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DIVISION II

NO. 39588-6

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II BY  
STATE OF WASHINGTON

  
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

KAREN JARVIS, APPELLANT

Appeal from the Superior Court of Pierce County

No. 08-1-04771-9

**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the assault statute vague when grabbing and dragging another person constitutes offensive conduct?
2. Was there sufficient evidence to find that defendant assaulted the victim?
3. Did the trial court properly decline to give defendant's proposed jury instructions number 4 and 7 where there was no evidence to support them, and defendant was still allowed to argue her case?
4. Should this Court decline to consider an issue that is raised for the first time on discretionary review and was not raised on appeal in the Superior Court or in defendant's petition to this Court?

B. STATEMENT OF THE CASE.

1. Procedure

On March 18, 2009, the State charged defendant, Karen Jarvis, with assault in the fourth degree. Record on Appeal, pages 5-6<sup>1</sup>. The charge was the result of defendant dragging one of her students, 12 year

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<sup>1</sup> The record on appeal was submitted as an attachment from the Superior Court. The State will refer to this 70 page attachment, which contains the Clerk's Papers from the RALJ appeal, as "Record on Appeal" followed by the appropriate page number.

old C.B.<sup>2</sup>, across the classroom. Record on Appeal, pages 7-8.

On August 27, 2008, the case proceeded to trial in front of the Honorable Judge Dacca. RP 1<sup>3</sup>. Both the State and the defense proposed their respective jury instructions. Record on Appeal, pages 9-26, 27-42. Defendant's proposed jury instruction 4 was similar to the State's proposed jury instruction 8, except defendant added one sentence: "[a]n act is not an assault if it is done with the consent of the person alleged to be assaulted." *Id.* The State objected to defendant's instruction because it was not anticipating anyone to testify that C.B. consented to what had happened on January 10, and because the situation in question was not the kind contemplated by the consent provision. RP 226-227; RP1 23. The State also objected to defendant's proposed jury instruction 7 because there had been no testimony that C.B. was committing some dangerous act that gave defendant the right to use force against him. RP 231-232; RP1 27. The trial court agreed with the State and rejected defendant's proposed jury instructions 4 and 7. RP 235; RP1 29.

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<sup>2</sup> As the victim is a minor, the State will refer to him using his initials.

<sup>3</sup> The trial transcript consists of three parts. For convenience, the State will refer to the proceedings that took place on August 27, 2008, as RP; the proceedings that took place on August 28, 2008, as RP1; and the proceedings that took place on September 19, 2008, as RP2.

The jury found defendant guilty of the crime of assault in the fourth degree. RP1 123; Record on Appeal, page 57. The trial court denied defendant's motion for arrest of judgment. RP2 12, 13, Record on Appeal, pages 69-70. The trial court sentenced defendant to a suspended sentence with probation. RP2 18, Record on Appeal, pages 69-70.

Defendant filed a timely notice of appeal. CP 1-5. The Superior Court affirmed defendant's convictions in a written ruling and a formal remand order was then completed. CP 41-43, CP Supp. 53-55.

Defendant has now filed for discretionary review with this Court. CP 44-49.

## 2. Facts

C.B. went to Drum Intermediate School in University Place. RP 55, 56. C.B. had Down Syndrome and used a combination of sign language and limited verbal communication. RP 54, 55. On January 10, 2008, he was 12 years old, four feet five inches tall, and weighed 80 pounds. RP 54, 56, 57.

C.B. was a very small child for his age. RP 58. Because of his small size and his disabilities, C.B. reacted negatively to negative kinds of touching. RP 61-62. C.B.'s teachers were aware of that. RP 62. C.B. also needed more time to process directions and did worse under noisy and crowded conditions. RP 86, 100.

Defendant was C.B.'s teacher. RP 56. Ms. Hansen and Ms. McDougall were her aids. RP 65, 105. Ms. Hansen had worked in the same class with defendant for about five years, and Ms. McDougall had worked with defendant for two years. RP 108, 189-190.

On January 10, 2008, the school was to have a lock-down, Columbine-style drill. RP 110. According to Ms. Hansen, the teachers and their aids learned about the drill that morning. RP 112. The school did not have written rules for the drill. RP 158. The expectation was that all seven students of the special education class, the teacher and two aids would go to the bathroom and be quiet. RP 111, 117. Ms. Hansen testified, however, that going into a room other than the classroom was "not a hard fast rule." RP 172.

When the principal announced a lock down drill over the loud speaker, most of the kids were at their desks, and C.B. was next to the whiteboard. RP 119, 121-122. When C.B. heard the announcement, he ran to his desk and got under it. RP 122, 123. Apparently C.B. thought it was an earthquake drill. RP 122, 123. Ms. Hansen testified that C.B. "thought he was in the right spot." RP 156.

Ms. Hansen tried to coax C.B. out for a few minutes, but he did not budge. RP 123-124, 125, 157. "He was criss-cross applesauce and he was holding on to the front legs [of his desk]." RP 124. Ms. Hansen decided that she would just stay with C.B. in the classroom. RP 126.

After Ms. Hansen ceased her efforts to get C.B. from under the desk, defendant angrily yelled at C.B. to come out, but the boy did not move. RP 127-128, 160. Defendant threw the desk off of him. RP 127-128. C.B. began flailing. RP 129. Defendant tried to grab at C.B.'s arms, legs, ankles for a few minutes. RP 129. She finally got a hold of him and started dragging him by his wrist and ankle. RP 129. C.B. was "screaming at the top of his lungs." RP 130. He struggled and freed his arm, but defendant grabbed C.B. by the ankle and proceeded to drag him across the floor of the classroom all the way to the bathroom. RP 130. Defendant dragged C.B. approximately 25 feet. RP 116.

Ms. Hansen described the situation as follows: "[s]he is dragging him across the room... He is holding on to everything that she is dragging him past and it's falling over and banging..." RP 130. C.B.'s shoulders and head were on the floor. RP 131. His shirt was around his neck. RP 131. C.B. was still screaming "at the top of his lungs." RP 181. At some point, C.B. latched on to a table leg, and defendant continued to drag him together with the table, moving the table a foot. RP 132. He grabbed the leg of another desk. RP 133. He grabbed the door jam. RP 133. Defendant continued to drag C.B.. RP 133.

Finally, defendant jerked C.B. free from the door jamb, and he "swung into the bathroom" by the force of the momentum and slid across the floor. RP 134. Defendant released the boy, leaned against the shower wall and said, "That wore me out." RP 135.

A few minutes passed in complete silence. RP 136. Then the bell rang, and defendant walked out of the bathroom with all the children except C.B. RP 136, 199. Ms. Hansen and Ms. McDougall helped C.B. stand up. RP 137, 199. “He just wrapped his arms around Ms. McDougall...” RP 137. He looked exhausted and was whimpering. RP 137.

Ms. McDougall was inside the bathroom with most of the children during the incident. RP 193-194. She did, however, hear C.B.’s screams and a lot of banging as if “items [were] being tipped over.” RP 194. She then saw defendant yank C.B. into the bathroom with such force that he slid seven to eight feet on the tile floor. RP 195, 196-197. Ms. McDougall confronted defendant about the incident the same day. RP 201.

Ms. Hansen talked to defendant about allowing her and C.B. to stay in the classroom during future drills - just as the general education children did. RP 139-140, 173. Defendant thought it was a good idea. RP 140, 173.

Very shortly thereafter, Ms. Hansen emailed the school psychologist on her behalf and on behalf of Ms. McDougall. RP 202. The three women met three days later, on Sunday, January 13. RP 203. On Monday, Ms. Hansen and Ms. McDougall reported the incident to the principal. RP 138.

C.B.'s mom, Ms. Bonner, noticed a bruise on C.B.'s thigh around the same time. RP 69. She also noticed a change in C.B.'s behavior: "anxiety, um, fear, acting out, night terrors, um, he would pick and chew his fingernails to the point where they would bleed. He would not go to sleep by himself. He didn't want to get up in the morning." RP 71. About two weeks later, Ms. Bonner was informed that the school district was investigating the incident. RP 67-68. Subsequently, the Pierce County Sheriff's Office commenced an investigation as well. RP 84.

Defendant testified at trial. RP1 35-81. She testified that she had tried to explain to C.B. that he confused the drills, but he refused to go to the bathroom. RP1 51. Then, according to defendant, she gave C.B. a choice: either he went to the bathroom or she was going to move him there. RP1 51. Defendant decided to move C.B. to the bathroom because she would not be teaching him a good lesson if she let him remain under the desk, and because she would have to move C.B. if it were a real emergency. RP1 52. She knew C.B. would become hysterical, but was willing to move him anyways because she thought she was saving his life and teaching him obedience at the same time. RP1 52, 53. Defendant then largely corroborated the testimony of her aids about what had happened next, except she did not think she dragged C.B. by his ankle. RP1 54-62, 76-77.

Defendant admitted that, although she knew that C.B. needed more notice, she did not forewarn C.B. about the upcoming drill. RP1 64. In addition, defendant knew that C.B. did not like to be touched. RP1 72. However, according to defendant, babying the kids was not her style of teaching. RP 79-80.

C. ARGUMENT.

1. THE ASSAULT STATUTE IS NOT VAGUE AS GRABBING AND DRAGGING ANOTHER PERSON CONSTITUTES OFFENSIVE TOUCHING.

Defendant has the heavy burden of proving beyond a reasonable doubt that the statute is unconstitutionally vague. *State v. Halstien*, 122 Wn.2d 109, 118, 857 P.2d 270 (1993); *City of Spokane v. Douglass*, 115 Wn.2d 171, 178-179, 795 P.2d 693 (1990). Defendant must demonstrate either (1) that the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed, or (2) that the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Douglass*, 115 Wn.2d 171, 178-179.

“A statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct.” *State v. Myles*, 127 Wn.2d 807, 813, 903 P.2d 979 (1995) (internal citation omitted). Under the second prong, “the fact that the statute may require a subjective evaluation by a law enforcement officer does not render the statute unconstitutional; only if the

statute invites an inordinate amount of discretion is it unconstitutional.”

*Myles*, 127 Wn.2d 807, 812 (internal citation omitted).

“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.” RCW 9A.36.041. The Washington criminal code does not define “assault;” thus, for its definition the courts have turned to the common law. *State v. Kier*, 164 Wn.2d 798, 806, 194 P.3d 212 (2008); *State v. Wilson*, 125 Wn.2d 212, 217-218, 883 P.2d 320 (1994); *State v. Aumick*, 73 Wn. App. 379, 382, 869 P.2d 421 (1994); *State v. Hupe*, 50 Wn. App. 277, 282, 748 P.2d 263, *review denied*, 110 Wn.2d 1019 (1988). Washington courts recognize three definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another (attempted battery); (2) an unlawful touching with criminal intent (actual battery); and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is capable of inflicting that harm (common law assault). *State v. Bland*, 71 Wn. App. 345, 353, 860 P.2d 1046 (1993) (quoting *State v. Walden*, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)); *Aumick*, 73 Wn. App. at 382.

“The fact that some terms in an enactment are undefined does not automatically mean that the enactment is unconstitutionally vague.” *Douglass*, 115 Wn.2d at 180. We presume that other statutes and court rulings are available to citizens to clarify the meaning of the statute in question, and that

the language of the statute “is afforded a sensible, meaningful, and practical interpretation. *Id.*

In this case, the plain language of the statute that defines assault in the fourth degree combined with the common-law definitions of assault provide a clear notice to the public that an intentional touching that is harmful or offensive to an ordinary person is an assault on that person. RCW 9A.36.041. In addition to clearly notifying the public, the statute and the supplemental common law also provide sufficient standards of guilt to protect against arbitrary enforcement: intentional touching that is offensive to ordinary people is a crime. *Id.*

Defendant argues that “[t]here is no guidance for Ms. Jarvis or other teachers to follow in the course of a drill.” Appellant’s Brief p. 14. However, common sense dictates that a school drill is not an excuse for grabbing a student - especially a student with Down Syndrome - and dragging him across the classroom by his ankle. While acceptable in true emergencies, such drastic conduct is unacceptable and completely unnecessary during a drill. The jury’s guilty verdict demonstrated that defendant’s conduct was offensive and harmful. RP1 123.

In her brief, defendant heavily relies on mental hospital analogies, which are inapplicable to the case at bar. However, defendant says nothing about RCW 28A.320.125, in which the legislature requires that a safe school plan “include provisions for *assisting* and *communicating* with students and staff, including those with special needs or disabilities” (emphasis added).

Thus, during drills, the legislature wants the teachers to assist and communicate with students, not forcefully drag them to “safety.”

As the Superior Court noted, defendant completely failed to meet her high burden of proof and show that the assault statute is vague beyond a reasonable doubt. CP Supp. 53-55. In fact, defendant failed to present any evidence in support of her argument. Instead of showing how the assault statute falls under either prong of the void-for-vagueness test, defendant urged the court to find that she acted lawfully based on other unrelated statutes and inapplicable case law. Appellant’s Brief, p. 12-16.

Defendant urges this Court, as she urged the Superior Court, to analogize this case to the case of an attendant at a mental hospital. Defendant urges this Court to overturn her conviction based on statutes and case law, which, under certain circumstances, exempts an attendant at a mental hospital from being charged with an assault on a patient. *See* Appellant’s Brief, p. 13-4. Defendant urges this Court to view the situation as if it were a true emergency. However, this was not an emergency, but a drill, and the State always emphasized that defendant’s actions were proscribed under the circumstances of a drill, and would not be criminal under the circumstances of a true emergency. *See* RP1 103, 104, 118-119.

While we, as a society, would allow a teacher to use force in moving a disoriented or disabled child to safety during an emergency, a drill is a completely distinguishable situation. A drill creates an *artificial* emergency situation to train the students and teachers to respond properly to the danger and evaluate the efficiency of the response. In other words, a drill is an

opportunity to *teach* students to respond to an emergency, and not a carte blanche to manhandle children.

C.B. incorrectly responded to a lock-down drill, and defendant should have showed him the correct way *in a manner that would address C.B.'s disability*. Instead, defendant chose to teach C.B. obedience by forcefully dragging the hysterical child across the room. RP1 52, 53. Washington views such conduct as an assault. As a society, we draw the line between fact and fiction, reality and make believe. All defendant was required to do is to use her common sense and act according to the true nature of the situation and the developmental ability of her student.

Just as the jury rejected defendant's good-intention claim in this case, a Maine jury rejected a defendant's claim that he was teaching a child that "the fire could really hurt you," when he passed the flame from a propane torch over the child's hand, burning it. *State v. Gray*, 440 A.2d 1062, 1064 (Me. 1982). The court did not give any weight to the fact that the child had previously failed to respond to a fire drill. *Id.* at 1063-1064. It also rejected Gray's void-for-vagueness argument, holding that, "[t]here can be no doubt on the facts of this case that the legislature intended to punish conduct like that of appellant under [aggravated assault statute] and that defendant had adequate notice that such conduct was prohibited" and that it could cause serious bodily injury. *Id.* at 1064.

Similarly, in this case, defendant knew that C.B. would be traumatized if she grabbed and dragged him. RP1 72. This became abundantly clear when C.B. became hysterical as soon as defendant commenced her attempt to move him. RP 129-130. There was no doubt that defendant's touching was offensive to C.B.. Although defendant, like Gray, acted out of seemingly good intentions, she assaulted C.B. when she grabbed his ankle and dragged him 25 feet before yanking him through a door jam. An ordinary person knows that this is wrong.

Contrary to defendant's assertion, she was not charged because the prosecutor autocratically, based on his or her personal convictions, decided that defendant's conduct had gone too far. Appellant's Brief p. 14. She was charged with assault in the fourth degree because her behavior met the definition of assault. Initially, defendant's assistants reported the incident. RP 138. They were so taken aback by defendant's conduct that they contacted the school counselor and then the principal. *Id.* The school district had commenced its investigation before the Sheriff's Office and the Prosecutor's Office got involved.<sup>4</sup> RP 67-68, 84. In sum, the record is devoid of any evidence of prosecutorial vindictiveness or arbitrary charging.

Finally, this case does not compromise student safety. On the contrary, this case promotes thoughtful actions and reasoned decisions and discourages robotic or emotional knee-jerk reactions. Teachers are indeed entrusted with

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<sup>4</sup> It should also be noted that the prosecutor who tried the case was not the prosecutor who had charged it. Record on Appeal, page 5-6, 7-8; RP 1.

ensuring safety for the children in their care, and we expect them to use common sense when they discharge their duties. Defendant made a very bad judgment as a teacher and a person, and she should be held responsible for her actions. The Superior Court was correct in rejecting defendant's void for vagueness argument by noting that defendant knew it was a drill and her conduct could clearly be interpreted as harmful or offensive. It was a question properly left to the jury. Defendant did not meet her burden and this Court should affirm the decision of the lower court.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT ASSAULTED C.B.

The evidence is sufficient when, viewed in the light most favorable to the prosecution, it allows a rational trier of fact to find, beyond a reasonable doubt, the essential elements of the crime. *See State v. Gentry*, 125 Wn.2d 570, 596-597, 888 P.2d 1105 (1995); *State v. Amenzola*, 49 Wn. App. 78, 85, 741 P.2d 1024 (1987). However, when this Court reviews the sufficiency of the evidence, it "does not need to be convinced of the defendant's guilt beyond a reasonable doubt, but must only determine whether substantial evidence supports the State's case." *State v. Potts*, 93 Wn. App. 82, 86, 969 P.2d 494 (1998).

"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). All reasonable inferences from the evidence must favor the State and must be interpreted most strongly against the defendant.

*State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial evidence is as reliable as direct evidence. *See State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). In the case of conflicting evidence or evidence where reasonable minds might differ, the jury is the one to weigh the evidence, determine credibility of witnesses and decide disputed questions of fact. *Theroff*, 25 Wn. App. at 593. Credibility determinations are for the trier of fact and not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To convict defendant of the crime of assault in the fourth degree, the State had to prove (1) that on or about January 10, 2008, defendant assaulted C.B., and (2) that this act occurred in the Pierce County, Washington. Record on Appeal, pages 43-56, Jury Instruction 4. “A person commits the crime of assault in the fourth degree when he or she commits an assault.” *Id.* Jury Instruction 5.

“An assault is an intentional touching of another person 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.” *Id.* Jury Instruction 6. “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime.” *Id.* Jury Instruction 7.

In this case, the State proved that defendant intended to grab C.B. and drag him across the room. In fact, defendant acknowledged that that was her intent. RP1 51-52. The evidence also showed that defendant's actions were offensive to C.B. and would be offensive to an ordinary person. C.B. screamed and flailed thereby demonstrating that defendant was hurting him physically and emotionally and that her touching was unwanted. RP 129, 130, 181. Similarly, it is axiomatic that an ordinary person would be offended if another person grabbed him by the ankle, dragged him 25 feet, and yanked him into the bathroom.

Defendant asserts that the State failed to prove that she had acted with criminal intent. Appellant's Brief, p. 16. However, her argument is misplaced. Contrary to its confusing name, the criminal-intent offensive-touching definition of assault does not require specific intent to inflict harm or cause apprehension; "rather, [the definition] requires intent to do the physical act constituting assault." *State v. Hall*, 104 Wn. App. 56, 62, 14 P.3d 884 (2000); see also *State v. Stevens*, 158 Wn.2d 304, 311, 312, 143 P.3d 817 (2006) (in applying the facts of the case to the definition in question, the court reasoned that the touch was not accidental; that it was without privilege or consent; that it made the victim feel violated; "and therefore the touch was arguably unlawful").

Thus, intent in this context means a knowing conduct. *State v. Hooper*, 118 Wn.2d 151, 158, 822 P.2d 775 (1992). In other words, to prove intent under the actual battery definition of assault (*see* section one of this brief), the State must only show that defendant intended the assaultive conduct, not that defendant intended to commit a specific crime or hurt the victim. For example, if a stranger suddenly, without a warning or permission, kisses a person on the lips or grabs her breast, this would be an assault under the definition in question, even if the stranger meant to show his affection or make a joke, because an ordinary person would find such kiss or touch offensive. Thus, the fact that the stranger did not mean harm, did not intend to assault, had good intentions, was showing affection or joking, is irrelevant because he or she intended the touching.

In this case, defendant never disputed her intent to grab C.B. and drag him across the room. She only disputed the meaning of her actions: whether she intended to hurt him. Under the assault definition used in this case, whether defendant meant to hurt or offend C.B. is irrelevant. The evidence was sufficient because the State showed that defendant intended to grab and drag C.B., and that an ordinary person would find such touching offensive.

The Superior Court found that this intent element was well established by the testimony and by defendant's own admission. CP Supp. 53-55. Defendant's actions were purposeful. *Id.* The evidence was sufficient to find that defendant assaulted C.B.

3. THE TRIAL COURT PROPERLY DECLINED TO GIVE DEFENDANT'S PROPOSED JURY INSTRUCTIONS 4 AND 7 AS THERE WAS NO EVIDENCE TO SUPPORT THESE INSTRUCTIONS AND DEFENDANT WAS STILL ABLE TO ARGUE HER CASE TO THE JURY.

This Court reviews the trial court's refusal to give proposed jury instructions under the abuse of discretion standard. *State v. Winings*, 126 Wn. App. 75, 86, 107 P.3d 141 (2005). This Court must review the adequacy of jury instructions de novo and view the evidence in the light most favorable to the party that requested the instruction. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002); *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-456, 6 P.3d 1150 (2000). A party is only entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. *State v. Stanley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

Defendant's proposed jury instruction 4 read:

An assault is an intentional touching with unlawful force that is harmful or offensive regardless 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.*

Record on Appeal, pages 27-42 (emphasis added).

Defendant's proposed jury instruction 7 read:

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.

*Id.*

While the aforementioned jury instructions were presented as supporting defendant's theory of the case, the theory was not supported by the evidence. RP 226-228, 230-235; RP1 21-25. Defendant attempted to compare the students in a special education class to the patients at a mental hospital and carve out extraordinary rights for the special education teachers; rights that do not even exist for attendants in mental hospitals.

While the law sometimes excuses a person who uses reasonable force to apprehend a mentally ill person, the excuse is limited to situations when the mentally ill person poses real danger to himself or others. *See* RCW 9A.16.020(6); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 828, 440 P.2d 823 (1968). For example, the plain language of RCW 9A.16.020(6) unequivocally dictates that for the section to apply, the mentally ill person must be "*committing*" a dangerous act. Thus, this law contemplates situations when a mentally ill person strikes himself or others or attacks in a violent rage.

The facts in this case are completely distinguishable. C.B. did not present any danger to himself or anybody else around him. He was not *committing* anything. He simply hid under his desk. RP 122, 123. The record is devoid of any evidence in support of defendant's theory.

First, this was a drill and not a true emergency. RP 110, 119. C.B.'s life was not in danger. No shooter was walking the hallways of the school. Defendant knew and understood it was a drill. RP1 43, 51. She even subsequently agreed that it would be a good idea to leave C.B. with Ms. Hansen in the classroom during future drills. RP 140, 173.

Second, just because C.B. has Down Syndrome does not mean that "any person" can manhandle him using some farfetched dangerousness excuse. C.B. did not endanger other students or teachers. C.B. did not hurt anybody or impede the drill. He simply hid under a desk. RP 122, 123. All the students but him walked to the bathroom and were already there with Ms. McDougall when defendant removed C.B. from under the desk and dragged him across the classroom. RP 193-194. In sum, defendant presented no evidence upon which he could base proposed jury instruction 7, and therefore, the trial court properly rejected it.

Finally, neither C.B. nor his mother expressly consented to defendant's actions. Additionally, simply because C.B. is a student in a special education class does not give his teacher a constructive permission to drag him around

the classroom. So, the last sentence in defendant's proposed jury instruction 4 was superfluous in this case, and the trial court properly rejected it.

The Superior Court properly upheld the trial court's ruling as there was no evidence presented that C.B. or his parents consented to him being dragged around during a drill. In addition, there was no evidence C.B. was endangering anyone. Defendant's proposed instructions were not proper. The Superior Court also noted that the trial court did give defendant's proposed instruction 10 which stated, "A school has a duty to protect students in its custody from reasonably anticipated dangers." CP Supp. 53-55. This allowed defendant to fully argue her case. Defendant was not entitled to jury instructions for which no evidence supported their being given to the jury. Further, the instructions given by the trial court allowed defendant to adequately argue her case to the jury. The trial court did not error.

4. THIS COURT SHOULD DECLINE TO HEAR AN ARGUMENT THAT IS RAISED FOR THE FIRST TIME ON DISCRETIONARY REVIEW AND WAS NOT INCLUDED IN DEFENDANT'S PETITION FOR REVIEW TO THIS COURT.

For the first time, defendant raises an argument as to her proposed instruction 6. This issue was not raised in the RALJ appeal at the Superior Court. Defendant also did not mention jury instruction number 6 in her

petition for review. If she had, the State would have objected. Defendant fails to identify where she raised this claim in the appeal in the Superior Court. Discretionary review is not a method for obtaining review of an issue that has not been litigated in the underlying appeal. This Court will not consider claims that were not raised or briefed in the Superior Court. *See In re Lord*, 152 Wn.2d 182, 94 P.3d 952 (2004), *Halstien*, 122 Wn.2d at 130 (both cases deal with cases from the Court of Appeals to the Supreme Court but the procedural posture is analogous).

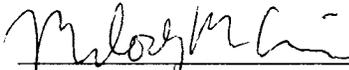
In this case, defendant did not brief or present argument related to her proposed jury instruction number 6. The State did not have a chance to respond to this argument below as it wasn't made. As such, the Superior Court did not rule on defendant's claim as it was not before the court. This argument is made before this Court for the first time. This Court cannot review a decision that was never raised and never reviewed by the lower court. Defendant cannot raise new arguments on discretionary review. This Court should decline to consider defendant's arguments as related to her proposed jury instruction number 6.

D. CONCLUSION.

The State respectfully requests that this Court affirm defendant's conviction of assault in the fourth degree. The conviction should be affirmed because the assault statute is not vague; the State presented sufficient evidence that defendant assaulted C.B.; and the trial court properly rejected defendant's proposed jury instructions 4 and 7. The decision of the Superior Court should be upheld.

DATED: April 8, 2010.

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
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MELODY M. CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.8.10   
Date Signature

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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