FILED
Court of Appeals
Division II
State of Washington
3/1/2019 12:57 PM

No. 52306-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

V.M.
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Mary Sue Wilson, Judge
Cause No. 17-8-00434-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

B. STATEMENT OF THE CASE.

The appellant, V.M., and the victim, R.K. attended Rochester High School together. 1 RP 14.[1] During a fifth period civics class, R.K. lifted her backpack, striking V.M. in the face, after which V.M. started punching R.K. 1 RP 15, 18. R.K. described the event stated,

> "Then I lifted my backpack that—that was in between our chairs to try and block so I couldn't see her, and I didn't know that this happened after the fact, but it like brushed her face, and then somehow we both ended up standing up and then she started punching me."

1 RP 18. V.M. hit R.K. at least three to four times with a closed fist. 1 RP 19. R.K. testified that she did not swing back or ever try to hit V.M. 1 RP 20.

The teacher, Eric Holmkvist, testified that after a warmup question, V.M. "jumped out her chair and started striking" R.K. 1 RP 43, 45. Mr. Holmkvist did not see R.K. strike or attack V.M. 1 RP 46. Mr. Holmkvist reiterated, "I saw her jump out of her seat and strike [R.K.] three times." 1 RP 46. When asked if R.K. fought back, Mr. Holmkvist testified, "she was trying to cover in a

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1 The verbatim report of proceedings occurs in three volumes, and will be designated as follows- 1 RP – 3/13/18 and 3/20/18; 2 RP 3/26/18; 3 RP 7/12/18, consistent with the designation in the Opening Brief of the Appellant.

defensive position." 1 RP 46. Mr. Holmkvist then tried to intervene and V.M. stopped hitting. 1 RP 46-47. Following the incident, R.K. was sobbing, very distraught, and trying to fix her glasses. 1 RP 47, 48.

Thurston County Sheriff's Deputy Paul Gylys was the school resource officer at Rochester High School on the day of the incident. 1 RP 65. Deputy Gylys interviewed V.M. following the incident and V.M. indicated that R.K. had raised a closed fist toward V.M. and V.M. made a statement, "you won't hit me," or "I dare you to hit me." 2 RP 59. Then V.M. said that hit R.K. hit her in the face with a backpack. 1 RP 67. V.M. said that she punched R.K. after being hit with backpack. 1 RP 67. Deputy Gylys indicated that the side of V.M.'s face was slightly discolored but V.M. did not complain of any pain. 1 RP 67. V.M. told Deputy Gylys that it "did not hurt her and it only made her mad." 1 RP 69. V.M. stated that the incident only made her angry 2 RP 59.

Deputy Gylys also spoke with R.K. and observed injuries on her. 1 RP 70. R.K. had a swollen area consistent with "maybe a fifty-cent-piece-sized impact" near the crown of her head or near the hairline. 1 RP 70-71. The area had some slight discoloration.

1 RP 72. Deputy Gylys also observed an injury above R.K.'s left eye, "essentially middle forehead area." 1 RP 73.

V.M. testified that she had previous negative interactions with R.K., and that R.K. had hit her and other students in the past. 1 RP 107-108. V.M. testified that on the day of the incident, R.K. made three or four threats toward her. 1 RP 110. V.M. stated that R.K. saw V.M. "staring at her and acted like she was going to punch me in the face three times." 1 RP 114. V.M. said that R.K. took her backpack and "smacked me in the face." 1 RP 114. V.M. said that she pushed the backpack away and hit V.M. 1 RP 115.

On cross examination, V.M. denied that she was scared of R.K. 1 RP 117. When asked, "you didn't have any fears of [R.K.] attacking you or hurting you?" V.M. stated "no." 1 RP 117. V.M. testified that she thought she remembered R.K. hitting her back. 1 RP 120. She stated that R.K. was on her chair during the incident and V.M. was standing over her. 1 RP 120. V.M. eventually stated, "I think she was falling out of her chair because at one point she fell out of it and hit her head on the table," and then admitted that V.M. punching R.K. is what caused her to fall out of her chair. 1 RP 123. R.K. fell from a seated position. 1 RP 124.

Defense counsel questioned Principal Matthew Ishler about R.K.'s school disciplinary record and accommodations. 2 RP 16-20. When asked if he recalled records of R.K. hitting, pushing and yelling at other students during middle school, Principal Ishler stated, "I don't recall seeing that." 2 RP 18. Principal Ishler was then asked about specific accommodations that the school had in place for R.K. and stated, "I would have thought they would have been about her condition with cerebral palsy." 2 RP 20. Assistant Principal Kevin Wilson testified that both V.M. and R.K. were disciplined for the event. 2 RP 38-39. Mr. Wilson testified that he reviewed R.K.'s disciplinary records and noticed that she had a history of being quarrelsome in middle school, but he did not see anything between V.M. and R.K. 2 RP 42.

V.M. was charged with assault in the fourth degree for the incident. CP 1. The trial court adjudicated V.M. guilty of the incident. CP 6, 2 RP 98. During the trial court's oral ruling, the court made specific and detailed findings. 2 RP 91-97. The trial court found that on the date in question, R.K. hit V.M in the face with her backpack hard enough to cause a red mark on V.M.'s face. 2 RP 92. V.M. reacted "almost instantaneously by hitting, striking, or punching" R.K. in the head at least three times, leaving bruises

on both sides of R.K.'s forehead. 2 RP 92. The trial court found that R.K. did not engage in any hitting or any aggressive or offensive actions after the backpack hit V.M., based on the testimony of Mr. Holmkvist and R.K. 2 RP 92.

The trial court considered past history, finding that R.K. "did hit V.M. in the past and that V.M. had seen R.K. "hit others in the school setting in the past." 2 RP 92. The trial court also found inconsistencies in R.K.'s account of the incident because "she indicated that she had to be told that the backpack hit or brushed [V.M.]'s face" and she indicated that "she had never been disciplined and had never been addressed at school for fighting." 2 RP 94.

The trial court then found that the punching or striking stopped as soon as Mr. Holmkvist yelled at V.M. 2 RP 94. The court found that "immediately after the event, as well as during her testimony before this court, [V.M.] said that the backpack hitting her in the face did not hurt her; it just made her mad," and then found that V.M. "at the time subjectively wasn't fearful of [R.K], despite the events that" the court had previously mentioned. 2 RP 94-95. The trial court found that V.M.'s testimony that R.K. hit her back was not

credible, "as it is at odds and inconsistent with Mr. Holmkvist's testimony." 2 RP 95.

The trial court found that V.M. had the knowledge that her fist would make contact with R.K., therefore the requisite intent for assault existed beyond a reasonable doubt, and V.M. knew that hitting R.K. at least three times on the head would be harmful and offensive to R.K. 2 RP 95. The trial court then considered whether there was a lawful use of force. 2 RP 95.

The trial court reiterated that V.M. responded to being hit with the backpack out of anger, not fear, and the evidence indicated that R.K. did not keep swinging and V.M. struck her at least three times. 2 RP 95. The trial court found that at that point, V.M. "became the aggressor and [R.K.] was lower down in her chair, and the swings had the effect of pushing [R.K.] partly out of her chair." 2 RP 95. The trial court then stated:

> "The court finds that the force was more than necessary and that the State has carried its burden to establish that this was not a lawful use of force; that in light of the one swing of the backpack and then no subsequent swings of the backpack by [R.K.], that [V.M.] did not have a reasonable belief that she was going to be injured, and that the force was more than necessary, even if there was a reasonable belief."

2 RP 97-98. The trial court continued:

> "Now, if [V.M.] had acted instantaneously and stopped after one swing, thinking that the backpack was an intentional swing at her, it would have been a more difficult question for the court in terms of reasonable force. But again, here the court is finding that [V.M.] herself indicated that she was not hurt, she was angry; and swinging three times in a downward direction at another individual is more force than is necessary and is not by a person who reasonably believes that she is going to be injured."

2 RP 98. The trial court imposed six months of probation and 12 hours of community service. 2 RP 110, CP 6-15. The trial court allowed for early review of probation for possible early vacation of probation after three and a half months. 2 RP 112; CP 15. The trial court vacated the remaining probation time on July 12, 2018. 3 RP 8. This appeal follows.

C. ARGUMENT.

1. Sufficient evidence supported the trial court's finding that V.M. did not act in self-defense.

The use of force upon another person is not unlawful when used by a person bout to be injured in preventing attempting to prevent an offense against his or her person, if the force is not more than is necessary. RCW 9A.16.020(3). When self-defense has been properly raised, the absence of self-defense becomes another element of the offense which the State must prove beyond

a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 493-494, 656 P.2d 1064 (1983).

When reviewing a claim that the State failed to prove beyond a reasonable doubt the absence of self-defense is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found" the lack of self-defense beyond a reasonable doubt. State v. Freriksen, 40 Wn.App. 749, 756, 700 P.2d 369, *review denied*, 104 Wn.2d 1013 (1985). A claim of insufficient evidence admits the truth of the State's evidence. State v. Pacheco, 70 Wn.App. 27, 38-39, 851 P.3d 734 (1993), *rev'd on other grounds*, 125 Wn.2d 150 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, the trial court, in its role as the finder of fact, found that V.M. acted with force that was more than necessary and that, "in light of one swing of the backpack and then no subsequent swings of the backpack by [R.K.], that [V.M.] did not have a reasonable belief that she was going to be injured." 2 RP 97. The trial court's finding was supported by sufficient evidence.

V.M.'s own version of events detailed her standing above R.K. while striking her, causing her to partially fall out of her chair. 1 RP 120, 123, 124. V.M. testified that she did not have any fears of R.K. striking or hitting her. 1 RP 117. Mr. Holmkvist indicated that V.M. jumped from her seat and hit R.K while R.K. was in a defensive position. 1 RP 46. The trial court found that V.M.'s testimony that R.K. tried to hit back was not credible based on Mr. Holmkvist's observations. 2 RP 95.

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Considering the evidence presented in a light most favorable to the State, it is clear that a rational trier of fact could find the absence of self-defense beyond a reasonable doubt given the evidence that V.M. repeatedly struck R.K. in a downward motion

while standing over her, causing her to partially fall from her chair. The trial court correctly found that V.M. did not have a reasonable belief that she was going to be injured and that the force used was not reasonable in light of the facts and circumstances.

2. The late filing of findings of fact and conclusions of law is harmless if the oral ruling was sufficient for review of the issue and the late filed findings were not tailored to the issues raised on appeal.

Failure to enter complete written findings pursuant to JuCR 7.11(d) is inconsequential when the trial court's comprehensive oral ruling sufficiently allows for review of the case. State v. Bynum, 76 Wn.App. 262, 265, 884 P.2d 10 (1994). Delayed entry of findings of fact do not prejudice the appellant when they track the trial court's oral ruling.

Here, the trial court's oral ruling was comprehensive and allowed adequate review of the issues raised.

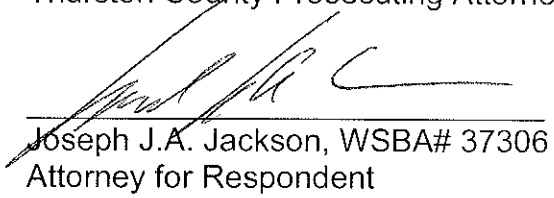
D. CONCLUSION.

Sufficient evidence supported the trial court's conclusion that V.M. did not act in self-defense when she stood over R.K. and struck her three times. The State respectfully asks this Court to

affirm the trial court's finding that V.M. committed assault in the fourth degree.

Respectfully submitted this 1 day of March, 2019.

JON TUNHEIM
Thurston County Prosecuting Attorney



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Dated this 1st day of ~~February~~ March, 2019, at Olympia, Washington.

Cynthia Wright

CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

March 01, 2019 - 12:57 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52306-0
Appellate Court Case Title:	State of Washington, Respondent v. V.M., Appellant
Superior Court Case Number:	17-8-00434-0

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