

FILED
Court of Appeals
Division II
State of Washington
10/7/2019 9:08 AM

No. 53584-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAMION RAY BIRGE AND JESSE JAHNER,

Appellants.

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

The Honorable Jerry T. Costello, Judge
Cause No. 19-1-00256-7

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The trial court erred in dismissing the charge of assault of a child in the third degree against both respondent's pursuant to State v. Knapstad. CP 90, 234.

2. The trial court applied an incorrect standard by finding that the State needed to prove that Birge and Jahner did not intend to exceed reasonable parental discipline. RP 80.

3. The trial court erred in finding that the State could not prove complicity and that the "inability to prove accomplice liability means the inability to prove the underlying charge of Assault of a Child in the Third Degree." RP 81.

4. The trial court erred by failing to consider the evidence and all rational inferences in a light most favorable to the State in regard to the count of assault of a child in the third degree for both respondents. RP 81.

5. The trial court erred in dismissing the charge of official misconduct against both respondents pursuant to State v. Knapstad. CP 90, 234.

6. The trial court failed to recognize that the fundamental right to parent includes the right to not use corporal punishment. RP 82.

7. The trial court incorrectly made a finding of fact regarding intent in the context of a Knapstad motion rather than considering the evidence and inferences in a light most favorable to the State on the count of Official Misconduct. RP 82.

8. The trial court's reliance on the parental discipline statute in dismissing both counts against each respondent was improper in a motion to dismiss pursuant to State v. Knapstad. RP 81, 82.

9. The trial court's finding that the official misconduct statute is void for being unconstitutionally vague was erroneous. RP 83.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in dismissing the charge of assault of a child in the third degree against both respondents given that a rational juror could have inferred that Birge and Jahner committed the offense as either principals or accomplices.

2. Whether the trial court failed to take all reasonable inferences in favor of the State and erred in considering a potential defense by finding that Birge and Jahner intended only that R.C. comply with RCW 9A.16.100.

3. Whether dismissal of the charge of official misconduct was improper where the evidence presented by the State and rational inferences therefrom supported a prima facie showing of guilt.

4. Whether the phrase "unauthorized act" is so vague that a person of common intelligence could not understand the proscribed conduct of RCW 9A.80.010.

C. STATEMENT OF THE CASE.

Damion Birge and Jesse Jahner were police officers on duty for the City of Tacoma on June 5, 2017, when they responded to a call for assistance at the residence of R.C. involving K.J.C. (DOB: 08/30/07). CP 1, 109. R.C. is K.J.C.'s adoptive mother and maternal grandmother. CP 1, 109. K.J.C. suffers from several psychological and emotional disorders and is considered a high needs child. CP 17, 159. When Birge and Jahner arrived at the residence, R.C. was present along with Catholic Community Services workers, Meluleki Ncube and Michelle Straling. CP 17, 159. Ncube had called 911 because K.J.C. had been breaking windows and throwing dishes and had armed himself with a knife. CP 17, 159.

By the time Birge and Jahner arrived, R.C. had returned home and was able to calm K.J.C. CP 17, 159. K.J.C. was sitting

on the couch and was no longer actively breaking things. CP 17, 159. Birge and Jahner were familiar with K.J.C. because they had previously responded to the residence and had involuntarily committed the child on at least one other occasion. CP 18, 160.

The following day, Cobi Silver, a social worker at Mary Bridge Children's Hospital contacted the Tacoma Police Department and reported that medical providers had noticed bruising on the child's body. CP 18, 160. K.J.C. indicated that the bruising came from being struck with a belt. CP 18, 160. R.C. indicated that the officers told her to hit the child with the belt and threatened not to take him if she failed to comply. CP 18, 160. Ncube validated the fact that R.C. beat K.J.C. with a belt, only after she was told to by Birge and Jahner. CP 18, 160. A total of eight bruises and one abrasion were documented. CP 18, 160.

When interviewed by another law enforcement officer, R.C. indicated that Jahner and Birge began yelling at her to get a belt almost as soon as they arrived. CP 18, 160. She stated that they told her that if she didn't, the police would no longer respond to her home and they would not request an ambulance to remove K.J.C. from the home. CP 18, 160. Ncube and Straling indicated that R.C. resisted hitting K.J.C., and stated "no" when the idea of hitting

K.J.C. initially was brought up. CP 18, 160. Straling indicated that R.C. resisted hitting K.J.C. for approximately five minutes. CP 18, 160.

Birge picked up the belt and demonstrated "how it's done," striking the table approximately four times. CP 19, 161. Birge instructed R.C. to hit K.J.C. once for every window that he broke. CP 19, 161. At one point, Jahner held K.J.C. face-down into the couch cushions to expose K.J.C.'s buttocks to R.C.'s strikes as K.J.C. was squirming around. CP 19, 161. Straling and Ncube indicated that K.J.C. received at least 20 to 25 strikes. CP 19, 161. The marks were still visible twenty-two hours later. CP 19, 161.

Birge and Jahner were charged as principals of accomplices with assault of a child in the third degree, coercion and official misconduct. CP 4-5, 112-113. Both filed motions to dismiss. CP 6-14, 118-138. In Birge's motion, he indicated that Birge and Jahner "advised the Grandmother of both her rights under RCW 9A.16.100 and the fact that the juvenile could not be taken into custody." CP 7. In support of his motion to dismiss, Jahner provided both the State's Declaration of Probable Cause and a supplemental police report that he had written. CP 142-145; 148-150. In the supplemental report, Jahner indicated that Catholic Community

Services had told R.C. that she could not physically discipline K.J.C. CP 148. He indicated that he provided her a copy of RCW 9A.16.100, and then he and Birge explained that she could use small items as an extension of her hand. CP 148-149. The report indicated that Birge advised her to discipline with a belt, and they advised her that she had the legal right to discipline him. CP 149. The report included a statement that R.C. had thanked Birge and Jahner regarding the incident. CP 150.

The State filed a responsive pleading indicating a belief that material facts were in dispute. CP 16-35, 154-173. Additional briefing was requested by the trial court and filed by the parties regarding accomplice liability. CP 53-58, 59-68, 205-214, 215-216, RP 4. The State filed an amended information, deleting the charge of coercion and correcting an error with regard to the official misconduct charge. CP 88-89, 232-233.

The trial court considered the motion for dismissal pursuant to State v. Knapstad on May 2, 2019. RP 1. After hearing arguments from counsel, the trial court noted that it could not conclude, "as a matter of law," that the State "is unable to prove that the grandmother exceeded the limits of lawful physical discipline and negligently inflicted bodily harm." RP 80.

The trial court then stated:

The question of intent or knowledge is pivotal in this case. It is undisputed that the defendants intended that the grandmother strike the child with the belt. I think it's undisputed that the defendants intended that the grandmother strike the child forcefully more than once. It is also undisputedly clear to me that the defendants verbally expressed their intent that the grandmother could and should use corporal punishment on the child consistent with RCW 9A.16.100, lawful use of force on the child.

RP 80. The trial court continued, "Their intent that the grandmother use force consistent with that State law is abundantly clear to me. I think it's undisputable." RP 80. The trial court then discussed the reasonable inferences, stating:

What I think are reasonable inferences to take from those particular statements are that the defendants intended that the grandmother forcefully strike the child with the belt and use multiple blows, but I cannot and do not reasonably infer that the defendants knew or intended that the force they sought the grandmother to use was going to be unlawful and constitute and assault.

Viewing this evidence most favorably to the State, I cannot conclude that the State could prove complicity in the crime of assault. The inability to prove accomplice liability means the inability to prove the underlying charge of assault of a child in the third degree. I am granting the motion to dismiss Count I.

RP 81.

The trial court next issued its ruling regarding the charge of official misconduct. The trial court stated:

Again, viewing the evidence most favorably to the State, the intent that I glean from this evidence that can be proven is that these defendants intended that the grandmother use lawful physical force on this child, not that it be excessive, not that it constitute an assault, not that the child be deprived of any lawful right or privilege. I cannot find on the evidence before me that this element can be proven.

RP 82.

With regard to whether the evidence supported that Birge and Jahner intentionally committed an unauthorized act or intentionally refrained from performing a duty, the trial court stated,

I addressed at length what I believe the evidence allows inference of as to the defendants' intent. Each of these prongs fails when it comes to the necessary intent that has to be proven.

RP 82.

Finally, the trial court addressed an argument that the phrase "unauthorized act" included in the official misconduct statute is unconstitutionally vague stating:

I don't think I must reach the issue of vagueness. I don't know if this is going to end up in front of the Court of Appeals, but I do agree with the defendants' arguments that the phrase 'unauthorized act' is void, in my view, for being unconstitutionally vague. I agree with the arguments that have been advanced. It is impossible for a reasonable person to know what that

means, but, as I say, I don't think legally I have to reach that issue because I see a failure of proof on the necessary element of intent.

RP 82.83.

The dismissal was memorialized in written orders of dismissal. CP 90, 234. The State then timely filed this appeal. CP 92-106, 235-249.

D. ARGUMENT.

An appellate court reviews the trial court's decision to dismiss under State v. Knapstad, 107 Wn.2d. 346, 729 P.2d 48 (1986) de novo, viewing the facts and all reasonable inferences in the light most favorable to the State. State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). To prevail on a motion to dismiss under State v. Knapstad, the defendant must establish that no material facts are in dispute and the undisputed facts are insufficient as a matter of law to establish a prima facie case of guilt. State v. Knapstad, 107 Wn.2d at 356. If material factual allegations are denied or disputed by the State, the trial court must deny the motion. Id.

1. Based on the evidence available, a jury could reasonably conclude that Birge and Jahner committed the crime of assault of a child in the third degree as either principals or accomplices.

As charged in this case, the crime of assault of a child in the third degree requires that while acting as a principal or accomplice, Birge and Jahner caused R.C. to act with criminal negligence and did thereby cause bodily harm to K.J.C. by means of a weapon or other instrument or thing likely to produce bodily harm. CP 88, 232. A person is guilty of assault of a child in the third degree if the person, "with criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm," and that the person harmed is under the age of 18. RCW 9A.36.031(d); RCW 9A.36.140(1).

A person acts as an accomplice to a crime if "with knowledge that it will promote or facilitate the commission of the crime, he . . . (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3). "The law holds an accomplice equally culpable as the principal, regardless of which one actually performed the harmful act." State v. McDonald, 90 Wn. App. 604, 953 P.2d 470 (1998). Accomplice liability is premised on the accomplice's general knowledge that he or she is assisting the principal in committing a crime, not upon his or her

specific knowledge of the elements of the principal's crime. State v. Boot, 89 Wn. App. 780, 793, 950 P.2d 964 (1998).

In this case, the evidence demonstrates that Birge and Jahner yelled at R.C. to get a belt, Birge demonstrated how to use the belt by "striking the table four times," and instructed R.C. to "beat the demons out of K.J.C." by hitting him for every window that he broke. CP 2-3; 110-111. During the beating, Jahner "held K.J.C. face-down into the couch cushions to expose K.J.C.'s buttocks to the strikes," and Birge stated that if K.J.C. continued squirming, K.C. should wait until he slept and hit him with the belt while he was sleeping. CP 3, 111. While Birge and Jahner directed and assisted the beating, K.J.C. was struck 20 to 25 times. CP 3, 111.

The evidence supported the inference that Birge and Jahner directed the criminally negligent actions and a jury could have found that they acted as principals in creating the criminal negligence that caused the bodily harm to K.J.C. A person is guilty of a crime if they act with the kind of culpability that is sufficient for the commission of the crime and cause an innocent or irresponsible person to engage in such conduct. State v. Bauer, 180 Wn.2d 929, 943, 329 P.3d 67 (2014); RCW 9A.08.020(2)(a). Intent is not required, only "culpability that is sufficient for the commission of the

crime.” Bauer, at 944. A jury could have reasonably inferred that Birge and Jahner acted with criminal negligence in causing R.C. to act with criminal negligence. Additionally, the evidence clearly supported the inference that both Birge and Jahner had knowledge of the actions which caused bodily harm to K.J.C.

The trial court erred in concluding that a jury could not infer that Birge and Jahner knew or intended that the conduct would exceed lawful force. The officers directed the actions and encouraged 20-25 blows with a belt. A reasonable jury could have inferred that they intended that the force used be excessive from the nature and number of strikes combined with the expressed desire that R.C. “beat the demons out of him.” However, intent for excessive force was not required for accomplice liability. Knowledge was required. Both Birge and Jahner were present, encouraged, and even participated in the beating. A reasonable juror could have inferred that they acted with knowledge that an unreasonable amount of force was being used.

The question of whether the force was reasonable parental discipline was an issue of fact that should have been determined by a jury. The fact that R.C. stated that she only participated because Birge and Jahner ordered her to do so, could be construed by a jury

as indicative that the beating was not reasonable parental discipline. CP 2, 110.

2. The trial court's reliance on the parental discipline statute in determining that the state could not prove the requisite mental state was erroneous as a matter of law and failed to take all rational inferences in favor of the State.

“The physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child.” RCW 9A.16.100. Doing any act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks is presumed unreasonable. RCW 9A.16.100.

“Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for the purpose of restraining or correcting the child.” RCW 9A.16.100. Whether force used is reasonable and moderate is objectively determined by a jury. State v. Singleton, 41 Wn. App. 721, 724, 705 P.2d 825 (1985).

In this case, the State alleged that R.C. had no intention of physically disciplining K.J.C., and only did so because Birge and Jahner ordered her to do so. CP 2, 110. The State further alleged that Catholic Community Services Worker Ncube, “validated the

fact that R.C. beat K.J.C. with a belt, only after she was told to do so by the defendants.” CP 18, 156. The State’s factual allegations also indicated that Catholic Community Services Worker Staling “indicated that R.C. resisted hitting K.J.C. for approximately five minutes.” CP 18, 156. The version of events put forth in briefing for the defendants contrasted the factual allegations of the State with regard to whether R.C. wanted to discipline K.J.C. CP 152.

Where a factual dispute exists, dismissal pursuant to State v. Knapstad is improper and denial of the motion to dismiss is mandatory. Knapstad, 107 Wn.2d 356-357. Defense counsel for both Birge and Jahner argued that the force used was reasonable within the parental discipline statute. CP 8, 123-124. The evidence offered by the State supported the inference that the beating exceeded the limitations of the parental discipline statute and supported the inference that Birge and Jahner knew that to be the case. The State alleged that Birge and Jahner yelled at R.C. to get a belt, Birge demonstrated how to use the belt by “striking the table four times,” and R.C. was instructed to “beat the demons out of K.J.C.” by hitting him for every window that he broke. CP 2-3; 110-111. During the beating, Jahner “held K.J.C. face-down into the couch cushions to expose K.J.C.’s buttocks to the strikes,” and

Birge stated that if K.J.C. continued squirming, K.C. should wait until he slept and hit him with the belt while he was sleeping. CP 3, 111. While Birge and Jahner directed and assisted the beating, K.J.C. was struck 20 to 25 times. CP 3, 111.

By stating, "what I think are reasonable inferences to take from those particular statements are that the defendants intended that the grandmother forcefully strike the child with the belt and use multiple blows, but I cannot and do not reasonably infer that the defendants knew or intended that the force they sought the grandmother to use going to be unlawful and constitute an assault," the trial judge was necessarily making a factual determination. RP 81. Such a determination improperly substituted the trial judge's decision making for that of a jury. A trial judge is not to rule on factual questions in a Knapstad motion. State v. Newcomb, 160 Wn. App. 184, 188, 246 P.3d 1286 (2011). The court's role in reviewing a Knapstad motion does not include deciding which version of events is correct. State v. Groom, 133 Wn.2d 679, 693, 947 P.2d 240 (1997). Moreover, the trial court should not have considered whether the defense of reasonable parental discipline was meritorious in the context of a Knapstad motion. State v. Groom, 80 Wn. App. 717, 723, 911 P.2d 403 (1996), *affirmed by*,

133 Wn.2d 679, 693, 947 P.2d 240 (1997) (“The existence of a meritorious defense is not relevant to the determination of a motion to dismiss under Knapstad”).

It was improper for the trial court to base its ruling on a finding of what the respondents’ intended. The question in a Knapstad motion is whether, based on undisputed facts, the State can present a prima facie showing of guilt. State v. Johnson, 66 Wn. App. 297, 298, 831 P.2d 1137 (1992). In determining whether the undisputed facts establish a prima facie case of guilt against a defendant, the standard is that no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Id. at 299.

The trial judge determined, in his mind, that the defense raised by the respondents was meritorious and dismissed the case. Such a finding was not contemplated by State v. Knapstad. Material issues of fact existed, and a rational juror could have found that Birge and Jahner, as principals, caused bodily injury to K.J.C. with criminal negligence; or could have found that Birge and Jahner had knowledge of the criminal acts as they occurred at their direction thus making them guilty pursuant to a theory of accomplice liability. As argued above, intent is not the relevant standard for the offense

of assault of a child in the third degree as charged; however, looking at the evidence and all rational inferences in favor of the State, a rational juror could have easily found that two trained police officers intended that the force used exceed reasonable parental discipline as they directed 20-25 blows with a belt while telling R.C. to "beat the demons out of" K.J.C. Dismissal of the charges pursuant to a Knapstad motion was improper.

3. There was sufficient evidence to demonstrate a prima facie showing of guilt on the charge of official misconduct for both Birge and Jahner such that dismissal pursuant to State v. Knapstad was improper.

A public servant commits official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege, he intentionally commits an unauthorized act under color of law; or intentionally refrains from performing a duty imposed upon him. RCW 9A.80.010. In this case, the State filed a Bill of Particulars which detailed the factual allegations that it was relying upon for the crime of official misconduct. CP 43-52; 174-183.

The State alleged that Birge and Jahner intentionally deprived K.J.C. of the right not to be assaulted and his right to be free from excessive force and intentionally deprived R.C. of her ability to parent her child. CP 45- 46; 176-177. In dismissing the

allegations of official misconduct, the trial court stated, “the intent I glean from this evidence that can be proven is that these defendants intended that the grandmother use lawful physical force on this child.” RP 82. He then concluded that the State could not prove the specific intent required stating, “I cannot find on the evidence before me that this element can be proven.” RP 82.

Again, the trial court was improperly making a factual determination in the context of a Knapstad motion. A rational juror could have found that Birge and Jahner intended to deprive K.J.C. of the right not to be assaulted and the right to be free from excessive force and a rational juror could have found that Birge and Jahner intended to deprive R.C. of her fundamental right to parent K.J.C.

The Fourteenth Amendment prohibits any state deprivation of life, liberty, or property without due process of law. The right of personal security is also protected by the Fourth Amendment to the U.S. Constitution, which was made applicable to the states through the Fourteenth because its protection was viewed as “implicit in ‘the concept of ordered liberty’... enshrined in the history and the basic constitutional documents of English-speaking peoples.” Wolf v. Colorado, 338 U.S. 25, 27-28; 69 S.Ct. 1359, 93 L.Ed. 1782 (1949);

overruled on other grounds, Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). It has been said of the Fourth Amendment that its “overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the State.” Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). While the contours of this historic liberty interest in the context of our federal system of government have not been defined precisely, they always have been thought to encompass freedom from bodily restraint and punishment. See Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. Youngberg v. Romeo, 457 U.S. 307, 316, 73 L. Ed. 2d 28, 102 S. Ct. 2452 (1982). It is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law. Ingraham v. Wright, 430 U.S. 651, 674, 97 S. Ct. 1401, 1414, 51 L.Ed.2d 711, 732 (1977).

It is a material factual dispute in this case whether R.C. consented to the assault of K.J.C., and whether the degree of force used constituted reasonable parental discipline. The State’s version of events indicates that, at the time of the incident, K.J.C. was

seated on the couch; he was no longer breaking things and/or actively threatening to harm anyone. CP 1, 17, 109, 159. Birge and Jahner then caused R.C. to be armed with a weapon, caused K.J.C. to be hit, threatened R.C. with repercussions if she failed to comply and even physically held K.J.C. down so that he could be beaten with the belt; more than 20-25 times with no limitations. CP 18-19, 160-161. These facts could lead a rational juror to conclude that Birge and Jahner intended to deprive K.J.C. of his right to be free from assault.

The juror also could have found that Birge and Jahner intended to deprive K.J.C. of the right to be free from excessive force. RCW 9A.16.020 provides that the use, attempt, or offer to use force upon or toward the person of another is not unlawful ... [w]hen necessarily used by a public officer in the performance of a legal duty, or a person assisting the officer and acting under the officer's direction." The officer directing the use of force can only do so when it would be lawful and constitutional for the officer to utilize the force himself; to do otherwise would simply violate the constitutional provisions of the Fourth and Fourteenth Amendments. Specifically, a seizure of a person is unreasonable under the Fourth Amendment if a police officer or other person

acting under color of state law uses excessive force in making a lawful arrest or in defending himself or others.

Under the Fourth Amendment, a police officer may use only such force as is objectively reasonable under all of the circumstances. Graham v. Connor, 490 U.S. 386, 397, 109 S. Ct. 1865, 1872, 104 L.Ed.2d 443, 456 (1989). In other words, the jury must judge the reasonableness of a particular use of force from the perspective of a reasonable officer on the scene and not with the 20/20 vision of hindsight. Id.

In this case, when Birge and Jahner arrived, K.J.C. was calmly sitting on the couch. He was a small 9-year old with developmental disabilities. CP 17-18; 159-160. The officers had prior experience with him. CP 18, 160. K.J.C. did not pose an imminent risk or threat. More specifically, K.J.C. did not try to run, he did not fight, he did not make threats or evade the officers. K.J.C. was no longer a danger. CP 17-18, 159-160. Birge and Jahner had no justification to use force against K.J.C.

Additionally, Birge and Jahner had no right to engage in parental discipline of K.J.C. The State alleged that R.C. did not want to strike K.J.C. and resisted Birge and Jahner's orders to do so for approximately five minutes. CP 2, 18, 110, 156. The State

contends that the force that Birge and Jahner ordered R.C. to use exceeded the limits of parental discipline. Clearly, such force could also be construed by a rational juror as depriving K.J.C. of his right to be free from excessive force. The reasonable use of force is a question to be considered by the jury. "What is reasonable force is a question of fact, under all of the evidence, to be determined by the jury." Smith v. Drew, 175 Wash. 11, 18-19, 26 P.2d 1040 (1933).

The trial judge should not have substituted his inference as to Birge and Jahner's intent for that which could be inferred by a rational jury. Additionally, the trial judge seems to have completely ignored the evidence that Birge and Jahner intended to interfere with R.C.'s fundamental right to parent.

The United States and Washington Supreme Courts have long recognized parents' fundamental rights to the care and custody of their children. The "rights to conceive and to raise one's children have been deemed 'essential,' 'basic civil rights of man' ... 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L.

Ed. 2d 551 (1972) (citations omitted) (*quoting Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S. Ct. 1110, 86 L. Ed. 1655 (1942); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944)). The rights have been recognized as protected by the due process clause of the Fourteenth Amendment, the equal protection clause of the Fourteenth Amendment, and the Ninth Amendment. *Id.* It is also a First Amendment right of association issue that allows a parent to choose how to rear their child.

State interference with the parent's right to rear her or his children is subject to strict scrutiny, "justified only if the state can show that it has a compelling interest and such interference is narrowly drawn to meet only the compelling state interest involved." *In re Custody of Smith*, 137 Wn.2d 1, 15, 969 P.2d 21 (1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000). Protecting a parent's right to rear her or his child has sometimes required Washington and federal courts to read special protections into custody and visitation statutes when a parent's interest conflicts with that of a nonparent.

As previously stated, there exists a material issue of fact as to whether R.C. wanted to engage in parental discipline. The State's evidence indicated that R.C. did not want to strike K.J.C. and resisted Birge and Jahner's orders to do so for approximately five minutes. CP 2, 18, 110, 156. Persistently pressuring a parent or guardian to engage in a parenting tactic that they do not want to engage in clearly infringes upon the fundamental right to parent. A rational juror could have found that Birge and Jahner intentionally deprived R.C. of that right by forcing her to engage in corporal punishment.

The trial court's statement "I glean from these facts that these defendants intended that this grandmother use lawful force on this child, not that it be excessive," ignores the very simple fact that it was the grandmother's decision whether to use such force, not Birge and Jahners. It was erroneous for the trial judge to grant Birge and Jahner's motions for dismissal pursuant to State v. Knapstad.

The trial court further erred in determining that the evidence did not support that Birge and Jahner intentionally committed an unauthorized act or refrained from performing a duty. RP 82-83. A rational juror could have found both. The State alleged that Birge

and Jahner engaged in an unauthorized act by perpetrating the assault and requiring R.C. to comply with their will. CP 50, 181.

An unauthorized act under “color of law” include acts not only done by federal, state, or local officials within their lawful authority, but also acts done beyond the bounds of that official’s lawful authority, if the acts are done while the official is purporting to or pretending to act in the performance of his/her official duties. Persons acting under color of law within the meaning of this statute include police officers, prisons guards and other law enforcement officials, as well as judges, care providers in public health facilities, and others who are acting as public officials.

Black’s Law Dictionary defines “color of law” as the “appearance or semblance, without the substance, of a legal right.” Black’s Law Dictionary 282 (8th ed. 2004). Misconduct under “color of law” involves “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.” Miguel v. Guess, 112 Wn. App. 536, 550, 51 P.3d 89 (2002) (*quoting Barkauskie v. Indian River Sch. Dist.*, 951 F. Supp. 519, 541 (D.Del. 1996) (*emphasis added*)), *review denied*, 148 Wn.2d 1019, 64 P.3d 650 (2003).

As noted above, law enforcement officers do not have authority to exercise parental discipline and certainly do not have authority to order a beating of a special needs child. A rational jury could have found that Birge and Jahner intended to commit an act for which they did not have authority by intentionally causing K.J.C. to be beaten or by intentionally ordering R.C. to engage in corporal punishment against her wishes. Both of which are issues of fact that should have been considered by a jury.

A rational juror could also have found that Birge and Jahner intentionally refrained from performing a duty imposed upon them by law. The law places upon law enforcement officers specific duties that they are required to perform. In this case, the Tacoma Municipal Code governs officers of the Tacoma Police Department. Each member of the police force shall, "at all times of the day or night, and the members of said force are hereby thereunto empowered, to especially preserve the public peace, prevent crime . . . [and to] guard the public health." TMC 7.02.030. *See also* Const., art. XI, § 11; RCW 35.22.280(35).

Here, Birge and Jahner failed to preserve the public peace and prevent crime. A rational juror could have found that their actions encouraged the commission of a crime. The situation that

they responded to had calmed before they arrived. CP 17-17, 159-160. As alleged by the State, but for their instigation, no physical altercation would have occurred. The evidence alleged by the State supports an inference that the level of physical contact constituted a crime. A rational juror could infer from the evidence that Birge and Jahner intentionally refrained from their duties as law enforcement officers by encouraging and/or committing a crime, or by simply engaging in activities that infringed upon public peace.

Additionally, Birge and Jahner were supposed to guard the public health. Their actions led to marks on K.J.C.'s body that remained for at least 22 hours. RP 19, 161. Such conduct was contrary to public health and could be construed by a jury as intentionally refraining from their duty to guard the public health. The trial court's conclusion that he could not infer that Birge and Jahner intended to refrain from their duty or intentionally engaged in an unlawful act failed to view the facts and inferences in a light most favorable to the State. When properly viewed, it is clear that a rational juror could find each element of official misconduct. Dismissal of the charges was improper.

4. The phrase “unauthorized act,” as included in RCW F9A.80.010 is not unconstitutionally vague and the trial court’s conclusion that the phrase is void for vagueness was erroneous.

The trial court indicated, “I do agree with the defendants’ arguments that the phrase ‘unauthorized act’ is void in my view, for being unconstitutionally vague.” RP 83. The trial court continued, “It is impossible for a reasonable person to know what that means.” RP 83.

Statutes are presumed constitutional and the burden is on the challenger to prove it unconstitutional beyond a reasonable doubt. State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994). To prove that a statute is unconstitutional beyond a reasonable doubt, a party must show that a statute is so vague that it does not define a criminal offense with sufficient specificity to allow a person of ordinary understanding to know what conduct the statute actually prohibits. State v. Presegard, 108 Wn. App. 14, 21, 28 P.3d 817 (2001). The mere showing of uncertainty, does not prove unconstitutional vagueness. Id. at 21.

Our State Supreme Court has established a test for determining statutory vagueness. A statute lacks definiteness when it fails to provide “(1) adequate notice to citizens, and (2) adequate

standards to prevent arbitrary enforcement.” State v. Maciolek, 101 Wn.2d 259, 264 676 P.2d 996 (1984). Issues of vagueness are reviewed de novo. Prestegard, 108 Wn. App. at 21.

People of common intelligence can understand the meaning of “unauthorized act.” While the question is fact specific, it is not vague. Moreover, the phrase is not vague in the context of this case. People of common intelligence can understand that a law enforcement officer may not engage in excessive force, may not instigate and encourage assaultive behavior, and may not infringe upon a parent’s fundamental right to parent by ordering them to engage in corporal punishment. The term also does not allow for arbitrary enforcement. While the phrase may leave issues of fact for the jury to decide, the statute does not leave unbridled discretion in defining the proscribed conduct. Due process is violated only when there are no standards by which police, judge, and jury must follow to determine violations. Maciolek, 101 Wn.2d at 267. Laws exists defining Birge and Jahner’s position and duties as police officers and govern whether their actions or inactions were official misconduct. TMC 7.02.030. Const., art. XI, § 11; RCW 35.22.280(35); see also, State v. Florea, 296 Ore. 500, 504, 677

P.2d 698 (1994) (a public servant's authority is governed by sources of law).

The trial court's conclusion that the term "unauthorized act" is unconstitutionally vague was incorrect. The term sufficiently puts a person of common intelligence on notice that a police officer may not act outside of their authority in their official capacity. The term is not unconstitutionally vague and that prong of the official misconduct statute is not void.

E. CONCLUSION.

The trial court improperly dismissed the charges of assault of a child in the third degree and official misconduct against Birge and Jahner pursuant to State v. Knapstad. Material issues of fact exist which should be decided by a jury and the evidence alleged by the State is sufficient for a prima facie showing of guilt. A rational juror could conclude that Birge and Jahner committed the offenses. The term "unauthorized act" is sufficiently clear that a person of common intelligence can understand the conduct that is proscribed. The State respectfully requests that this Court reverse the orders dismissing the charges entered by the trial court and remand the

cases against Birge and Jahner back to the trial court for further proceedings. The facts are sufficient to be decided by a jury.

Respectfully submitted this 7th day of October 2019.



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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: October 7, 2019

Signature:  _____

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

October 07, 2019 - 9:08 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Appellant v. Damion Ray Birge and Jesse Jahner, Respondents
Superior Court Case Number: 19-1-00256-7

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