

FILED

MAR 23 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29353-0-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MARCELLUS SEAMSTER, JR.,

Defendant/Appellant.

APPELLANT'S BRIEF

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Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. The lack of a definitional instruction on assault (WPIC 35.50) denied Marcellus Seamster, Jr. a constitutionally fair trial.
2. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of assault of a child in the third degree.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was Mr. Seamster denied a fair trial, as required by Const. art. I, § 22, when the trial court failed to give a definitional instruction of assault?
2. Was the State relieved of its burden of proof when no instruction was given to define assault?
3. Did the State prove each and every element of the offense of child assault in the third degree beyond a reasonable doubt?

STATEMENT OF CASE

Tawnya Redwine is the mother of K.R.. K.R. was born on November 16, 1996. Mr. Seamster is Ms. Redwine's significant other. (Trial RP 440, ll. 7-8; l. 12; RP 440, l. 24 to RP 441, l. 1).

Ms. Redwine and Mr. Seamster have lived together for approximately ten years. They have discussed how to discipline K.R. during this period of time. They first try grounding, earlier bedtimes and loss of pri-

vileges. Ms. Redwine has then authorized Mr. Seamster to spank K.R. as a last resort. (Trial RP 222, ll. 5-22; RP 441, ll. 10-11; RP 442, ll. 11-24; RP 443, ll. 1-5; RP 508, ll. 10-18).

Ms. Redwine and Mr. Seamster first learned that K.R. had a My Space account in September 2009. Access was through her cellphone. Mr. Seamster deleted the account after he and K.R. had a discussion concerning it. She was then prohibited from using My Space. (Trial RP 445, ll. 11-16; RP 446, ll. 15-21; RP 514, l. 12 to RP 515, l. 3; RP 517, ll. 10-20).

On November 2, 2009 K.R. was using her cellphone in the bedroom. Ms. Redwine and Mr. Seamster again learned that K.R. had a My Space account. She initially denied that she was talking with a guy. However, when Mr. Seamster accessed that account he learned that K.R. was having phone sex. K.R. later admitted to having an explicit conversation on My Space. (Trial RP 246, ll. 8-25; RP 270, ll. 1-14; RP 380, ll. 11-20; RP 381, ll. 8-11; ll. 15-19; RP 520, ll. 2-13; RP 521, ll. 7-22; RP 522, ll. 8-16; RP 524, ll. 2-7; RP 525, ll. 3-13).

Due to the fact that K.R. lied and was having phone sex Ms. Redwine and Mr. Seamster agreed that this was the "last straw." Ms. Redwine authorized Mr. Seamster to spank K.R.. (Trial RP 449, ll. 1-8; ll. 23-24; RP 450, ll. 3-4; ll. 21-24; RP 485, ll. 20-24; RP 523, ll. 2-23).

Mr. Seamster had K.R. pull down her pajama pants. He spanked her with a belt. Mr. Seamster is left-handed. He used his right hand when

he spanked her. Prior to spanking her, he wrapped the belt around his hand. He held on to the buckle so that it would not hit her. (Trial RP 250, ll. 19-23; RP 272, ll. 15-22; RP 273, ll. 17-23; RP 274, ll. 2-5; RP 528, ll. 11-19; 530, ll. 10-14).

Mr. Seamster spanked K.R. approximately 3 to 7 times with the belt. She was squirming around while being spanked. She said "ouch" and cried. (Trial RP 251, ll. 18-22; RP 358, ll.7-9; RP 361, ll. 7-10; RP 383, ll. 1-6; RP 481, ll. 12-17; RP 575, ll. 6-11; RP 611, l. 24 to RP 612, l. 9).

Mr. Seamster later went into K.R.'s bedroom and apologized to her for the spanking. He told her that he and her mother only wanted to protect her. They didn't want her going out and getting hurt. (Trial RP 256, ll. 1-9; RP 555, ll. 1-8).

Mr. Seamster's date of birth is March 7, 1980. He is 6 feet 3 inches tall and weights between 300 and 350 pounds. (Trial RP 250, l. 25; RP 571, ll. 11-17).

K.R. slept on her stomach due to the pain from the spanking. After she saw a doctor she was prescribed pain pills which she took for 1-2 weeks. She had trouble sitting down, lying on her back, wearing pants, going to the bathroom, and bending over. (Trial RP 257, ll. 22-24; RP 260, ll. 8-19; ll. 22-25).

On November 3, 2009, during a physical education class at school, her classmates saw bruises on K.R. She was referred to the assistant prin-

cial - Vicki Swisher. Ms. Swisher observed marks on K.R.'s lower left inner thigh and back. There was bruising, blood specks and a cut. (Trial RP 146, ll. 1-24; RP 147, ll. 11-19; RP 258, ll. 8-23).

Ms. Swisher contacted the Moses Lake Police Department. Officer Frey arrived with Sara Perez, a CPS investigator. (Trial RP 148, ll. 7-12; RP 155, ll. 4-9).

Ms. Perez noted that K.R. could not sit still. It seemed as if she was unable to find a comfortable position. She appeared to be in pain. Ms. Perez took photos of the bruising she observed on K.R.. (Trial RP 158, ll. 3-11; ll. 16-20; Ex. 17).

Ms. Perez described K.R. as limping or waddling when she walked. K.R. is overweight. (Trial RP 176, ll. 15-17; RP 189, ll. 20-24).

On November 6, 2009, Ms. Perez took additional photos. At that time K.R. complained of pain. She had difficulty removing her clothes and posing. (Trial RP 179, ll. 10-19; Ex. 30).

K.R.'s bruises lasted approximately 1 week. She bruises easily. She has a scar on her inner thigh. She believes the belt broke the skin. (Trial RP 262, ll. 2-13; RP 492, ll. 10-12; ll. 21-22).

Ms. Perez looked at K.R.'s My Space page. It contained personal information including chats with friends, music she likes, and a statement that K.R. "liked the sound of little boys screaming when she raped them." K.R. stated that she was either 18 or 19 years of age on her My Space

page. (Trial RP 187, l. 16 to RP 188, l. 24; RP 189, ll. 11-18; RP 268, ll. 13-20).

An Information was filed on November 4, 2009 charging Mr. Seamster with assault of a child third degree and child molestation second degree. (CP 1).

Numerous scheduling orders were entered and continuances were granted. Appropriate waivers were signed. (CP 20; CP 23; CP 24; CP 25; CP 33; CP 34; CP 36; CP 51).

An Amended Information was filed on April 5, 2010. It changed the charging period for the child molestation count. A Second Amended Information was filed June 30, 2010. It added an aggravating factor to the child molestation count. (CP 31; CP 49).

Mr. Seamster filed multiple motions to dismiss and/or suppress evidence based upon governmental mismanagement and/or misconduct. (CP 52; CP 59; CP 65; Pre-trial RP 118, ll. 4-17; Trial RP 48, l. to RP 49, l. 12; RP 109, l. 4 to RP 113, l. 22; RP 114, l. 18 to RP 115, l. 25; RP 120, l. 12 to RP 121, l. 8).

The dismissal motions pertained to lack of discovery concerning the November 6, 2009 digital photos taken by CPS. Defense counsel claimed that the lack of comparative photos impacted the ability of the defense expert to prepare for trial. (Pre-trial RP 108, l. 19 to RP 109, l. 8; RP 109, ll. 19-22; RP 111, l. 15 to RP 112, l. 2; RP 122, ll. 5-17; RP 123, l. 9 to RP 124, l. 2; Trial RP 4, ll. 5-8; RP 40, l. 1 to RP 42, l. 20).

After the jury was selected, a pre-trial hearing was conducted concerning the missing photographs. Sara Perez testified that an Assistant Attorney General advised her not to respond to defense counsel's letter concerning the November 6, 2009 digital photos. (Trial RP 77, ll. 1-22; RP 78, ll. 14-22; RP 89, l. 12 to RP 90, l. 21; RP 97, ll. 5-18).

The trial court denied all of the defense motions. The Court gave defense counsel various options to pursue as opposed to dismissal/suppression. (Pre-trial RP 129, ll. 11-18; Trial RP 19, ll. 7-21; RP 63, l. 4 to RP 67, l. 1; RP 93, l. 15 to RP 94, l. 24; RP 100, l. 2 to RP 104, l. 8; RP 121, l. 11 to RP 123, l. 3).

Mr. Seamster moved for a mistrial following the last of the trial court's rulings. The motion for mistrial was denied. The State finally elected to proceed without its expert witness. (Trial RP 129, ll. 1-23; RP 130, ll. 18-24; RP 131, ll. 3-7; RP 131, l. 25 to 132, l. 12; RP 132, l. 15 to RP 133, l. 2; RP 140, ll. 19-21; RP 141, ll. 12-17).

Dr. Kiesel, a forensic pathologist, testified for the defense as a consultant. In his opinion, the mark on K.R.'s inner thigh was not necessarily caused by the belt. This appeared more like a fingernail scratch. This was the only area where a cut occurred. (Trial RP 606, ll. 11-17; RP 607, l. 25 to RP 608, l. 1; RP 619, l. 1 to RP 620, l. 11; RP 621, ll. 7-14).

The State discussed the trial court's proposed jury instructions on assault of a child in the third degree. The State pointed out that there was no reference to "a wrongful act." (Trial RP 631, ll. 2-24).

Defense counsel did not object to any of the jury instructions. (Trial RP 635, ll. 1-2).

A jury found Mr. Seamster guilty of third degree assault of a child. It found him not guilty of child molestation second degree. (CP 160; CP 161).

Judgment and Sentence was entered on August 23, 2010. (CP 166).

A Notice of Appeal was filed on September 13, 2010. (CP 189).

SUMMARY OF ARGUMENT

The absence of a jury instruction defining “assault” relieved the State of its burden of proof and denied Mr. Seamster a constitutionally fair trial.

The State failed to prove, beyond a reasonable doubt, each and every element of the offense of child assault in the third degree.

ARGUMENT

RCW 9A.36.140(1) defines the crime of assault of a child in the third degree as follows:

A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in

RCW 9A.36.031(1)(d) or (f) against the child.

The State did not charge Mr. Seamster with a violation of RCW 9A.36.031(1)(d).

There is no dispute that Mr. Seamster is over the age of eighteen. There is no dispute that K.R. is under the age of thirteen. There is no dispute that Mr. Seamster spanked K.R. with a belt.

The question is whether or not the spanking amounts to third degree assault as defined in RCW 9A.36.031(1)(f).

RCW 9A.36.031(1)(f) defines third degree assault as follows:

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:

...

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering... .

“...[A] criminal assault requires unlawful force.” *State v. Acosta*, 101 Wn. 2d 612, 618, 683 P. 2d 1069 (1984).

QUERY: Was the force used by Mr. Seamster when he spanked K.R. “unlawful?”

A parent has a right to use reasonable and timely punishment to discipline a minor child within the bounds of moderation and for the best interest of the child. **The parent may decide what is required and the means to impose appropriate control.** For this purpose, a parent may inflict *rea-*

sonable corporal punishment. *State v. Thorpe*, __R. I.__, 429 A.2d 785, 788 (1981); see: *Anderson v. State*, 61 Md. App. 436, 487 A.2d 294, 297-99 (1985); *Bowers v. State*, 283 Md. 115, 389 A. 2d 341, 348 (1978). The focus is on the welfare of the child and not on the parent's liberty of action. If the limits are exceeded, the parent may be criminally liable for assault. 59Am. Jur. 2d *Parent and Child* § 24 (1971). The prevalent approach in modern case law is to determine "whether, in light of all the circumstances, the [parental] conduct itself, viewed objectively, would be considered excessive, immoderate, or unreasonable." ...2P.R. Robinson, *Criminal Law Defenses* § 144(e)(2), at 171 (1984); see *Bowers*, 389 A.2d at 348; see also *State v. Waller*, 22 Or. App. 299, 538 P. 2d 1274, 1275 (1975).

State v. Singleton, 41 Wn. App. 721, 723, 705 P. 2d 825 (1985). (Emphasis supplied.)

The objectively reasonable test adopted in *Singleton* has been partially codified in RCW 9A.16.100. It states:

It is the policy of this state to protect children from assault and abuse and to encourage parents...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...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**...for purposes of restraining or correcting the child.

(Emphasis supplied.)

Ms. Redwine authorized Mr. Seamster to discipline K.R. when necessary. They discussed methods of discipline. Spanking by a belt was the last resort if K.R. exceeded the legitimate parameters set by Ms. Redwine and Mr. Seamster.

RCW 9A.16.100 also sets out a number of actions that are presumed unreasonable. The only pertinent portion of the statute applicable under the facts and circumstances of Mr. Seamster's case is: "...(6) doing any...act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks."

Following the spanking K.R. had bruises on her lower back, buttocks and thighs. The bruises lasted one to two weeks. Mr. Seamster contends that the bruising constitutes "minor temporary marks."

K.R. testified that the spanking was painful. She had trouble sleeping, sitting down, wearing pants, bending over and going to the bathroom. She took prescribed pain pills for one to two weeks.

It is the normal result of spanking with a belt that the recipient is going to experience pain. It is the purpose behind the spanking; *i.e.*, a reminder not to repeat the same mistake again.

RCW 9A.04.110(4)(a) defines the phrase "bodily harm" as meaning "physical pain or injury...or an impairment of physical condition."

Mr. Seamster concedes that he inflicted bodily harm on K.R. However, that bodily harm was not "greater than transient pain." *See: State v. Hall*, 104 Wn. App. 56, 62, 14 P. 3d 884 (2000).

The offense of third degree assault under RCW 9A.36.031(1)(f) requires “substantial pain.” The “substantial pain” must extend for a sufficient period of time to “cause considerable suffering.”

The Legislature has not seem fit to define “transient pain,” “substantial pain,” or “considerable suffering.”

There is no statutory definition of the word “assault.”

When the Legislature does not define a term used in a criminal statute, the common meaning of that term is applied. *See: State v. Engel*, 166 Wn. 2d 572, 579, 210 P. 3d 1007 (2009).

The following definitions are contained in The Random House Dictionary of the English Language (Unabridged ed. 1966):

Transient means: **1.** not lasting, enduring, or permanent; transitory. **2.** lasting only a short time; existing briefly; temporary... .

Substantial means: **1.** of ample or considerable amount... **2.** of a corporeal or material nature; real or actual... .

Moderate means: **1.** kept or keeping within reasonable or proper limits; not extreme, excessive, or intense...**2.** of medium quantity, extent, etc.

K.R.’s bruising did not last. It was not enduring. It was not permanent. It was transitory.

The pain was real and actual even though Mr. Seamster used his opposite hand to reduce the force of the strokes when he spanked K.R.

The word “suffer” means: “to undergo or feel pain or distress... .”

The word “considerable” means: “rather large or great... in...extent... .”

The Random House Dictionary of the English Language, *supra*.

Mr. Seamster maintains that K.R. exaggerated any suffering that the spanking caused. The bruises were resolving within a three day period after the spanking. (Ex. 17; Ex.30).

The *Singleton* case sets out factors to be considered as to whether or not parental punishment exceeds reasonable and moderate discipline.

The *Singleton* Court stated at 723-24:

Several courts have identified the circumstances which the trier of fact should consider in determining reasonableness of the punishment: *e.g.* the age, size, sex, and physical condition of both child and parent, the nature of the child’s misconduct, the kind of marks or wounds inflicted on the child’s body, the nature of the instrument used for punishment, etc. *Harbaugh v. Commonwealth*, 209 Va. 695, 167 S.E.2d 329, 332 (1969); *see State v. Hunt*, 2 Ariz. App. 6, 406 P.2d 208, 222, (1965); *see Carpenter v. Commonwealth*, 186 Va. 851, 44 S.E.2d 419, 424-25 (1947). These factors are objective not subjective. Thus, the force that is made lawful ... is that which is reasonable and moderate as objectively determined by a jury. This is a limitation upon parental authority. The parent’s belief that it is necessary to punish the child does not permit immoderate and unreasonable force. *Waller*, 538 P. 2d at 1275.

RCW 9A.16.100 incorporates several of these factors for the jury to consider in analyzing whether or not the punishment inflicted is reasonable and moderate under the circumstances. The factors include:

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 and is not intended to be exclusive.

K.R. is large for her age. She is not disabled. She is not particularly vulnerable. Bruising from a spanking is expected to occur.

Even though the statute does not include consideration of the child's misconduct, Mr. Seamster contends that it is a critical component in determining whether or not punishment is moderate and reasonable. *See: State v. Singleton, supra.* K.R. had been engaging in phone sex with an adult male. This is egregious misconduct by a child under the age of thirteen.

Additionally, K.R. initially denied that she was on My Space. Having a My Space account was a violation of restrictions placed upon her by her mother and Mr. Seamster. Thus, lying and phone sex necessitated remedial measures.

When all of these undefined terms are placed in context, it becomes highly pertinent that the trial court failed to give a definitional instruction on assault. WPIC 35.50 defines assault in part as follows:

An assault is an intentional touching or striking...of another person, with unlawful

force, that is harmful or offensive... . **A touching or striking... is offensive if the touching or striking...would offend an ordinary person who is not unduly sensitive.**

(Emphasis supplied.)

Spanking a pre-teen who is engaging in phone sex is not offensive. The force used by Mr. Seamster when he spanked K.R. was moderate and reasonable.

The NOTE ON USE to WPIC 35.50 states: “Use this general definition with any instruction that refers to assault.”

The word “assault” has a definitive meaning in the law. In the recent case of *State v. Flora*, slip opinion 64149-2 (3/14/2011) the court discussed the term “willfully” as used in the felony elude statute. The Court stated at 4:

Because the term has a particular meaning, it should be defined for the jury upon request by a party. *See: State v. Allen*, 101 Wn. 2d 355, 358-62, 678 P. 2d 798 (1984). Without a definition, the jury is left to come up with its own understanding of a technical term for a comparable mental state. *Allen*, 101 Wn. 2d at 362.

Mr. Seamster maintains that defining “assault” falls within the requirements of the *Flora* case. The lack of a definitional instruction on “assault” left the jury in limbo. He also asserts that the failure to provide the definitional instruction is akin to not reading an assault instruction to the jury. *See: State v. Sanchez*, 122 Wn. App. 579, 94 P. 3d 384 (2004).

The trial court gave a definitional instruction for third degree assault. The instruction refers to the word “assault.” (Appendix “A”). Moreover, the trial court gave an instruction on the parental defense under RCW 9A.16.100. (Appendix “B”).

...[E]xamples of manifest constitutional errors in jury instructions include directing a verdict, shifting the burden of proof to the defendant, failing to define the “beyond a reasonable doubt” standard, failing to require a unanimous verdict, and **omitting an element of the crime charged.**

State v. O’Hara, 167 Wn. 2d 91, 103 (2009).

Even reading the definitional instruction of third degree assault with the parental defense instruction, there is a lack of sufficient guidance for a jury to conclude, beyond a reasonable doubt, that Mr. Seamster was guilty of the offense.

The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt

State v. Green, 94 Wn. 2d 216, 616 P. 2d 628 (1980).

In effect, the lack of the instruction shifted the burden of proof and relieved the State of the necessity of proving each and every element of the offense of third degree assault of a child beyond a reasonable doubt.

See: RCW 9A.04.100(1).

CONCLUSION

Mr. Seamster is entitled to a new trial. He was unconstitutionally convicted due to instructional error. The instructional error is manifest. The jury was not fully advised as to the definitional predicates for the offense of third degree assault of a child.

Additionally, the State failed to prove, beyond a reasonable doubt, each and every element of the offense of third degree assault of a child. The case should be dismissed.

DATED this 22^d day of March, 2011.

Respectfully submitted,



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APPENDIX "A"

INSTRUCTION NO. 5

ASSAULT IN THE THIRD DEGREE

A person commits the crime of assault in the third degree when he or she, with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

A person is criminally negligent, or acts "with criminal negligence," when he or she fails to be aware of a substantial risk that bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering may occur, and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

When criminal negligence as to a particular result is required to establish an element of a crime, the element is also established if a person acts recklessly as to that result. A person acts recklessly when he or she knows of and disregards a substantial risk that bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering may occur, and this disregard is a gross deviation from conduct a reasonable person would exercise in the same situation.

"Bodily harm" means physical pain or injury, illness, or an impairment of physical condition.

APPENDIX "B"

INSTRUCTION NO. 6

PHYSICAL DISCIPLINE OF A CHILD

It is a defense to a charge of assault that the force used was lawful as defined in this instruction.

The physical discipline of a child is lawful when it is reasonable and moderate and is inflicted by a parent, or by a person authorized in advance by the child's parent to use such force, for purposes of restraining or correcting the child.

You may, but are not required to, infer that it is unreasonable to restrain or correct a child by doing any act likely to cause, and which does cause, bodily harm greater than transient pain or minor temporary marks. You shall consider the age, size, and condition of the child and the location of the injury when determining whether the bodily harm is reasonable and moderate. This inference is not binding upon you, and it is for you to determine what weight, if any, such inference is to be given.

The State bears the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, then you should return a verdict of not guilty as to Count 1.