims that there was not substantial evidence to support Finding of Fact IV which states: "Dasan Berrios at no time expressed confusion or misunderstanding regarding the terms of the notice of trespass." CP 32. However, it is clear from the record that there was substantial evidence to support the court's finding.

A trial court's findings of fact are reviewed to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation. State v. Halstien, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). Where there is conflicting evidence, the reviewing court determines only whether the challenged findings are supported by the evidence which was most favorable to the prevailing party. State v. Black, supra.

Finding of fact IV is supported by the testimony of both Mr. Sellars and the Appellant. Mr. Sellars testified that he served the Appellant with the trespass notice and explained the reasons for it. RP 15. He testified that he told the Appellant he was no longer welcome at Armin Jahr, and that meant if he were on campus, they would call the police. Id. Mr. Sellars also told the Appellant that there were security cameras, and if the Appellant were on the

campus and they didn't see him, he would be held accountable if he was recorded. RP 16. The Appellant did not ask Mr. Sellars any questions. Id. Mr. Sellars believed when he issued the notice that it would be reasonably understood by the Appellant. RP 29. The Appellant did not express any concern to Mr. Sellars about when he could or could not be on the campus. Id.

The Appellant first testified that Mr. Sellars did not explain the Notice of Trespass to him, but he then went on to testify that "Mr. Sellars had just explained to not be on the property and he asked me to sign it for him." RP 39, 40. When he talked to his mother about it later, they read the notice, and they discussed that he was not to be on the property during school hours. RP 40.

Finding of fact IV is supported by substantial evidence and should be upheld by this court.

IV. CONCLUSION

For the foregoing reasons, Dasan Berrios's conviction and sentence should be affirmed.

DATED November 6, 2008.

Respectfully submitted,

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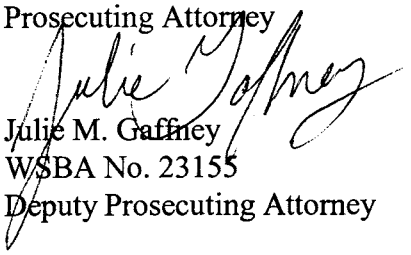
Prosecuting Attorney



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