

FILED

APR 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29353-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARCELLUS SEAMSTER, JR., APPELLANT

BRIEF OF RESPONDENT

Karen Horowitz
Attorney for Respondent, State of Washington
WSBA # 40513
Grant County Prosecuting Attorney's Office
P.O Box 37
Ephrata, WA 98823-0037
(509) 754-2011

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A. ASSIGNMENTS OF ERROR

The Respondent, State of Washington, asserts that no error occurred in the trial and conviction of the Appellant and respectfully requests that his conviction be affirmed.

B. STATEMENT OF THE CASE

The Appellant, Marcellus Seamster, Jr., was convicted following a jury trial of one count of Assault of a Child in the Third Degree under RCW 9A.36.140(1) and RCW 9A.36.031(1)(f). CP 166. A standard range sentence was imposed. CP 166-182.

K.R. was born on November 16, 1996. 3RP 225. On November 2, 2009 she lived in Moses Lake, WA with her mother, Tawnya Redwine, and her mother's boyfriend, Marcellus Seamster, Jr. 3RP 225-26. Mr. Seamster, the appellant, was 29 years old. 5RP 572.

On November 2, 2009 Mr. Seamster punished K.R. for accessing her MySpace account on her cell phone that evening. 3RP 246-47. Mr. Seamster took K.R.'s cell phone away from her, went into his bedroom, picked up his belt, and called K.R. into the room. 3RP 248. He told K.R. to take off her pants, and she did so. 3RP 250-51. K.R. was wearing underwear. 3RP 250. Mr. Seamster held his belt in his right hand. 3RP 250. He held K.R. in place by grabbing her elbow, and hit her more than 5

times with the belt. 3RP 251. She screamed as he did so and was in pain. 3RP 252.

K.R. slept on her stomach that night due to the pain from being hit by Mr. Seamster. 3RP 257. She had trouble getting out of bed and getting dressed because it hurt her to have anything touching her legs. 3RP 257-58. K.R. went to the doctor on November 3, 2009 and was prescribed pain pills which she took for the next week or two. 3RP 260. During that time K.R. had difficulty sitting, moving, using the restroom, and sleeping. 3RP 260-61. She had bruising which lasted approximately one week and has a scar on her inner thigh from Mr. Seamster's belt. 3RP 262. Assistant Principal Vicki Swisher observed bruising, blood specks, and a cut to K.R.'s lower back and legs on November 3, 2009. 3RP 147.

C. STATEMENT OF THE ISSUES

1. Did the jury instructions properly instruct the jury on Washington law and accurately inform the jury regarding the burden of proof?
2. Was there sufficient evidence presented for the jury to find that the State had proved the elements of assault of a child in the third degree beyond a reasonable doubt?

D. ARGUMENT

1. The jury was properly instructed regarding Washington law and the burden of proof.

The instructions given to the jury accurately instructed the jury on Washington law and correctly stated the burden of proof. Mr. Seamster was charged and convicted of Assault of a Child in the Third Degree under RCW 9A.36.140 and RCW 9A.36.031(1)(f). CP 166. The jury was properly instructed regarding this charge. Further, the defense did not object at trial to the jury instructions given. 5RP 635.

Jury Instruction No. 4 provided the elements of Assault of a Child in the Third Degree. CP 151. The instruction given is nearly identical to WPIC 35.39. It accurately informed the jury of the elements of the charged crime. *See* RCW 9A.36.140.

Jury Instruction No. 5 defined Assault in the Third Degree, criminal negligence, and bodily harm. CP 152. The definition given for Assault in the Third Degree is identical to WPIC 35.20. The definition given for bodily harm is identical to WPIC 2.03. The definition given for criminal negligence is nearly identical to WPIC 10.04. The definitions accurately informed the jury regarding Washington law. *See* RCW 9A.04.110(4)(a); RCW 9A.36.031; RCW 9A.08.010.

These instructions did not require the jury to find that an “assault” occurred. Instead, to convict the defendant the jury had to find beyond a reasonable doubt that the defendant committed the crime of assault in the third degree against K.R. CP 151. To find that the defendant committed

the crime of assault in the third degree, they had to find that he, with criminal negligence, caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering. CP 152.

Additionally, the jury was instructed regarding the defense of lawful physical discipline of a child. CP 153. The instruction given was nearly identical to WPIC 17.07. The jury was instructed that the State bears the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. CP 153. This instruction accurately informed the jury regarding Washington law. RCW 9A.16.100.

2. There was sufficient evidence to show that the State proved each of the elements of Assault of a Child in the Third Degree beyond a reasonable doubt.

There was sufficient evidence to convict Mr. Seamster of the crime of Assault of a Child in the Third Degree under RCW 9A.36.140 and RCW 9A.36.031(1)(f). When reviewing a sufficiency of the evidence challenge, the court considers whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. *State v. Hepton*, 113 Wn. App. 673, 681, 54 P.3d 233 (2002); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The jury, as finder of fact, is free to weigh the evidence and make credibility determinations, and the

reviewing court must defer to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. E.J.Y.*, 113 Wn. App. 940, 952, 55 P.3d 673 (2002).

To convict Mr. Seamster of the crime of assault of a child in the third degree, the State was required to prove beyond a reasonable doubt (1) that on or about November 2, 2009, Mr. Seamster committed the crime of assault in the third degree against K.R.; (2) that Mr. Seamster was eighteen years of age or older and K.R. was under the age of thirteen; and (3) that this occurred in the State of Washington. RCW 9A.36.140; CP 151. A person commits the crime of assault in the third degree when he, with criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering. RCW 9A.36.031; CP 152.

K.R. was twelve years old on November 2, 2009. 3RP 225. Mr. Seamster was 29 years old. 5RP 572. They lived at the same residence in Moses Lake, WA. 3RP 225-26. That evening, Mr. Seamster punished K.R. for accessing her MySpace account on her phone. 3RP 246-47. He took K.R.'s phone away from her, went into his bedroom, picked up a belt, and called K.R. into the room. 3RP 248. Mr. Seamster then told K.R. to take off her pants, and she did so. 3RP 250-51. K.R. was wearing underwear. 3RP 250. Mr. Seamster held K.R. in place by grabbing her

elbow, and hit her multiple times with the belt. 3RP 251. She screamed as he did so and was in pain. 3RP 252.

K.R. slept on her stomach that night due to the pain from being hit by Mr. Seamster. 3RP 257. She had trouble getting out of bed and getting dressed because it hurt her to have anything touching her legs. 3RP 257-58. K.R. went to the doctor on November 3, 2009 and was prescribed pain pills which she took for the next week or two. 3RP 260. During that time K.R. had difficulty sitting, moving, using the restroom, and sleeping. 3RP 260-61. She had bruising which lasted approximately one week and has a scar on her inner thigh from Mr. Seamster's belt. 3RP 262. A school employee observed bruising, blood specks, and a cut to K.R.'s lower back and legs on November 3, 2009. 3RP 147.

There was sufficient evidence to find that the State proved each of the elements of Assault of a Child in the Third Degree beyond a reasonable doubt. Further, there was sufficient evidence to find that the State proved beyond a reasonable doubt that the force used by Mr. Seamster was not lawful. Consequently, Mr. Seamster's conviction should be affirmed.

E. CONCLUSION

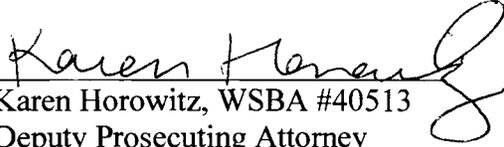
For the reasons set out above, the State respectfully requests that Mr. Seamster's conviction be affirmed.

DATED: April 21, 2011

Respectfully submitted:

D. ANGUS LEE,

Prosecuting Attorney


Karen Horowitz, WSBA #40513
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