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No. 53584-0-II

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

STATE OF WASHINGTON,

Appellant,

v.

DAMION BIRGE AND JESSE JAHNER,

Respondents.

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

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF THE CASE.

For purposes of this reply brief, the State relies on the Statement of the Case contained in the original Brief of Appellant, with additions as necessary in the argument sections, below.

B. ARGUMENT.

1. The trial court's conclusion that Birge and Jahner intended for R.C. to use force consistent with state law was necessarily a finding of fact that should not have been decided in a *State v. Knapstad* motion.

In delivering its ruling, the trial court stated, "Their intent that the grandmother use force consistent with that State law is abundantly clear to me. I think it's undisputable." RP 80. This finding of fact was improper in the context of a Knapstad motion. 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). As argued in the Brief of Appellant, the record in this case supported theories that Birge and Jahner acted as both principals and accomplices in directing the beating of K.J.C.

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). A reasonable jury could have found that Birge and Jahner, who were law enforcement officers, knew that the conduct that they were directing R.C. to engage in was unlawful. Directing a parent about the law regarding parental discipline is meaningless if the conduct directed exceeds parental discipline.

"Where, as here, the punishment was inflicted with a belt with force great enough to cause bruising, it went beyond the bounds of reasonableness and moderation." State v. Schlichtmann, 114 Wn. App. 162, 169, 58 P.3d 901 (2002). 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. Their actions led to marks on K.J.C.’s body that remained for at least 22 hours. CP 11, 161.

Under the rationale utilized by the trial court and advocated by the Respondents, all a person would have to do to avoid criminal liability is say out loud that they are intending to act within the legal confines of parental discipline, regardless of whether they exceed those confines. That cannot be the law. The law allows for a jury to decide if the force utilized was reasonable and moderate.

The Respondents rely upon State v. Bauer, 180 Wn.2d 929, 329 P.3d 67 (2014), for the proposition that Birge and Jahner did not have the required *mens rea* for the offense of assault of a child in the third degree. Brief of Respondents at 13-14. The facts of Bauer are very different than the facts at issue in this case. In Bauer, the defendant was charged with assault in the third degree after a child injured a classmate with a firearm that the defendant failed to secure. Bauer, 180 Wn.2d at 932-933. The decision of our

State Supreme Court focused on legal causation and specifically noted that Bauer did not have knowledge of the specific conduct that constituted the assault, i.e. the shooting. Id. at 939-940, 945.

The Court stated, “there is no evidence of any such interaction here that would permit a finding that Bauer caused TC to take a gun to school.” Id. at 945. In contrast, a jury could easily conclude that Birge and Jahner caused R.C.’s actions in this case. The facts demonstrated that they directed *the* particular actions which constitute the offense. Birge and Jahner’s conduct toward the commission of assault of a child far exceeded Bauer’s conduct. Bauer left firearms unsecured, but did not direct TC to take the firearm, bring it to school, or negligently use it to injure another student. Bauer, at 939-940, 945. Birge and Jahner directed and caused the actual events which led to the charge.

The holdings in Bauer actually support a conclusion that Birge and Jahner acted as both principals and accomplices. RCW 9.A.08.020(2)(a) requires proof that the defendant acted with the same *mens rea* as that required for the crime. Bauer, 180 Wn.2d at 944. Here, the jury could have concluded that Birge and Jahner acted with criminal negligence and committed an “affirmative act of assistance, interaction, influence or communication” which caused

the acts which constituted the assault. Id. at 945. A reasonable jury could find that Birge and Jahner, acted “with the kind of culpability that is sufficient for the commission of the crime,” and “caused an innocent or irresponsible person to engage in such conduct.” RCW 9A.08.020(2)(a).

The facts also support a conclusion that Birge and Jahner acted with knowledge that the acts would promote or facilitate the crime of assault of a child and solicited, commanded, encouraged, or requested that R.C. commit the acts. RCW 9A.08.020(3)(a). As noted above, 20-25 strikes with a belt, leaving marks which are visible 22 hours later clearly exceeds the bounds of parental discipline. Considering the facts in a light most favorable to the State, a reasonable jury could have found that Birge and Jahner, who were trained police officers, knew that the conduct that they were directing exceeded those bounds.

The facts alleged supported the necessary *mens rea* for a jury to consider the crime of assault of a child in the third degree for both Birge and Jahner as either principals or accomplices. The trial court erred by making a factual determination that Birge and Jahner lacked the requisite *mens rea*. The charge should not have been dismissed in a Knapstad motion.

2. RCW 9A.08.010 is neither unconstitutionally vague nor overbroad as applied in this case, and the trial court's dismissal of the charge of official misconduct was improper pursuant to *State v. Knapstad*.

The Respondent's argue that RCW 9A.08.010 is both unconstitutionally vague and overbroad. Brief of Respondents, at 21, 30. The trial court dismissed the charge in count 2 of official misconduct because it made a factual determination that the intent of the Respondents was for R.C. to comply with the reasonable parental discipline statute. RP 82. Despite that finding, while acknowledging that it did not need to reach the issue, 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 State assigned error to this finding and provided analysis of the issue in the Brief of Appellant. For the reasons set forth in the Brief of Appellant, the State maintains that the statute is not unconstitutionally vague. Brief of Appellant, at 28-30. The term "unauthorized act" included in the statute sufficiently put Birge and Jahner on notice that a police officer may not act outside of their authority in their official capacity. The Brief of Respondents provides a list of possible examples of how the term "unauthorized

act” could be interpreted. Brief of Respondents, at 27. However, this list ignores the fact that in order to violate the official misconduct statute, an unauthorized act must be done under color of law and with intent to obtain a benefit or to deprive another person of a right or privilege. RCW 9A.80.010(1). 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). Birge and Jahner cannot overcome the presumption that the statute is constitutional.

In making its ruling, the trial court did not address the argument contained in the Brief of Respondents that the official misconduct statute is unconstitutionally overbroad. As the trial court made no ruling regarding an overbreadth argument, this Court is not required to consider the issue. RAP 2.4(a). If this Court elects to provide guidance to the trial court upon remand, the Court should find that RCW 9A.80.010 is not unconstitutionally overbroad.

In Washington, “Article 1 section 5 analysis of overbreadth follows the analysis of the First Amendment.” State v. Immelt, 173 Wn.2d 1, 6, 267 P.3d 305 (2011). A law is overbroad if it “sweeps within its prohibitions” a substantial amount of constitutionally protected conduct. City of Tacoma v. Luverne, 118 Wn.2d 826,

839, 827 P.2d 1374 (1992). A statute is not unconstitutionally overbroad simply because it is possible to conceive of some impermissible applications. State v. Homan, 191 Wn. App. 759, 767, 364 P.3d 839 (2015).

Not all forms of speech are constitutionally protected. State v. Brush, 5 Wn. App.2d 40, 53-54, 425 P.3d 545 (2018) (holding that domestic violence/ongoing pattern of psychological abuse aggravating factor under SRA not overbroad). The starting point of an overbreadth analysis is to determine whether the challenged statute proscribes speech. State v. Halstien, 122 Wn. App. 109, 123, 857 P.2d 270 (1993). On its face, RCW 9A.80.010 does not proscribe a real and substantial amount of protected speech. Even if a statute does proscribe a real and substantial amount of protected speech, “a statute will be invalidated only if the court is unable to limit sufficiently its standardless sweep by a limiting instruction.” State v. Pauling, 149 Wn.2d 381, 386, 69 P.3d 331 (2003).

As noted in the Bill of Particulars filed by the State, the allegation in this case was that Birge and Jahner intentionally deprived K.J.C. of his right to be free from assault and/or excessive force and/or deprived R.C. of her right to parent as she sees fit,

while acting under the color of law and they intentionally refrained from performing their duty of preserving the public peace. CP 45-51; 176-182. The official misconduct statute does not proscribe protected speech and the conduct alleged to have been committed by Birge and Jahner was not protected by the First Amendment.

A public employee's right to speak is not absolute. Sprague v. Spokane Valley Fire Dep't, 189 Wn.2d 858, 877, 409 P.3d 160 (2018); White v. State, 131 Wn.2d 1, 10, 929 P.2d 396 (1997). "When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes." Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 1960, 164 L.Ed. 2d 689 (2006); Tyner v. DSHS, 137 Wn. App. 545, 558, 154 P.3d 920 (2007). The official misconduct statute at issue in this case criminalizes abuse of office with the intent to obtain a benefit or deprive another of their rights. To the extent the statute may proscribe some degree of speech, such speech would not be protected. Unlike the extortion statute in State v. Pauling, 149 Wn.2d 381, 388-389, 69 P.3d 331 (2003), referenced by the Respondents, RCW 9A.80.010 criminalizes only the commission of unauthorized acts committed under color of law.

The statute does not prohibit a substantial amount of protected speech and is not unconstitutionally overbroad.

As noted above, the trial court's ruling dismissing this charge was based on State v. Knapstad. For the same reasons noted above regarding the charge of assault of a child, and for the reasons noted in the Brief of Appellant, that ruling was improper. Brief of Appellant, at 17-27. When viewing the evidence in a light most favorable to the State, a reasonable jury could have found each element of the offense of official misconduct. Dismissal was improper.

C. 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. The official misconduct statute is not unconstitutionally vague and does not substantially

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proscribe protected speech. 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.

Respectfully submitted this 2nd day of January, 2020.



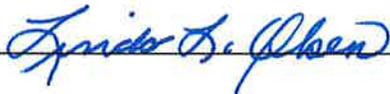
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DECLARATION OF SERVICE

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 Appellate Courts' 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: January 2, 2020

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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