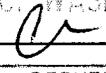


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DIVISION II

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No. 39588-6-II

STATE OF WASHINGTON

BY   
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DIVISION II OF THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

KAREN JARVIS,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-04771-9

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BRIEF OF APPELLANT

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ORIGINAL

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I. ASSIGNMENTS OF ERROR

(1) RCW 9A.36.041 is vague as applied to Ms. Jarvis under the facts presented here.

(2) There was insufficient evidence to convict Ms. Jarvis because there was no evidence to prove criminal intent.

(3) The court erred in failing to give defendant's proposed instruction #4.

(4) The court erred in failing to give proposed instruction #6.

(5) The court erred in failing to give proposed instruction #7.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Whether the fourth degree assault statute is vague as applied to the charges filed against Ms. Jarvis? (Assignments of Error #1).

(2) Whether the conviction should be reversed because of the insufficiency of the evidence? (Assignments of Error #2).

(3) Whether the instructions allowed the defendant to argue her theory of the case? (Assignments of Error #3, #4 and #5).

III. STATEMENT OF THE CASE

A. Procedural History

Ms. Jarvis was charged with assault in the fourth degree on April 9, 2008. CP<sup>1</sup> She pled not guilty to the charge and the matter proceeded to trial on August 27, 2008.

During the course of the trial, the defendant requested instructions dealing with the proposed defense in this case. RP 228-235 (08/28/08). The court refused to give proposed Instruction's #4, #6, and #7. CP 19, \_\_\_\_\_<sup>2</sup>, and 20.

Defendant's Proposed Instruction No. 4 reads as follows:

An assault is an intentional touching with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

An act is not an assault, if it is done with the consent of the person alleged to be assaulted.

Defendant's Proposed Instruction No. 6 reads as follows:

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<sup>1</sup> Record on appeal transmitted to Superior Court as an attachment at pages 5-8.

<sup>2</sup> See Record on Appeal at page 36.

Restraint or restrain means to restrict another person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is without consent if it is accomplished by physical force or any means including acquiescence, if the victim is a child less than 16 years old, an incompetent person and if the other person or institution having lawful control or custody of the victim has not acquiesced.

Defendant's Proposed Instruction No. 7 reads as follows:

The use of force is lawful whenever used by any person to prevent a mentally incompetent or mentally disabled person from committing an act dangerous to any person, or in enforcing restraint for the protection or restoration to health of the person during such period only as is necessary to obtain legal authority for the restraint or custody of the person.

In denying the instructions, the court stated that Instruction #9 (Definition of Intent) allowed the defense to argue its theory of the case. RP 23:23-29:16 (08/28/08). Ultimately, this court allowed Instruction No. 8, but did not allow the defense to argue that touching that was later deemed to be "offensive" did not fall within the definition of assault.

During closing arguments, the prosecutor argued:

So if you find the defendant intended to grab Cole Bonner and drag him across the floor into that bathroom that that is intent. That result the grabbing and the dragging constitutes a crime. So don't get misled by thinking that you have to find the defendant intentionally assaulted Cole Bonner because that's not what happened.

No one is arguing that she walked up and did all of this on purpose. She was doing what she thought was right. Unfortunately what she thought was right is an assault in the State of Washington I would submit to you.

So please read this carefully. She intended to grab him. By grabbing him and dragging him across the floor she accomplished her result and that result turns out to be an assault under the different rules or the different instructions you were given.

RP 102:8-22 (08/28/08).

And again, you know, you're probably going to hear that if this was a real situation things would be different well of course they would. There is always a difference between reality and a drill. And - and, you know, the defendant said well we need to drill as if it's real life but at what point do you draw the line.

The - because the line obviously must be drawn. You - you can't have a drill and just do whatever you want in the name of it being a drill.

RP 104:13-21 (08/28/08).

Moreover, in rebuttal, the prosecutor argued:

So make no mistake we are not standing her before you to tell you that Ms.

Jarvis is a bad person, that she is an evil person. We are simply saying that on January 10, 2008 she made a very bad choice and that's why you're here today.

That is why this is a crime because some choices are so bad that they are criminal. Her intentions can be the best in the world but when she grabbed Cole Bonner, knocked the desk off of him and dragged him across the floor she committed assault in the fourth degree as defined by the laws of the State of Washington.

RP 119:13-23 (08/28/08).

These arguments were precisely what the defendant was concerned about when the court refused its proposed instructions.

The jury convicted her of the charged crime.<sup>3</sup> She then moved for judgment notwithstanding the verdict, which was denied on September 19, 2008.<sup>4</sup> She received a suspended sentence.<sup>5</sup>

Ms. Jarvis appealed her conviction to the Superior Court, which denied her appeal by written decision dated June 26, 2009. CP 41-43.

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<sup>3</sup> See Record on Appeal at 57.

<sup>4</sup> See Record on Appeal at 58-62.

<sup>5</sup> See Record on Appeal at 69-70.

B. Facts

Ms. Jarvis was a Special Education Teacher at Drum Elementary in the University Place School District at the time of the events giving rise to this action. RP 35:9-14 (08/28/08). She has a BA in Education with a Special Education major and works with people with disabilities. RP 36:4-7 (08/28/08). She works with the lowest functioning students in the district at grades level 5-7. RP 37:1-4 (08/28/08).

One of her students at Drum Elementary was a person by the name of Cole Bonner, among his limitations, he had a difficult time communicating verbally. RP 40:19-41:22 (08/28/08), RP 144:14-23 (08/27/08).

On January 10, 2008, the school had a lockdown drill. RP 43:11-13 (08/28/08). The difference between a lockdown drill and an earthquake drill is that, during an earthquake drill, the kids go outside. In a lockdown drill, which is a Columbine-type of situation, the kids are to remain inside in a safe place. RP 45:4-25 (08/28/08). As part of the lockdown drill, the students in Ms. Jarvis' room, due to their level

of functioning, are to go into the bathroom during the drill where they are to remain quiet. RP 44:16-21 (08/28/08).

The various individuals have different responsibilities and at this time, Ms. Jarvis, once the drill was announced, went and locked the door to the hall and then went through the kitchen to make sure that the door was locked at that area. RP 50:6-12 (08/28/08). The two para-educators closed the blinds and Ms. McDougill led most of the kids into the bathroom, with the exception of Cole. RP 50:18-25 (08/28/08).

Ms. Hanson was with Cole, who was under his desk thinking it was "an earthquake drill." Ms. Hanson initially attempted to correct him, but decided that he was there for the duration and decided to let him stay where he was. RP 156:9-157:21 (08/27/08). Ms. Jarvis walked over to him and said, "Cole, you made a mistake, you think this is an earthquake drill but it's not, it's a lockdown drill." RP 51:8-10 (08/28/08). See also RP 159:13-24 (08/27/08). At this time, Ms. Jarvis gave Cole choices, which was the procedure they used. The choice was to either go to the

bathroom, or that she would move him to the bathroom. RP 51:13-18 908/28/08). Cole refused to go to the bathroom, remaining instead under his desk.

Ms. Jarvis was proceeding in the context of a real life situation. It was understood that these drills were to be considered as a real life situation. RP 148:4-15 (08/27/08). In that situation, she would be moving him to the bathroom and because the drill is supposed to be taught as a real life situation, she made the decision to move him to the bathroom. RP 52:5-15 (08/28/08). She did not intend to hurt him or discipline him. RP 53:4-15 (08/28/08). She grasped him and pulled him to the bathroom by sliding him on the floor. RP 54:16-25 (08/28/08). While she was doing that, he struggled to get away, grabbing desks and chairs. RP 54:16-55:9 (08/28/08). Once she got him into the bathroom, she had no additional physical contact with him. RP 58:14-22 (08/28/08). She did not hit or slap him or engage in any offensive behavior other than attempting to get a grasp of him in order to get him into the

bathroom where everybody else was located. RP 160:11-25 (08/27/08).

Ms. Hanson stood there and watched and did nothing. RP 53:16-19 (08/28/08). RP 166:2-14 (08/27/08).

Based upon this testimony, Ms. Jarvis was convicted of assault in the fourth degree.

#### IV. ARGUMENT

- A. THE COURT SHOULD REVERSE THE VERDICT AND DISMISS THIS CASE BECAUSE THE ASSAULT STATUTE IS VAGUE AS APPLIED TO THE CONDUCT AT ISSUE.

"Statutes are to be construed to affect their purposes and to avoid an unlikely or strained consequence." See State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995), (citing Ski Acres Inc. v. Kittitas County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992).) Under the due process clause of the 14th Amendment, a statute is void for vagueness if it does not define the criminal offense with sufficient specificity so that ordinary people can understand what conduct is prescribed. See State v. Watson, 160 Wn.2d 1, 154 P.3d 909 (2007). In the situation where the statute does not involve First Amendment rights, as is the case here, a

vagueness challenge is to be evaluated by examining the statute as applied under the particular facts of the case. 160 Wn.2d at 4.

A statute is void for vagueness if the statute (1) "does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed"; or (2) "does not provide ascertainable standards of guilt to protect against arbitrary enforcement." Id. at 5 quoting State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). As such, the due process clause forbids criminal statutes that permit a standardless sweep, allowing police, judges, juries, and prosecutors to pursue their own personal predilections. City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795 P.2d 693 (1990).

RCW 9A.36.041(1) provides:

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.

Instruction #4 defines assault as follows:

An assault is an intentional touching with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is

not unduly sensitive. An act is not an assault if it is done with the consent of the person alleged to be assaulted.

WPIC 35.50. CP 19.

The underlying principle is that an individual should not be held criminally responsible for conduct, which she could not reasonably understand to be proscribed. Id. at 6 citing (United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed 989 (1954)). In so doing, the courts have held that citizens may use other statutes and court rulings to clarify the meanings of particular statutes. City of Spokane v. Douglass, 115 Wn.2d 171 at 180. The case law and statutes, applicable here, support the notion that schools have a duty to protect other persons from the intentional criminal actions from third parties when one party is "entrusted with the well-being of another". See Niece v Elmview Group Home, 131 Wn.2d 39, 50, 929 P.2d 420 (1997). See also RCW 9A.16.020(6) (making it lawful to use force to prevent a mentally disabled person from committing an act dangerous to any person).

It is these decisions and statutes that the court should use in decided whether the statute is

vague as applied to the facts. While there is no case or statute specifically addressing a drill, it is clear that the courts in this state have sought to prevent caretakers, including teachers, who are responsible for the care of the disabled to be charged with assault when the touching may be offensive to the disabled person.

Indeed, as noted in O'Donoghue v. Riggs, 73 Wn.2d 814, 828, fn. 2, 440 P.2d 823 (1968), the Washington Supreme Court, while discussing the crime of assault, stated:

We do not wish to be understood as in any manner suggesting that the usual and ordinary definition of battery applies to all intentional contact between a patient in a mental hospital and an attendant, even though the patient may find the personal contact offensive. One who enters a hospital as a mentally ill person either as a voluntary or involuntary patient, impliedly consents to the use of such force as may be reasonably necessary to the proper care of the patient or for the necessary enforcement of reasonable rules governing the patient's safety and health. RCW 9.11.040(6) states that the use of force toward the person of another is not unlawful: "Whenever used by any person to prevent an idiot, lunatic or insane person from committing an act dangerous to himself or another, or in enforcing necessary restraint for the protection of his person, or his restoration to health, during such period only as shall be necessary to obtain legal authority for the restraint

or custody of his person." So, also, the reasonable use of force may be necessary within a mental hospital in the proper care and treatment of a patient and in order to protect him or others from harm.

This reasoning should be applied in a school setting as well. In this case, the state argued that had this been a real situation that there would not have been a charge of assault. It also argued because the touching was "offensive", so long as it was intentional, it was assault. The entire thrust of the state's argument is that Ms. Jarvis acted beyond what she was required to do under the circumstances of a "lockdown drill" and her conduct would have been perfectly legal had it been a real life situation. RP 104:13-21 (08/28/08). There are no standards that she could follow in this situation.

This is clearly a situation where the prosecutor simply decided, based on his own predilections and views, that she went too far. Yet, there is no guidance for Ms. Jarvis or other teachers to follow in the course of a drill - only that it was to be considered real life and she acted as such. As the state argued, "at what point do you draw the line?" RP 104:13-21 (08/28/08).

However, it is the legislature that is required to draw the line with sufficient specificity so the public does not have to guess and rely on the prosecution to draw the line on a case by case basis. This is simply a situation involving second-guessing and the prosecutor placing his own standards as the basis for the conviction. However, Ms. Jarvis and the school district have a duty to protect those individual entrusted to their care. That includes training to protect the child in the future.

This prosecution and verdict will result in teachers, who are required to protect those individuals under their care, being cautious because they may be second-guessed in the future. This will ultimately lead to the very real situation whereby persons under their care will have their safety compromised. And, ultimately, the district can be sued because it failed to adequately train the individuals on how to react under real life situations. The Superior Court simply found that the statute was not vague, however, as applied to a teaching environment, a

teacher would not know that she could not take measures to ensure the safety of her students.

B. THIS COURT SHOULD REVERSE THE VERDICT BECAUSE THERE IS INSUFFICIENT EVIDENCE TO PROVE THAT MS. JARVIS ACTED WITH CRIMINAL INTENT.

In a criminal case, a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State's case in chief, (c) at the end of all the evidence, (d) after verdict, and (e) on appeal. In each instance, the court takes the evidence and the reasonable inferences therefrom in the light most favorable to the State... At the end of all the evidence, after verdict, or on appeal, a court examines sufficiency based on all the evidence admitted at trial... Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available. State v. Freigang, 114 Wn.App. 1052, 61 P.3d 343 (2002).

In State v. Dodgen, 81 Wn.App. 487, 915 P.2d 531 (1996), Division I stated:

Generally, the court reviewing a sufficiency of the evidence claim looks at the evidence as a whole whenever a defendant presents evidence after the

trial court has denied his or her motion to dismiss for lack of sufficient evidence. State v. Chavez, 65 Wn.App. 602, 605, 829 P.2d 1118 (1992); State v. Smith, 56 Wn.App. 909, 914, 786 P.2d 320 (1990). Thus, we consider the evidence in its entirety.

State v. Dodgen, 81 Wn.App. at 493.

The standard of review for a challenge to the sufficiency of the evidence was set forth in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). There it was said that evidence is sufficient if, after it is viewed in a light most favorable to the state, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Green, 94 Wn.2d at 221, 616 P.2d 628 (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)). The trier of fact determines credibility. State v. Casbeer, 48 Wn.App. 539, 740 P.2d 335 (1987). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 619 P.2d 99 (1980).

In this case, the state has presented no evidence that Ms. Jarvis acted with criminal intent. Criminal intent may be inferred from the

conduct demonstrated at trial. See State v Vargis, 151 Wn.2d 179, 201 86 P.3d 139 (2004). However, there was no hitting, no punching, no kicking, or anything other than she was attempting to move Cole Bonner into a protected area as part of the lockdown drill. While that action may have been offensive to Cole, the Supreme Court has indicated that this is not enough in the context of dealing with developmentally disabled individuals. O'Donoghue, supra.

Moreover, RCW 9A.16.020(11) makes it lawful to use force to prevent a mentally disabled person from committing an act dangerous to any person. The whole purpose of the drill was to train Cole Bonner, a mentally disabled individual, to protect himself, as well as the other individuals, in case of a real life "Columbine" situation. If not trained properly, his acts would be dangerous to everybody. Under this scenario, the evidence was insufficient to convict.

C. THE COURT SHOULD REVERSE BECAUSE THE TRIAL COURT PREJUDICED THE DEFENDANT WHEN IT REFUSED TO GIVE HER REQUESTED INSTRUCTIONS.

The state must prove every essential element of a crime beyond a reasonable doubt for a

conviction to be upheld. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). It is reversible error to instruct a jury in a manner that may relieve the state of this burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984).

If the instructions allow a party to argue its theory of the case and do not mislead the jury or misstate the law, then they are adequate. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006) (citing State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 219 (2005)). Whether the instruction states that applicable law is a question of law reviewed de novo. 158 Wn.2d at 308. The failure to give a proposed instruction is reviewed for an abuse of discretion. State v. Winnings, 126 Wn.App. 75, 86, 107 P.3d 141 (2005).

In Stevens, the Washington Supreme Court reversed defendant's conviction for child molestation because the trial court refused to give the proposed instruction on involuntary intoxication. 158 Wn.2d 309-311. The court held that because the defendant's proposed instructions

were a correct statement of the law and negated the mental state required for the offense, he was prejudiced by the court's failure to give the instruction. Id.

Here, proposed Instructions No. 4, No. 6 and No. 7 went to the heart of the defendant's theory of the case. These instructions are a correct statement of the law and were applicable here, given that it was a situation involving a protection of the victim and his classmates in the case and it was the only way that the defense could argue its theory of the case.

Indeed, the state was allowed to argue that the defendant's intent was irrelevant to this fact pattern because it was only relevant that once the contact was made, it only mattered that it was offensive to the victim. As a result, the jury was not instructed that the law in this state is that not every contact with a developmentally disabled individual is assault even if it was offensive to that individual.

The court affirmed based on its finding that she was allowed to argue her theory of the case on the instructions given. However, even the court's

order affirming the conviction, actually states that the state only has to demonstrate that the touching was intentional and it need only be offensive to the victim. Thus, she was unable to argue her theory of the case.

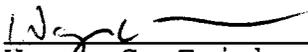
As a result, this court should accept review as it conflicts with decisions of the Court of Appeals and the Supreme Court.

V. CONCLUSION

Based on the points and authorities herein, as well as the files and records of this case, Ms. Jarvis, respectfully requests that the court reverse the conviction.

RESPECTFULLY SUBMITTED this 5th day of February, 2010.

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CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington this 5th day  
of February, 2010.

  
\_\_\_\_\_  
Lee Ann Mathews

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