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NO. 53584-0-II

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

(Pierce County Superior Court No. 19-1-00256-7)

STATE OF WASHINGTON,

Appellant,

v.

DAMION RAY BIRGE AND JESSE JAHNER,

Respondents.

BRIEF OF RESPONDENT JAHNER

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I. COUNTER STATEMENT OF CASE

A. Charges

Defendants Jesse L. Jahner and Damion Birge were initially charged in a three count Information. Count 1 charged the crime of Assault of a Child in the Third Degree, RCW 9A.36.031(1)(d) and RCW 9A.36.140(1). Count 2 charged the crime of Coercion, RCW 9A.36.070. Count 3 charged the crime of Official Misconduct, RCW 9A.80.010(1)(a). CP 112-113.[1]

In response to Defendant Jahner's Motion to Dismiss (CP 118-138), the State filed its First Amended Information on May 2, 2019, which dismissed Count 2, the charge of coercion and renumbered the remaining two counts. The First Amended Information recharged Count 1, Assault of a Child in the Third Degree, as the new Count 1. The First Amended Information also recharged former Count 3, the crime of Official Misconduct, but designated it as Count 2. The State dismissed the former Count 2, Coercion, RCW 9A.36.070. CP 232-233.

B. Declaration of David Allen

Defendant Jahner's attorney, David Allen, filed the Declaration of David Allen in Support of Defendant Jahner's Motion to Dismiss Counts 1, 2 and 3 in support of the *Knapstad* motion. In this Declaration, he included the

[1] Defendants Jahner and Birge were charged under separate cause numbers, though their cases were joined. Therefore, Defendants' Clerk's Papers (CP) indexes have different page numbers. This brief will refer to the Jahner Clerk's Papers.

initial Information and Certificate of Probable Cause as Appendix A; Defendant Jahner's Supplemental [Officer's] Report (which was referenced in the Certificate of Probable Cause) as Appendix B; as well as averring that he listened to the recordings of police interviews of witnesses including R.C., the grandmother and guardian of K.J.C.; and CCS case workers Ncube and Straling, who were present at the scene. He wrote in his Declaration that none of these witnesses heard any threats from either of the Defendants as those terms are defined in the Coercion statute which had been charged as Count 3 in the first Information. The Declaration concluded by stating that "there were no material disputed facts and the [un]disputed [sic] facts do not establish a *prima facie* case of guilt on the essential elements of the charged crimes." CP 139-140.

Defendant Birge joined in Jahner's motion.

C. <u>The Decision Below Dismissing the Information</u>

The court below granted Defendant's motion to dismiss Counts 1 and 2 of the Amended Information on a *Knapstad* Motion to Dismiss on May 2, 2019. CP 234. While this Court will undertake a *de novo* analysis, Defendant Jahner will reference the trial court's oral ruling in this brief to put the trial court's ruling into context. *State v. Ramirez*, 191 Wn.2d 732, 744 (2018).

D. Undisputed Facts

In his Motion to Dismiss, Defendant Jahner relied on the undisputed facts set forth in the State's Declaration for Determination of Probable Cause (CP 109-111) (hereinafter "PC Declaration"), as well as Defendant Jahner's Supplemental Report, which was referenced in the PC Declaration.[2]

The Deputy Prosecuting Attorney wrote in her PC Declaration that on June 5, 2017, R.C., the maternal grandmother (and adoptive mother) of then 9 year old K.J.C., asked caseworkers from the Catholic Community Services (CCS) to help take care of K.J.C. while she went on an errand. CP 109.

CCS caseworker Meluleki Ncube, who had previously worked with K.J.C. and was aware of his psychological and emotional disorders, arrived and observed that K.J.C. had an episode as soon as his grandmother left. K.J.C. locked himself inside the home leaving Mr. Ncube and a second CCS therapist, Michelle Straling, locked outside. They could not get him to open the door. K.J.C. screamed at them and started breaking windows in the residence and throwing dishes around. Mr. Ncube called 911 after he observed K.J.C. arming himself with a knife. Before Tacoma Police Department (TPD) Officers Jahner and Birge arrived, grandmother R.C.

[2] These were attached to the Declaration of David Allen as Appendices A and B. CP 139-153. For the Court's convenience, they are attached hereto as Appendix A and B.

arrived home and was able to unlock the door and calm K.J.C. enough so that he dropped his knife. CP 109. *Id.*

The State referenced Defendant Jahner's police reports in its PC Declaration (attached hereto as Appendix A). According to the PC Declaration, Jahner's original police report stated that he and Birge contacted R.C. who explained that K.J.C. had broken things in the home and hurt her several times in the past. K.J.C. had been involuntarily committed several times for his actions and threats which is why 911 was called. Officers Birge and Jahner then "contacted" K.J.C. and they observed minor cuts on his hands and that the residence was littered with broken glass and debris caused by his outburst. K.J.C. was very defiant and kicked and punched R.C. while she was attempting to discipline him. K.J.C. yelled at his grandmother, R.C., that she was the "fucking bitch that will die." According to Jahner's initial report, R.C. said she was deathly afraid of K.J.C., fearing for her life. K.J.C. was transported to Mary Bridge Children's Hospital.[3] CP 110.

The prosecutor then wrote in her PC Declaration that on June 6, 2017, a social worker for the hospital contacted TPD to inform them that there was bruising on K.J.C. caused by R.C. striking him with a belt, and that R.C. did so on Defendants' orders. CP 110.

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[3] Jahner, at the request of his supervisor, filed a supplemental report on June 7, 2017, which was attached to the Allen Declaration as Appendix B.

During a later interview with detectives, the PC Declaration recounted that R.C. stated that Birge and Jahner told her to get a belt. They told her if she did not, the police would no longer respond to her home and that they would not request an ambulance for K.J.C. CP 110.

When a belt was produced, Officer Birge picked up the belt saying he would show R.C. how it was done, striking the table with the belt four times. Birge also instructed R.C. to "beat the demons" out of K.J.C. and to hit K.J.C. for every window that he broke. CP 111.

According to R.C., at one point Jahner held K.J.C. face down onto the cushions to expose his buttocks to R.C.'s strikes.[4] Birge told R.C. that she should wait until K.J.C. slept and then hit him with a belt when he was sleeping. CP 111.

The PC Declaration states that K.J.C. received 20 or 25 strikes by R.C. and had bruises to his arms, legs and back, which were still visible 22 hours later. CP 111.

Defendant Jahner's supplemental police report was also referenced in the Certificate of Probable Cause, *supra*, at CP 110.[5] Officer Jahner wrote in this report that he and Birge had been to this house on a prior occasion and

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[4] Jahner denies he did this. However, for the purpose of the *Knapstad* motion, Jahner agreed that the Court could accept this fact.

[5] This report was attached as Appendix B to the Declaration of David Allen in Support of Defendant Jahner's Motion to Dismiss Counts 1, 2, and 3. CP 139-153. It is attached to this Brief as Appendix B, for the Court's convenience.

had called for an ambulance to take K.J.C. to the hospital for involuntary commitment for death threats. CP 148.

Faced with this recurring situation, Defendant Jahner wrote in his supplemental report (Allen decl., App. B) that Defendants Jahner and Birge decided to instruct K.J.C.'s grandmother, R.C., who is also his adopted mother, on what was allowed under the parental discipline statute, RCW 9A.16.100 "Use of force on children," and actually gave her a copy of this statute. CP 148-149.

E. State v. Knapstad

A *State v. Knapstad*, 107 Wn.2d 346 (1986) challenge to the sufficiency of the evidence requires the court to determine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Joy*, 121 Wn.2d 333, 338 (1993). "Strict compliance with the procedures set out in *Knapstad* is not required, so long as it is clear that the material undisputed facts were before the court." *State v. Dunn*, 82 Wn.App. 122, 126, *rev. denied*, 130 Wn.2d 1018 (1996). In ruling on a *Knapstad* motion, it is appropriate for the court to consider police reports, the affidavit of probable cause, and any sworn statements. *State v. Dunn*, 82 Wn.App. 122, 124-26 (1996). The Court must draw all reasonable inferences from the evidence in favor of the prosecution. *Joy*, 121 Wn.2d at 339. Any

credibility determinations must be reserved for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990). *Accord: State v. Jackson*, 82 Wn.App. 594, 608 (1996).

If the State's factual allegations in support of a criminal charge do not meet the legislative definition setting forth the essential elements of the crime, the motion to dismiss should be granted. *Id.,* 127-130. *Accord*: *Port Orchard v. Tilton*, 77 Wn.App. 178, 889 P.2d 953 (1995); *State v. Johnson*, 66 Wn.App. 297, 831 P.2d 1137 (1992).

If the motion is granted, "the court must enter a written order setting forth the affidavits and other materials it has considered and its conclusion regarding the insufficiency of the evidence." *Knapstad*, 107 Wn.2d at 357. "Since the court is not to rule on factual questions, no findings of fact should be entered." *Knapstad*, at 357. *Accord: State v. Groom*, 133 Wn.2d 679, 684, 947 P.2d 240 (1997).

II. SUMMARY OF DEFENDANT'S LEGAL ARGUMENT

Although a trial judge does not make findings of fact when granting a *Knapstad* motion, and this Court considers the legal issues *de novo*, the trial judge's reasoning as set forth in his oral ruling may be instructive. Here, Judge Costello explained that, while it is undisputed that the Defendants intended that the grandmother strike the child, nevertheless:

> It is also indisputably clear to me that the defendants verbally expressed their intent that the grandmother could and should and must use corporal punishment on the child consistent with RCW 9A.16.100, lawful use of force on a child.

RP 4.

The judge stated that the intent of the Defendants was for the grandmother to use force consistent with state law and when viewing the evidence most favorably to the State,

> . . . 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 an assault.

RP 5.

Based on this, the judge explained that even viewing the evidence in the light most favorable 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 1.

RP 5.

This ruling captures the Defendant's argument at the motion to dismiss and its position on appeal, which will be discussed *infra*.

III. THE UNDISPUTED FACTS DEMONSTRATED THAT THE DEFENDANTS DID NOT HAVE THE REQUIRED *MENS REA* TO BE LIABLE ON A VICARIOUS LIABILITY THEORY ON COUNT 1 AND THE RULING BELOW SHOULD BE AFFIRMED

A. The Information

Count 1 of the Amended Information charged Defendant Jahner (and also Birge under a separate cause number) with the crime of Assault of a Child in the Third Degree, alleging in the Information that:

> That JESSE L JAHNER, acting as a principal or an accomplice as defined by RCW 9A.08.020, in the State of Washington, on or about the 5th day of June, 2017, a person eighteen years of age or older, did unlawfully and feloniously, under circumstances not amounting to assault of a child in either the first or second degree, assault K. J. C., a child under the age of 13 years, when the defendant, with criminal negligence, did cause bodily harm to K. J. C., by means of a weapon or other instrument or thing likely to produce bodily harm, contrary to RCW 9A.36.031(1)(d) and 9A.36.140(1), and against the peace and dignity of the State of Washington.

CP 112-113.

B. Relevant Statutes

The crime of Assault in the Third Degree, which is the underlying basis for Count 1, is defined by statute as:

> A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:
>
> (d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm . . .

Criminal Negligence is defined as:

> A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d).

The State's theory in this case was one of vicarious liability. It is undisputed that all the strikes with the belt on K.J.C. were done by R.C. The State's theory of liability as to Defendants was that they were liable as accomplices.

RCW 9A.08.020, "Liability for the conduct of another – Complicity," provides in its relevant portions:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
>
> (2) A person is legally accountable for the conduct of another person when . . .
>
> > (c) He or she is an accomplice of such other person in the commission of the crime.
>
> (3) A person is an accomplice of another person in the commission of a crime if:
>
> > (a) **With knowledge that it will promote or facilitate the commission of the crime, he or she**:

> (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; . . . (emphasis added).

The requirements of RCW 9A.08.020 are incorporated in WPIC 10.51, "Accomplice-Definition," which provides in its relevant portion:

> A person is an **accomplice** in the commission of a crime **if, with knowledge that it will promote or facilitate the commission of the crime, he or she either**:
>
> **(1) solicits, commands, encourages, or requests another person to commit the crime; or**
>
> **(2) aids or agrees to aid another person in planning or committing the crime.**
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.] (Emphasis supplied.)

C. Where the Defendants Correctly Instructed the Grandmother as to Her Rights Under the Parental Use of Force Statute, Her Use of a Belt to Strike K.J.C. was Lawful and Cannot be the Subject of a Criminal Charge of Assault Against the Police Officers as Accomplices

Here, it is undisputed that the striking of K.J.C. was done solely by R.C., the grandmother/adopted mother. R.C. was authorized to do this by

virtue of RCW 9A.16.100, "Use of Force on Children." Under these clear and uncontradicted circumstances, grandmother R.C. did not commit a crime.

RCW 9A.16.100 provides:

> It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. **However, 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.** 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 purposes of restraining or correcting the child.
>
> **The following actions are presumed unreasonable when used to correct or restrain a child:** (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or **(6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.** The age, size, and condition of the child and the location of the injury shall be considered when determining whether the bodily harm is reasonable or moderate. This list is illustrative of unreasonable actions and is not intended to be exclusive. (Emphasis supplied.)

To be guilty of a crime as an accomplice, the State must prove that the Defendants, acting with **knowledge** that it would promote or facilitate the commission of the crime, solicited, commanded or encouraged R.C. "to commit [the crime]." RCW 9A.08.020(3)(a)(i) (emphasis added).

Since R.C. never committed a crime because of her rights under RCW 10.08.020, the parental use of force law, neither Defendant Jahner nor Birge are guilty of any crime. Nor was there any evidence or inferences from the undisputed facts from which a finder of fact could find that they acted with the necessary *scienter* required under this accomplice statute, which is knowledge that their actions would promote the crime of assault in the third degree by negligently causing bodily harm to another.

In *State v. Bauer*, 180 Wn.2d 929 (2014), the Court held that a person charged as an accomplice would not be liable for causing an irresponsible person, in that case a juvenile, to engage in the crime of assault in the third degree, the exact same charge as in the instant case. The facts of *Bauer* are instructive.

The juvenile found a loaded gun at the home of defendant Bauer, his mother's boyfriend. The boy brought the gun to school in his backpack a few days later. The gun discharged as he was going through the backpack at school and the bullet seriously injured one of his classmates.

Bauer was charged with third degree assault under the same prong as in this case, alleging under an accomplice liability theory that with criminal negligence he caused bodily harm to another person. Bauer moved to dismiss the charge pretrial on a *State v. Knapstad*, *supra*, motion.

The Washington Supreme Court, in a very considered opinion, held that Bauer was not responsible for the assault because his actions were not the "legal cause" of the victim's injuries. In reaching this decision the Court conducted an exhaustive analysis of the law and explained that factual cause differs from legal causation.

The *Bauer* Court discussed RCW 9A.08.020, the complicity statute, also called the accomplice statute, and for the identical reason the court in the instant case dismissed the charge, held that there was no evidence, as required by the accomplice liability statute, that Mr. Bauer had the requisite knowledge:

> The complicity statute establishes vicarious criminal liability in three situations: accomplice liability (RCW 9A.08.020(2)(c)); when a criminal statute itself expressly provides for vicarious liability (RCW 9A.08.020(2)(b)); and by "caus[ing]" an innocent person to do the illegal act (RCW 9A.08.020(2)(a)). **The Court of Appeals first noted, correctly, that the State could not rely on accomplice liability under the subsection (2)(c) prong. For accomplice liability to attach, the defendant must have knowledge that his actions will "'promote or facilitate'" the commission of "'*the*'" particular crime at issue.** *State v. Stein,* 144 Wash.2d 236, 245, 27 P.3d 184 (2001) (quoting RCW 9A.08.020(3)(a)). Because there is no evidence of such knowledge in this case, the Court of Appeals held, the State could not seek to convict Bauer as an accomplice. We agree. (Emphasis added.)

Id. at 943.

The *Bauer* Court further explained its holding, which is extremely apropos to the issues raised in the instant case:

> . . . . RCW 9A.08.020(2)(a) **[the complicity/accomplice statute] requires proof that the defendant acted with the same mens rea as that required for "the crime." We have previously interpreted the words "the crime" in other subsections of the complicity statute very narrowly. We have said that "the crime" means intent to promote the crime that was actually charged, not just any crime.** *State v. Cronin,* 142 Wash.2d 568, 579, 14 P.3d 752 (2000); *State v. Roberts,* 142 Wash.2d 471, 510–11, 14 P.3d 713 (2000). **Using that same narrow interpretation here, we find evidence of such mens rea was lacking.** Bauer may have been negligent about leaving loaded guns out in the presence of children. TC may have been negligent about enabling a gun enclosed in a backpack to discharge. **Bauer's negligence was thus not the same as the culpability required for "the crime"; it might have been equally negligent, but not as to the same act, result, and balancing of costs and benefits. Any negligence on Bauer's part thus does not meet the definition of culpability for "the crime" required by RCW 9A.08.020(2)(a).** Since any negligence on his part was not "culpability ... sufficient for the commission of the crime," RCW 9A.08.020(2)(a), Bauer cannot be liable under prong (2)(a).

Id. at 944-45 (emphasis added).

The crime of Assault of a Child in the Third Degree charge, under the specific prong alleged in this case, requires proof of criminal negligence, or lack of awareness:

> (d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence **when he or she fails to be aware of a substantial risk that a wrongful act may occur** and his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

RCW 9A.08.010(1)(d) (emphasis added).

There were no allegations or claims that Defendants actually assaulted K.J.C. themselves. Instead, the striking was by R.C. Therefore, the State had to prove that Defendants acted as accomplices under RCW 9A.08.020.

However, under the accomplice liability theory, the State had to prove that the Defendants, acting "with **knowledge** that it will promote or facilitate the commission of **the** crime," solicited, commanded, encouraged or requested R.C. to commit **the** crime. RCW 9A.08.020(3)(a)(i).

Therefore, under the accomplice liability statute, RCW 9A.08.020, as it relates to the crime of Assault of a Child in the Third Degree, RCW 9A.36.031(1)(d) and RCW 9A.36.140(1), the State would have to prove that the Defendants acted with knowledge that their actions would promote or facilitate the commission of an assault by R.C.

The upshot of this is that the State would have to prove that the Defendants knowingly encouraged a crime to be committed where the *scienter* of the underlying crime by R.C. was a failure to be aware of a substantial risk that a wrongful act may occur and that R.C.'s failure to be aware of this constituted gross deviation from a standard of care that a reasonable person would exercise in the same situation. As should be clear, the combination of these two very different requirements of *scienter*, knowledge and criminal negligence, when applied to the undisputed facts in our case, could not be

proven. That is, there was no evidence, or inferences that could be drawn therefrom, that the Defendants acted knowing that R.C. would be committing the crime of assault of a child 3°.

In some cases RCW 9A.08.010(2), General Requirements of Liability, permits the element of knowledge to be satisfied by the proof that the Defendants acted intentionally. However, this is not permissible where, as here, actual knowledge is required for liability and differs substantially from acting intentionally.

In *State v. Goble*, 131 Wn.App. 194 (2005), a defendant was charged with third degree assault under the prong that required proof the defendant knew that the victim "was a law enforcement officer." An instruction was given pursuant to RCW 9A.08.010(2), which told the jury that "acting knowingly or with knowledge also is established if a person acts intentionally." This was found to be reversible error, because the requirement of knowledge that the victim was a law enforcement officer could not be satisfied by proof that the Defendant acted intentionally:

> We agree that the instruction is confusing and that the italicized portion of the instruction allowed the jury to presume Goble knew [the police officer's] status at the time of the incident if it found Goble had intentionally assaulted [the police officer]. **This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew [the police officer's] status if it found the assault was intentional.** Further, given the

> conflicting evidence, we cannot say that this error was harmless and reversal is required.

Id. at 203-204 (emphasis added).

The same holds true here. In order to meet its burden, the State has to prove that Defendants acted with knowledge, regardless of whether they intentionally instructed R.C. as to her parental use of force rights.

When this matter is distilled down to its lowest common denominator, it is clear that what the State is alleging about the Defendants' actions sounds most like the crime of coercion, RCW 9A.36.070, which was previously charged in Count 2 in the original Information although voluntarily dismissed after Defendant Jahner filed his pretrial motions.

RCW 9A.36.070, Coercion, provides:

> (1) A person is guilty of coercion if by use of a threat he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from, or to abstain from conduct which he or she has a legal right to engage in.
>
> (2) "Threat" as used in this section means:
>
> > (a) To communicate, directly or indirectly, the intent immediately to use force against any person who is present at the time; or
> >
> > (b) Threats as defined in RCW 9A.04.110(27) (a), (b), or (c).
>
> (3) Coercion is a gross misdemeanor.

A key requirement in this statute is proof of a threat. The statute contains an internal definition of a threat, which is to communicate the

intent to use immediate force against a person who is present, to cause that person to engage in conduct, which the person has the right to abstain from doing. It also incorporates the definition of threats contained in RCW 9A.04.110(27)(a), (b), or (c).[6]

The State essentially conceded it did not have evidence of an actionable threat by Defendants and, for that reason, dismissed this charge.

Without the availability of the coercion count because of the lack of a "threat," the State cannot stretch or expand Count 1, the Assault charge, to cover the conduct alleged. For the reasons set forth *supra*, the Court should affirm the dismissal of Count 1.

IV. THE COURT'S DISMISSAL OF COUNT 2, OFFICIAL MISCONDUCT, SHOULD BE AFFIRMED

A. The Trial Judge's Ruling Should be Affirmed on Count 2, Charging Official Misconduct

The trial judge likewise dismissed Count 2, the official misconduct charge, explaining that viewing the evidence most favorably to the State, the evidence demonstrated:

> That these defendants intended that the grandmother use lawful physical force on this child, not that it be excessive, not that it constituted 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.

[6] The coercion statute, RCW 9A.36.070, has a scrivner's error in that the threats definitional statute is RCW 9A.04.110**(28)**, not (27).

RP 6.

In doing so, the trial judge explained that the statute required that the Defendants must intentionally commit an unauthorized act and that "each one of these prongs fails when it comes to the necessary intent that has to be proven." RP 6.

Therefore, Defendant Jahner incorporates by reference his argument on Count 1, *supra*, with the additional requirement that instead of knowledge, the State had to prove that the Defendants acted intentionally.

The crime of Official Misconduct has an alternative manner of commission which requires evidence that the "public servant" acted "with intent to obtain a benefit or to deprive another person of a lawful right or privilege. . ." It is assumed that the statute was directed against police officers or other public servants who took bribes, stole property from the evidence room or gained a benefit by doing some similar act.

There has been no evidence presented in the discovery or Certificate of Probable Cause that Defendants in any way intended to gain a benefit from their actions. Regardless of whether one could criticize the way Defendants resolved the conflict on the date of the incident, it is clear from the evidence that nothing they are alleged to have done would in any way benefit them. Unlike a more typical situation where a police officer asks for a bribe or steals

money or property from an arrestee, here the Defendants were trying to come up with a solution for an ongoing problem with K.J.C.

B. This Court Should Hold the Official Misconduct Statute to be Unconstitutionally Vague Violation of the First Amendment and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and Article 1, Sections 3 and 5, of the Washington State Constitution if it Disagrees with the Trial Judge's *Knapstad* Decision Below

While the trial judge did not reach the issue of whether the official misconduct statute was unconstitutionally vague because he dismissed the official misconduct charge on other grounds, Defendant asks the Court to reach this issue if it disagrees with the court's holding below.

RCW 9A.80.010 "Official misconduct" provides:

> (1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege:
>
> > (a) He or she **intentionally commits an unauthorized act** under color of law; or
> >
> > (b) He or she **intentionally refrains from performing a duty imposed upon him or her by law**.
>
> (2) Official misconduct is a gross misdemeanor.

(Emphasis supplied.)

The First Amended Information, CP 232-233 (Appendix A to Allen Declaration), alleged under Count 2 that Defendant:

> JESSE L JAHNER, acting as a principal or an accomplice as defined by RCW 9A.08.020, in the State of Washington, on or about the 5th day of June, 2017, did unlawfully, being a public servant, with intent to obtain a benefit or deprive another of a lawful right of privilege, **intentionally commit an unauthorized act under color of law**, contrary to RCW 9A.80.010(1)(a), and against the peace and dignity of the State of Washington. (Emphasis added.)

While the statute makes it a crime when an officer acts with intent to obtain a benefit when he "intentionally commit[s] an unauthorized act under color of law," the term "unauthorized act" is nowhere defined in the official misconduct statute or anywhere else in the RCW. This statutory element is therefore unconstitutionally vague in that it neither puts a defendant on notice as to what is an "unauthorized act" that constitutes a crime, nor does it provide objective standards for a jury or a judge to be able to ascertain whether a crime has been committed. *Bellevue v. Lorang*, 140 Wn.2d 19 (2000).

After conducting a Westlaw search, defense counsel could find no published or citable unpublished cases in Washington where a Washington appellate court ever considered the constitutionality of this statute in terms of a vagueness challenge. *See*: GR 14.1 (only unpublished COA decisions after March 1, 2013 "may be cited as non-binding authorities . . .").

The only reported criminal case in Washington involving the official misconduct statute is *State v. Groom*, 80 Wn.App. 717 (1996), which is not relevant to this issue, where a police chief was charged with the crime of

official misconduct for conducting an unlawful warrantless search of one of his officer's residence. The defense never challenged the constitutionality of the official misconduct statute. The COA simply held that under the *Knapstad* standard, which required the court to consider all facts most favorable to the State, that there would have been sufficient evidence for the case to go to a jury. This case therefore in no way deals with the issues presented herein.

An individual's right to due process, secured by the U.S. Const., Amend. 14, and Washington State Const., Art. 1, § 3, includes the fundamental notions of fair notice and equal application of the laws. The "void for vagueness" doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary or discriminatory enforcement. *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) (a vagrancy ordinance contained vague terms such as vagabonds, loitering, common drunkards); *Bellevue v. Lorang*, 140 Wn.2d 19, 30 (2000) (telephone threat ordinance, providing defense for caller if purpose was legitimate communication, void for vagueness).

As the United States Supreme Court has stated, "the law cannot trap the innocent by not providing fair warning or delegate basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective

basis, with the attendant dangers of arbitrary and discriminatory application." *Lorang*, 140 Wn.2d at 30 (*quoting* from *Grayned v. City of Rockford*, 408 U.S. 104, 108-9 (1972)).

Of equal concern is that a court will never be able to adequately fashion a fair jury instruction detailing those rights which the State now claims were violated by the Defendants alleged criminal actions or the duties they failed to perform or the unauthorized acts they committed, without commenting on the evidence? This further compounds the vagueness problem.

In *Kolender v. Lawson*, 461 U.S. 352 (1983) the Supreme Court struck down a California statute which required persons who loiter or wander on streets to provide "credible and reliable" identification and account for their presence when requested by a police officer. In striking down this statute, the Court discussed the classic concerns about a void for vagueness criminal statute:

> the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.

Id. at 357.

However, the Court went on to say that a vague statute has other serious infirmities, including a lack of standards guiding law enforcement:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." **Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."**

Id. at 357-58 (internal citations omitted) (emphasis added).

In *State v. Stockton*, 97 Wn.2d 528 (1982), the Court considered the scope of the extortion statute and held that it did not include threats to obtain sexual favors, but instead just threats for services, and dismissed the charge.[7] In so holding, the Court emphasized the need for statutes to use terms that a person of reasonable intelligence could understand, explaining:

> Statutes which define crimes must be strictly construed according to the plain meaning of their words to assure that citizens have adequate notice of the terms of the law, as required by due process. "Men of common intelligence cannot be required to guess at the meaning of the enactment."

Stockton at 533 (*quoting* from *State v. Shipp*, 93 Wn.2d 510, 515-16 (1980)).

Therefore, a penal statute cannot stand if it requires one to speculate regarding its meaning:

> No one may be required at the peril of life, liberty or property to speculate as to the meanings of penal statutes. All are

[7] The legislature later amended this statute to include threats for sexual services, resolving the issue for future cases.

> entitled to be informed of what the State commands or forbids.

Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) (invalidating criminal statute because of vagueness of term "gang").

There is no possible way that one can ascertain the meaning of the term "unauthorized," a crucial element, and it would be asking one to speculate as to its meaning and it would also be impossible to instruct the jury on this element. That is, does the term "unauthorized" refer to a requirement in a police department manual? Does it refer to some statutory police officer duty in the WAC's? Does it refer to the criminal code in the RCW or the Tacoma Municipal Ordinances? Does it refer to a provision in the Tacoma City Charter? Are there standards put out by the Washington State Criminal Justice Training Commission, which operates the Washington State Law Enforcement Academy and trains police officers, by which the term "unauthorized" can be judged?

Using this very vague standard of "unauthorized" could cause serious problems for both the State and a defendant in future cases. For example, assume that a police supervisor tells his officers that he will authorize a clearly illegal operation, such as beating up citizens who file complaints against the police. Would this authorization shield a police officer who should know that such action is illegal, but claims it is authorized by his supervisor?

Or, assume police officers embark on a legal activity that is outside their usual scope of authority and not specifically authorized by a supervisor. Is this an unauthorized act under the official misconduct statute? For example, what if a police officer takes an extra coffee or lunch break that is not authorized by department rules? While this might be an administrative issue, is this a crime? Or, if the officer carries a revolver, instead of the department issued Glock semi-automatic pistol, is this a crime? Or uses an erroneous advice of rights card with a suspect rather than the department authorized *Miranda* warnings? While any confession would be suppressed, would this also be a crime? This list is endless when trying to derive the meaning of a term as vague as "unauthorized."

Other cases reach a similar result: *Coates v. Cincinnati*, 402 U.S. 611 (1971) (ordinance making it a crime to congregate in a manner that was "annoying" to others, vague); *Mays v. State*, 116 Wn.App. 864 (2003) (civil commitment statute which contained element of "need for more sustained treatment," void for vagueness); *Sumner v. Walsh*, 148 Wn.2d 490 (2003) (use of terms "linger" and "stay" in juvenile curfew law were void for vagueness); *State v. Williams*, 144 Wn.2d 197 (2002) (statute criminalizing threats to "mental health" of another void for vagueness); *State v. Sansone*, 127 Wn.App. 630, 639 (2005) (the term "pornography," as used in a community placement order, was unconstitutionally vague because the term

has not been defined with sufficient definiteness such that ordinary people could understand what it encompasses); *City of Sumner v. Walsh*, 148 Wn.2d 490 (2003) (statute making it unlawful for a parent to permit a juvenile to remain in a public place during curfew hours, unless the minor was on an errand, void for vagueness, since the word errand was vague); *Spokane v. Neff*, 152 Wn.2d 85 (2004) (city anti-prostitution ordinance was void for vagueness because it did not define the term "known prostitute," which was one of the elements of the offense).

The official misconduct statute does not criminalize any specific behavior; rather, it prohibits any intentional "unauthorized" act by a public official acting under the color of law. This statute does not provide clear warning as to what is a crime so that a public servant has notice. The breadth of the statute also creates the risk that a jury may convict a defendant of official misconduct simply because it finds that he or she acted in a fashion the jury did not approve of, rather than criminally. This becomes extremely problematic if a jury is confronted with acts that are controversial, but not illegal. The vagueness of the term "unauthorized" could allow a conviction for acts a jury finds that were not prohibited though not specifically authorized.

As such, the statute suffers from the classic infirmities of a vague statute both in failing to provide notice to individuals as to what is prohibited

and guidance to the court and jury in judging the matter. It must therefore be held to be unconstitutional, as applied and on its face.

As far as the alternative way to commit this offense, the terms used in the statute "to deprive another of a lawful right or privilege," are likewise void for vagueness.

There is no definition or explanation in the statute or elsewhere in the RCW as to what the meaning of "a lawful right or privilege" means.

That is, does a "right" mean a constitutional right? Does a privilege mean something under the privileges and immunities clauses of Article 4, § 2 of the United States Constitution? Does it mean an evidentiary privilege, such as the attorney-client privilege, the marital communication privilege, or the privilege against self-incrimination? Does it connote the dictionary definition of privilege, which is:

> A special right, advantage or immunity granted or available only to a particular person or group.

Google Definition.

This is yet another infirmity with this statute which further demonstrates its being void for vagueness.

Therefore, the statute is not only void for vagueness. Viewing the evidence most favorable to the State, there is insufficient evidence to make out a *prima facie* case and Count 3 must be dismissed. *State v. Knapstad, supra.*

C. RCW 9A.80.010, the Official Misconduct Statute is also Unconstitutionally Overbroad on its Face and as Applied

Count 2, charging Official Misconduct is also unconstitutionally overbroad both facially and as applied to Jesse Jahner's case. A law is unconstitutionally overbroad under the First Amendment of the United States Constitution and Article I, § 5 of the Washington State Constitution if two requirements are met: (1) that law actually implicates constitutionally protected speech and (2) the law prohibits a substantial amount of constitutionally protected speech. *State v. Immelt*, 173 Wn.2d 1, 11 (2011). Because the acts charged involve protected speech, that is advice to R.C. as to her rights under the parental use of force statute, the First Amendment of the United States Constitution and Article I, § 5 of the Washington State Constitution are implicated. That is, Defendant Birge gave verbal instructions to R.C. as to how she could "correct" K.J.C.'s behavior by using discipline tactics permitted by RCW 9A.16.100, "Use of force on children."

This Court in *State v. Homan,* 191 Wn.App. 759 (2015) wrote:

> Determining whether a law prohibits a substantial amount of protected speech involves striking a balance between competing social interests. [W]e must weigh the amount of protected speech proscribed by the [law] against the amount of unprotected speech that the [law] legitimately prohibits. The policy concern is that the threat of enforcement of a law prohibiting some amount of constitutionally protected speech will deter or chill such speech.

Id. at 767 (internal quotations and citations omitted).[8]

In *Homan*, this Court examined Washington's luring statute, RCW 9A.40.090, and found it to be unconstitutionally overbroad.

Homan was convicted of the crime of luring at a bench trial and argued on appeal that the luring statute was unconstitutionally overbroad. The Supreme Court remanded the case for "a determination of whether RCW 9A.40.090 was unconstitutionally overbroad in violation of the First Amendment." On remand, this Court held the luring statute to be overbroad. *State v. Homan, supra.*

The facts of *Homan*, taken from the earlier *Homan* Court of Appeals opinion are that he approached a young boy while riding a children's Superman bicycle and said "Do you want some candy? I've got some in my house." Homan continued riding without stopping or slowing. The child did not respond and told his mother and the police about the incident.

On remand this Court conducted a detailed analysis of the constitutionality of the luring statute and explained that the luring statute was problematic because it did not require a defendant to engage in any

[8] There are three separate decisions in *Homan*: *State v. Homan*, 172 Wn.App. 188 (2012); *State v. Homan*, 181 Wn.2d 102 (2014); *State v. Homan*, 191 Wn.App. 759 (2015). Only the last *Homan* case will be discussed.

conduct to commit a crime, that luring could be committed with words alone, and that it did not contain a criminal intent requirement. *Homan*, 191 Wn.App. at 765. The COA used a four-part analysis to determine whether the luring statute was facially overbroad under the First Amendment, that is (1) whether the challenged law actually prohibits speech; (2) the legitimate sweep of the challenged law; (3) whether the challenged law also prohibits constitutionally protected speech; and (4) whether the law prohibits a substantial amount of such speech. *Id.* at 767-70.

Similar to the facts alleged in the Official Misconduct charge here, the luring statute clearly prohibited certain types of speech. *Id.* at 767. The COA further found that the luring statute also prohibited innocent, protected speech that fell within the definition of luring. *Id.* The decision recounted numerous examples of constitutionally protected speech suggested by the defense that would violate the luring statute.

The COA found that the statute prohibited a substantial amount of protected speech. *Id* at 771-74. In reaching this conclusion, the court noted that:

> **Any speech falling within the definition of luring not made with the intent to facilitate criminal conduct (or falling within some other category of unprotected speech) is protected under the First Amendment.** The absence of a criminal intent requirement in RCW

> 9A.40.090(1) means that the statute prohibits all of this protected speech. As Homan's and the ACLU's examples demonstrate, the amount of unprotected speech that RCW 9A.40.090(1) prohibits may be substantial. (Emphasis added.)

Id. at 771-72. The COA concluded that, in attempting to accomplish its purpose, the statute criminalized a substantial amount of protected speech and was thus unconstitutionally overbroad as written. *Id.* at 772-73.

State v. Pauling, 149 Wn.2d 281 (2003) is similarly instructive. In *Pauling*, the Court found that the former Washington extortion statute, RCW 9A.56.130, was unconstitutionally overbroad.[9] *Id.* at 389-90. Pauling argued that the former extortion statute prohibited constitutionally protected speech because, in similarity to the Official Misconduct statute, it did not have an element that required the threats to be wrongful and therefore was overbroad. *Id.* at 388. The Supreme Court agreed and repeated several examples from the Court of Appeals decision below of threats that would be criminalized but were not wrongful such as an expert witness threatening not to testify without payment or a consumer threatening a vendor with a report to the Better Business Bureau. *Id.* at 389. The Court held that "[w]ithout this wrongfulness element, there was

[9] In response to the Court's opinion finding that the statute was overbroad, the legislature subsequently revised the statute in S.S.B. No. 6602, stating "The legislature intends to revise the crime of extortion in the second degree in response to the holding in *State v. Pauling*, 108 Wn.App. 445 (2001) by adding a requirement that the threat required for conviction of the offense be wrongful." *See* RCW 9A.56.130.

no limitation placed on the type of threat made, which, in turn, allows the State to prosecute individuals criminally for their use of protected speech." *Id.* The court concluded that the statute, as written, was overbroad but saved the statute by requiring a limiting instruction.[10]

When the four-part analysis used by this Court in *Homan* is applied to the Official Misconduct statute, it is clear that the two suffer from the same constitutional infirmities. The Official Misconduct statute prohibits speech because, as here, it can be committed with words alone. Therefore the Court can test it against hypothetical examples. *See State v. Stevenson*, 128 Wn.App. 179 (2005) (where First Amendment speech is implicated, "[a] statute is overbroad when it is unconstitutional as applied to a hypothetical context, even if constitutional as applied to the litigant.").

The statute is clearly unconstitutionally overbroad when applied to the facts in the instant case. Defendant Birge instructed R.C. as to her rights under the Parental Discipline statute, RCW 9A.16.100. It was Defendants' good faith belief that a parent, pursuant to this statute, could use a belt to discipline or correct a child. As such, this is protected speech under the First Amendment of the United States Constitution as well as Article 1, § 5 of the Washington State Constitution. Prosecuting the Defendants for their exercise of freedom

---

[10] However, the Court upheld Pauling's conviction since his conduct was extortionate under any theory because his threats bore "no relation to a plausible claim of right to the property or services for which the threat was made." *Id.* at 392.

of speech implicates the overbreadth problem, even without considering hypothetical examples, which the Court is allowed to do. All statements by the Defendants were constitutionally protected speech which are being criminalized due to the subjective nature of the term "unauthorized acts" even though they are protected by the First Amendment and Article I, § 5.

The Official Misconduct statute is therefore unconstitutionally overbroad both on its face and as applied to Defendants.

V. CONCLUSION

This Court is urged to affirm the trial court's dismissal of Counts 1 and 2 under a *Knapstad* analysis. That is, even considering the evidence most favorably to the State and affording it all necessary inferences, the alleged conduct does not constitute either Assault of a Child in the 3° as charged in Count 1 or Official Misconduct as charged in Count 2. Alternatively, Count 2, official misconduct, should be held to be unconstitutionally vague and/or overly broad and likewise dismissed.

RESPECTFULLY SUBMITTED this 3rd day of December, 2019.

DAVID ALLEN, WSBA #500
Attorney for Respondent Jahner

PROOF OF SERVICE

Sarah Conger swears the following is true under penalty of perjury under the laws of the State of Washington:

On the 3rd day of December, 2019, I filed the above Response via the Appellate Court E-File Portal through which Respondent's counsel listed below will be served:

Attorneys for Appellant

Joseph James Anthony Jackson
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Attorney for Respondent Birge

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And e-mailed to Respondent Jesse Jahner.

DATED at Seattle, Washington this 3rd day of December, 2019.

/s/ Sarah Conger
Sarah Conger, Legal Assistant

APPENDIX A

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

January 22 2019 1:49 PM

KEVIN STOCK
COUNTY CLERK

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JESSE L JAHNER, Defendant. DOB: 02/17/1984	CAUSE NO. 19-1-00257-5 DECLARATION FOR DETERMINATION OF PROBABLE CAUSE (ADPC)

MEGAN WINDER declares under penalty of perjury:

That I am a deputy prosecuting attorney for Pierce County and I am familiar with the police report and/or investigation conducted by the WASHINGTON STATE PATROL, incident number 17017339;

That the police report and/or investigation provided me the following information; That in Pierce County, Washington, on or about June 5, 2017, the defendants, JESSE L JAHNER and DAMION R BIRGE, did commit the crimes of assault of a child in the third degree, coercion, official misconduct.

On June 5, 2017, R.C. (DOB: 02/11/1963), the adopted mother and maternal grandmother to K.J.C. (DOB: 08/30/07), called Catholic Community Services (CCS) to help take care of K.J.C. while she left the residence to get medication from the local pharmacy across the street.

Meluleki Ncube arrived at the residence and was fully aware of K.J.C.'s disabilities from their long history. K.J.C. suffers from several psychological and emotional disorders; as a result, he is considered a high needs child. Mr. Ncube observed that K.J.C. had an episode as soon as R.C. left the residence, locking himself inside the home leaving Mr. Ncube and a second CCS member, Michelle Straling, on the back porch. Mr. Ncube made several attempts to get K.J.C. to unlock and open the door. K.J.C. began to scream and yell at them, refusing their requests. K.J.C. began breaking windows in the residence and throwing dishes around. Mr. Ncube called 911 after he became concerned that K.J.C. armed himself with a knife. Before Tacoma Police Department officers arrived, R.C. had returned home, unlocked the door and was able to calm K.J.C. enough for him to drop the knife and sit down on the couch in the living room.

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Tacoma Police Officers DAMION R. BIRGE and JESSE L. JAHNER responded to the 911 call.

According to Jahner's original report, he stated that he and Birge contacted R.C. who explained that K.J.C. had broken things in the house and hurt her several times in the past. R.C. advised that K.J.C. had been involuntarily committed several times for his actions and statements of threats and that's why she called 911. The Defendants then contacted K.J.C., observing multiple minor cuts on his hands. They observed that the inside of residence was littered with broken glass and debris from K.J.C.'s tirade and the damage to the residence that was in excess of one thousand dollars. The report identifies that K.J.C. was very defiant, indicating that Jahner observed K.J.C. kick and punch R.C. while she attempted to discipline him. K.J.C. almost struck her in the face while yelling "fucking bitch that will die." According to Jahner's initial report, R.C. said she was deadly afraid of K.J.C., fearing for her life. K.J.C. was transported to Mary Bridge Children's Hospital. No mention was made of any discipline.

On June 6, 2017, Cobi Silver, a social worker at Mary Bridge Hospital contacted Tacoma Police Department. According to a report by TPD Officer Pincham, both K.J.C. and R.C. informed the social worker, and later Officer Pincham, that the bruising was caused by R.C. striking K.J.C. with a belt and that she only did so on the Defendants' orders.

Officer Pincham interviewed relevant personnel, including the Catholic Community Services worker Mr. Ncube, who validated the fact that R.C. beat K.J.C. with a belt, only after she was told to by the Defendants. Officer Pincham described a total of eight bruises and one abrasion on K.J.C. Officer Pincham reported to his supervisor.

Detective Stanley (TPD) asked Jahner and Birge to complete a supplemental report. In Jahner's original report, the physical disciplining of K.J.C. was not mentioned. The second report described the physical disciplining of K.J.C. before the Tacoma Fire Department and AMR ambulance were called to transport K.J.C. to Mary Bridge Hospital. In the report, Jahner mentioned that Birge asked Mr. Ncube if he was ever disciplined as child, to which Mr. Ncube responded "yea, I'm from Africa." Jahner wrote that Mr. Ncube voiced no concerns about the punishment or actions by R.C. or the two officers. Jahner accused CCS of doing a disservice to R.C. and K.J.C., because they instructed R.C. to not physically discipline K.J.C. Mr. Birge did not complete a supplemental report.

When interviewed, R.C. recalled that Birge and Jahner began yelling at her to get a belt almost as soon as they arrived. Birge and Jahner told her that if she didn't, the police would no longer respond to her home and that they would not request an ambulance for K.J.C.

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Upon the belt being produced, Birge picked up the belt, stating that he would show R.C. "how it's done," striking the table four times. The belt was a thin dress belt. Mr. Ncube disclosed that Birge instructed R.C. to "beat the demons" out of K.J.C. She was instructed to hit K.J.C. for every window that he broke.

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. Birge indicated that if the squirming continued, R.C. should wait until K.J.C. slept and hit him with a belt when he was sleeping.

The two witnesses, Ms. Straling and Mr. Ncube indicated that K.J.C. received 20 or 25 strikes as part of this discipline. K.J.C. sustained several bruises to his arms, legs, and back. The marks were still visible twenty-two hours later. Photos were taken documenting the bruising.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: January 22, 2019.
PLACE: TACOMA, WA

/s/ MEGAN WINDER
MEGAN WINDER, WSB# 42962
Deputy Prosecuting Attorney

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APPENDIX B

Narrative:

On 06-06-17, at approximately 1320 HRS, PPO BIRGE and I received a request for LESA Dispatch to contact Detective Stanley (TPD) regarding a parental discipline/involuntarily commit on a destructive and homicidal 9 year old juvenile.

It should be noted Detective Stanley requested the following supplemental report to document the lawful parental discipline that (O) C[redacted], R[redacted] performed on (O/2) C[redacted], K[redacted] while we observed. It should be noted that two members of Catholic Community Service (a black male and white female) were on scene as well and none of them had any objections before, during or after the lawful discipline.

Prior to arrival, LESA Dispatch advised the juvenile, (O/2) C[redacted], K[redacted] had destroyed a large amount of glass and (O) C[redacted], R[redacted] along with the Catholic Community Service members were outside as (O/2) C[redacted], K[redacted] was actively destroying the residence. When we arrived, we contacted (O) C[redacted] R[redacted] and the Catholic Community Service members out back. We were familiar with the residence as we had involuntarily committed (O/2) C[redacted], K[redacted] before for death threats. On the prior occasion, we observed several State and Catholic Community Service Members in the back yard, holding (O/2) C[redacted], K[redacted] down, as he was yelling and cussing at them.

We knew (O/2) C[redacted], K[redacted] was capable of hurting others and he appeared competent during our last interaction. (O/2) C[redacted], K[redacted] instantly became calm when TFD arrived and he received his desired outcome of leaving the residence in an ambulance.

Today PPO BIRGE and I walked into the residence and I observed several broken windows, a large amount of glass dishes shattered across the ground, and several glass decorations destroyed. (O/2) C[redacted], K[redacted] was sitting on the couch smiling, when we walked around the corner into the living room. As we walked over glass, (O) C[redacted], R[redacted] requested the black male Catholic Community Service member to pick up her dog so it would not "cut its feet on the glass." I observed as he did so. I then observed as the white female Catholic Community Service member had a broom and was sweeping glass up all around the residence.

(O) C[redacted], R[redacted] then explained that (O/2) C[redacted], K[redacted] was "out of control as usual" but this time destroyed all the glass in the residence. While sitting on the couch with a smile, (O/2) C[redacted], K[redacted] looked at (O) C[redacted] R[redacted] as if he did nothing wrong. (O) C[redacted], R[redacted] then stated that she just had back surgery and pointed to a large back brace that she had around her hips and waist. (O) C[redacted], R[redacted] expressed she was in "lots of pain" and "could not move well" and (O/2) C[redacted], K[redacted] knew that. (O) C[redacted] R[redacted] said that (O/2) C[redacted], K[redacted] "could easily do what he wants and hurt her badly if he wanted due to her injury."

(O/2) C[redacted], K[redacted] sat on the couch and smiled as she explained this. I looked at (O/2) C[redacted], K[redacted] and he kept his smile and shook his head up and down as if he was proud that his grandmother (his legal guardian) was scared of him. (O/2) C[redacted], K[redacted] knew he could hurt her as she stated in his presence.

(O) C[redacted], R[redacted] demanded we take (O/2) C[redacted], K[redacted] to Remann Hall for his actions. We explained due to his age II, and as she stated his "mental capacity of 4-5yrs old." I advised due to his age, Remann Hall was not a solution today for his clear disobedience.

PPO BIRGE and I asked (O) C[redacted], R[redacted] if she had ever physically disciplined (O/2) C[redacted], K[redacted] (O) C[redacted], R[redacted] said, "Nope, they said I cannot touch him." as she pointed to the black male from Catholic community Services. "They said I can only grab his hands to restraint him." I asked (O) C[redacted], R[redacted] if CPS has ever ordered her to not touch (O/2) C[redacted], K[redacted]. (O) C[redacted], R[redacted] said, "No, they did." As she pointed at the Catholic Community Service Members.

PPO BIRGE and I explained to (O) C[redacted], R[redacted] the RCW 9A.16.100 to (O) C[redacted], R[redacted] in detail. I later provided (O) C[redacted] R[redacted] with a copy of the listed RCW as I provide it to all parents when addressing legal discipline. I carry multiple copies of the RCW in my patrol vehicle and have given out hundreds to parents as I once did as a Deputy Clerk for the Pierce County Superior Court. I

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understand the importance of providing the RCW in which the law is stated. (O) C[redacted] R[redacted] expressed concern about her back injury and not being able to effectively discipline (O/2) C[redacted] K[redacted]

PPO BIRGE and I explained to (O) C[redacted] R[redacted] again, the law and she can use legal means outside the listed items as stated in the last line of the RCW "This list is illustrative of unreasonable actions and is not intended to be exclusive."

PPO BIRGE and I advised she can use small items as an extension on her hand, due to her physical limitations and his strength and size. PPO BIRGE advised (O)C[redacted] R[redacted] to discipline (O) C[redacted] K[redacted] (O/2) with a belt. C[redacted] R[redacted] grabbed her own belt out of her room. The belt was standard belt. (O) C[redacted] R[redacted] ordered (O/2) C[redacted] K[redacted] to roll onto his stomach so she could "Spank his butt" and he told her "Fuck you, no you won't." (O) C[redacted] R[redacted] asked us to physically discipline (O/2) C[redacted] K[redacted] and we told her "No." PPO BIRGE and I explained that it was her child and she had the legal right to discipline him for his actions of destroying well over a thousand dollars' worth of glass in the residence along with multiple threats and physical violence towards (O) C[redacted] R[redacted].

(O/2) C[redacted] K[redacted] refused to roll over and (O) C[redacted] R[redacted] pulled the belt back no more than shoulder height and attempted to discipline (O/2) C[redacted] K[redacted] He kicked his legs and feet towards (O) C[redacted] R[redacted] as she was attempted to "spank his butt area" several times. After several legal spankings with the belt (O) C[redacted] R[redacted] stopped. (O/2) C[redacted] K[redacted] made a crying sound but no tears came out, after several seconds of the sound he stopped and looked at (O) C[redacted] R[redacted]. He then pointed and said "Fuck you bitch!" He then attempted to get up and punch (O) C[redacted] R[redacted] (O) C[redacted] R[redacted] was barely able to push (O/2) C[redacted] K[redacted] off of her and onto the couch. (O) C[redacted] R[redacted] then asked us if she could discipline (O/2) C[redacted] K[redacted] for what he just did and I told her it was her choice. She hit him several more times with the belt as he kicked her, landing several blows causing her to step back.

(O/2) C[redacted] K[redacted] again "made a crying noise" for several seconds and said he was sorry for what he did. A few moments later, he stopped "crying" instantly and told her "Fuck you, don't touch me!" As stated in the original report, (O/2) C[redacted] K[redacted] picked up a large "Speak and Spell" style toy and threw it at (O) C[redacted] R[redacted]'S face from a few feet away. She barley moved her head to avoid being struck by the "Speak and Spell." (O) C[redacted] R[redacted] began to legally "spank him with the belt" for several strikes, until he stopped trying to kick her.

After a few more outburst of "I'm going to kill you bitch! You don't touch me!", (O) C[redacted] R[redacted] pleaded that she fears he would kill her today or tonight. Due to her true fear of (O/2) C[redacted] K[redacted] and his clear dominance of the residence after the discipline, PPO BIRGE and I advised her we would Involuntarily Commit (O/2) C[redacted] K[redacted] (O) C[redacted] R[redacted] said she "I Cannot have him back in house. I know he will kill me. " (O) C[redacted] R[redacted] stated if he kills her tonight, it would be our fault.

TFD and AMR arrived. As stated in the original report (O/2) C[redacted] K[redacted] was transported to the hospital without incident. We contacted (O/2) C[redacted] K[redacted] at the hospital and he was very happy to be there, as he requested to leave prior to our arrival and got what he wanted.

It should be noted that PPO BIRGE asked the black male Catholic Community Service Member if he was disciplined as a child and he said, "Yeah, I'm from Africa." He did not say or express any concern as he observed the legal discipline.

When PPO BIRGE and I spoke with (O) C[redacted] R[redacted] outside near the ambulance, I provided her with a copy of the RCW as stated above. She thanks us both several times saying "This is the first time I feel like I got my house back and have been in control in a long time."

She went on to explain that "DR SPOCK(unknown spelling)" was wrong. PPO BIRGE and I said we didn't know who that was. She then said, "He was the guy that wrote the book on raising kids and not physically disciplining them. He was wrong and now there is a generation of messed up kids."

We told her we are glad we could help her. She stated several more times she could not care for (O/2) C[redacted] K[redacted] as she is truly scared of him. (O) C[redacted], R[redacted] said she would not pick him up for the hospital. We advised her to contact CPS to make further arrangements regarding that but advised her if she was truly in fear, she should not allow him back into the house as he would/could kill her as she stated.

(O) C[redacted] R[redacted] advised CPS has been involved as they assisted her becoming (O/2) C[redacted], K[redacted] legal guardian. CPS has failed to provide an environment that suitable for (O/2) C[redacted] K[redacted]. (O) C[redacted] R[redacted] said she has been "deadly scared of him" for a long time and CPS has been aware of this, yet they have failed to find a location for (O/2) C[redacted], K[redacted] CPS has failed to act and due their duty in regards to (O/2) C[redacted], K[redacted] at the same time putting (O) C[redacted] R[redacted] in danger.

It should also be noted the Catholic Community Service told (O) C[redacted], R[redacted] she had no legal authority to discipline (O/2) C[redacted], K[redacted]. As (O) C[redacted], R[redacted] advised me, CPS has no such order limiting her ability to discipline (O/2) C[redacted] K[redacted] let alone defender hereself when she has been assaulted. Catholic Community Service has done a disservice to (O) C[redacted] R[redacted] as they have subjected her to multiple assaults and advising her to do nothing to protect herself.

End of Supplemental Report: JLJ

Reviewed By:		Reviewed Date:	

ALLEN, HANSEN, MAYBROWN, OFFENBECHER

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