

FILED
Court of Appeals
Division III
State of Washington
6/26/2018 4:27 PM

NO. 35561-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent

v.

ANDREW JOHN SPRINT,

Appellant.

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

OPENING BRIEF OF APPELLANT

KATE BENWARD
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION..... 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

D. STATEMENT OF THE CASE..... 4

1. Andrew Sprint finds out he is a father the day his son is born..... 4

2. Mr. Sprint and the Merritts vie for custody..... 6

3. The evidence at trial establishes the baby had head trauma, but the source and timing of the trauma is heavily disputed..... 7

4. Detective Helvey’s criminal investigation is driven by a disputed medical conclusion..... 13

5. The trial court acquits Mr. Sprint of first, second, and third degree assault, but finds him guilty of fourth degree assault, without evidence he harmfully touched his son..... 15

E. ARGUMENT..... 16

1. Without evidence that Mr. Sprint harmfully touched his child, his conviction for assault in the fourth degree was based on insufficient evidence..... 16

a. Mr. Valdez’s claim that Mr. Sprint was rough with Aiden in the past, which did not cause injury, does not establish that Mr. Sprint harmfully touched Aiden on April 16..... 18

b. Mr. Sprint’s distraught statements were not tacit admissions that established evidence of a harmful touching. 20

c. The trial court’s acquittal of Mr. Sprint for the offenses of assault in the first, second, and third degree because of not knowing what act caused Aiden’s injury, also requires acquittal of assault in the fourth degree. 22

2. This court should reverse the imposition of discretionary legal financial obligations because the trial court did not conduct an adequate inquiry into Mr. Sprint’s ability to pay, and there was not evidence he was able to pay......24

a. The trial court’s inquiry into Mr. Sprint’ ability to pay was inadequate.....24

b. The legislature recently amended the legal financial obligation statute to prohibit a court from imposing costs on indigent persons, which would prohibit the court from imposing costs on Mr. Sprint.
.....27

c. The amendments prohibiting courts costs on the indigent are remedial and clarifying, and should apply retroactively to Mr. Sprint.....28

d. Even if the amendments do not apply retroactively, the newly amended statute applies to Mr. Sprint because his case is still pending on direct appeal.....30

F. CONCLUSION.....31

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

City of Richland v. Wakefield, 186 Wn.2d 596, 380 P.3d 459 (2016).. 25

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 24, 25

State v. Christopher, 135 Wn.2d 1001, 369 P.3d 149 (2016) 27

State v. Como, 185 Wn.2d 1025, 377 P.3d 730 (2016) 27

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009). 17

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)..... 16

State v. Ralston, 185 Wn.2d 1025, 377 P.3d 724 (2016)..... 27

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013). 16, 18

Washington Court of Appeals Decisions

*Marine Power & Equip. Co. v. Wash. State Human Rights Comm'n
Hearing Tribunal*, 39 Wn. App. 609, 694 P.2d 697 (1985)..... 30

State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011) 16

State v. Ashcraft, 71 Wn. App. 444, 859 P.2d 60 (1993) 17, 19, 23

State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972)..... 19

State v. Jarvis, 160 Wn. App. 111, 246 P.3d 1280 (2011) 17

State v. Jussila, 197 Wn. App. 908, 392 P.3d 1108 (2017)..... 16

State v. Kane, 101 Wn. App. 607, 613, 5 P.3d 741 (2000) 28

State v. Lundy, 176 Wn. App. 96, 308 P.3d 755 (2013)..... 29

State v. Mathers, 193 Wn. App. 913, 376 P.3d 1163 (2016)..... 29

<i>State v. Neslund</i> , 50 Wn. App. 531, 749 P.2d 725 (1988).....	20
<i>State v. Rose</i> , 191 Wn. App. 858, 365 P.3d 756 (2015)	30
<i>State v. Scanlan</i> , 2 Wn. App. 2d 715, 733, 413 P.3d 82 (2018).....	20
<i>State v. Seward</i> , 196 Wn. App. 579, 384 P.3d 620 (2016), <i>review denied</i> , 188 Wn.2d 1015, 396 P.3d 349 (2017)	26
<i>State v. Tyler</i> , 138 Wn. App. 120, 155 P.3d 1002 (2007)	17

Statutes

Laws of 2018, ch. 269, § 6.....	27, 28, 29
RCW 10.01.160(3).....	4, 24, 27, 28, 29
RCW 36.18.020(2)(h).....	4, 27, 29
RCW 9A.36.041	16

Federal Court Decisions

<i>Holmes v. United States</i> , 580 A.2d 1259 (D.C. 1990).....	21
---	----

A. INTRODUCTION

Andrew Sprint had primary custody of his nine-week-old infant when he called 911, reporting his baby was limp and not breathing well. Medical testing revealed the baby had head trauma, the date and origin of which was the subject of competing medical opinion.

The trial court acquitted Mr. Sprint of the charged offense of child abuse in the first degree, and the lesser offenses of child abuse in the second and third degree, finding the State did not prove beyond a reasonable doubt that Mr. Sprint intentionally or recklessly caused the baby's injuries.

The court found, however, based on Mr. Sprint's statements and Mr. Sprint's roommate's critical description of Mr. Sprint's parenting, none of which indicated he caused the baby's injuries, that Mr. Sprint intentionally assaulted his son. The trial court convicted Mr. Sprint of assault in the fourth degree, imposing over \$30,000 in restitution and over \$1,400 in other costs without ever assessing Mr. Sprint's ability to pay.

B. ASSIGNMENTS OF ERROR

1. The court lacked sufficient evidence to find beyond a reasonable doubt that Mr. Sprint negligently inflicted injury through an intentional assault.

2. Absent substantial evidence, the trial court erred in entering finding of fact 2.1.

3. Absent substantial evidence, the trial court erred in entering finding of fact 2.2.

4. Absent substantial evidence, the trial court erred in entering finding of fact 2.3.

5. Absent substantial evidence, the trial court erred in entering finding of fact 2.4.

6. Absent substantial evidence, the trial court erred in entering finding of fact 2.5.

7. Absent substantial evidence, the trial court erred in entering finding of fact 2.6.

8. Absent substantial evidence, the trial court erred in entering finding of fact 2.7.

9. Absent substantial evidence, the trial court erred in entering finding of fact 2.8.

10. The trial court failed to adequately inquire into Mr. Sprint's ability to pay legal financial obligations.

11. The trial court erred in imposing discretionary legal financial obligations on an indigent person.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the prosecution establish beyond a reasonable doubt all of the elements of a charged offense. The prosecution elected to prove Mr. Sprint guilty by alleging an actual physical striking or touching of another, with or without physical harm, but failed to prove Mr. Sprint harmfully touched his child. Where the court lacked evidence that Mr. Sprint harmfully touched his child, resulting in the injury alleged by the prosecution, is dismissal of his conviction for assault in the fourth degree required?

2. Before imposing legal financial obligations, the trial court is required to make an individualized inquiry into a person's ability to pay costs. Where the trial court failed to inquire into Mr. Sprint's ability to pay costs, including the pending restitution bill of \$30,000 which the

court ultimately imposed, is reversal and remand for the court to determine Mr. Sprint's ability to pay required?

3. Absent evidence that Mr. Sprint was able to pay his legal financial obligation, and because he is indigent, does RCW 10.01.160(3) and RCW 36.18.020(2)(h) prohibit the court from imposing discretionary legal financial obligations?

D. STATEMENT OF THE CASE

1. Andrew Sprint finds out he is a father the day his son is born.

Andrew Sprint and Chalese Merritt knew each other from the local theater group they were involved in and dated briefly, engaging in sexual intercourse. RP 329, 331. They did not keep in touch after their casual relationship ended. RP 333. Chalese¹ did not know she was pregnant with Mr. Sprint's child until five months into the pregnancy. RP 332-33, 402. Even when she knew Mr. Sprint was the father of the baby, she did not tell him. RP 402.

Chalese arranged for the baby to be adopted through a mutual theater friend, Mike Magnotti. RP 339. Chalese knew the adoption

¹ Chalese Merritt's first name will be used to avoid confusion with the other witnesses who share the same last name. No disrespect is intended.

could not go through without Mr. Sprint's agreement but still did not tell him she was pregnant with his child, even though they had casual contact during her pregnancy. RP 403.

Mr. Mangotti called Mr. Sprint the day the baby was born. RP 340, 1299. Mr. Sprint was shocked when he learned that Chalese had just given birth to his son. RP 1299. He signed the document giving up his parental rights but immediately afterwards he changed his mind, revoking his consent within the allowed 24-hour period. RP 341-342, 1299-1300.

Once Mr. Sprint learned he was going to be a father, his friends collected all the things he would need to bring the baby home. RP 1062-63. Mr. Sprint's mom, sister, and friends came from the west side of the state while the baby was in the hospital. RP 1063.

Chalese had not planned to keep the child and chose not to see the baby after was born. RP 341. When she learned Mr. Sprint wanted to be a father and did not intend to waive his parental rights, she decided she also would be involved with her son. RP 342.

Mr. Sprint assumed he would take the baby home from the hospital with him because he wanted to be a parent and Chalese did

not. RP 1063, 1304-05. The baby ended up going home to Chalese's parents' home over Mr. Sprint's objection. RP 343, 1308.

2. Mr. Sprint and the Merritts vie for custody.

Twenty-one year old Chalese lived with her parents, Melanie and John Merritt. RP 345. They had an open door policy for Mr. Sprint to visit the baby whenever he wanted. RP 1308. Mr. Sprint went to their house nearly every day, where he would stay 6-10 hours. RP 1308-1309, 1316.

Mr. Sprint was twenty-eight years old and had his own apartment. He told Chalese that he felt like he was in a junior-high dating relationship when he visited her parents' house and he wanted to be able to take the baby back to his apartment. RP 1317.

One evening when Chalese's parents were at a movie, and Mr. Sprint was at their house taking care of the baby, he told Chalese that he wanted to spend time with their baby at his apartment and that he was going to take his son home with him. RP 352, 1317-1318. He pushed past Chalese, taking his son with him. RP 353, 1318. He told Chalese she was welcome to come to his apartment but that her parents were not. RP 1319.

Chalese and her parents went to court and the judge granted a temporary order granting Mr. Sprint 90 minute visits with the baby every other day. RP 354, 356, 1321. When they went back to court about three weeks later, the court flipped that custody arrangement, giving Mr. Sprint full custody, and limiting Chalese's visits to 90 minutes every other day. RP 357, 1322. In the meantime, the Merritts had named Mr. Sprint's son Aiden,² against Mr. Sprint's wishes. RP 516-517.

3. The evidence at trial establishes the baby had head trauma, but the source and timing of the trauma is heavily disputed.

Aiden was about nine and a half weeks old when Mr. Sprint called 911, reporting that he was getting ready to feed his son, when he saw the baby was not breathing well and went limp. RP 157, 274-278.

While on the phone with the 911 operator, Mr. Sprint observed that Aiden's breathing improved. RP 286. When the EMT arrived, the baby appeared normal. RP 155. Mr. Sprint still chose to have the EMTs take Aiden to the hospital for monitoring. RP 159. He followed in his own vehicle, so that he could drive them home afterwards. RP 172-3.

² The baby's name is spelled "Aieden," but the transcripts and trial court order spell his name "Aiden," which will be used here to avoid confusion.

Within a few minutes of arriving at the hospital, medical staff observed that Aiden had a blank stare, which medical staff recognized to be an “absence seizure.” RP 162. Such seizures are a result of “altered mental status,” and can be very subtle, sometimes not even apparent to caregivers. RP 38.

Doctors at Central Washington Hospital immediately ran a CT scan. RP 163. The CT scan revealed edema, subdural hematomas, and retinal hemorrhaging. RP 188. This triad of symptoms is referred to as “abusive head trauma” in the medical community. RP 686. These symptoms used to be referred to as “shaken baby syndrome” but this term was changed, because without evidence of impact to the head, causation of the injury cannot be determined. RP 687.

Aiden needed to be transported from Wenatchee to Harborview, in Seattle, and doctors began the process of anesthetizing and intubating him for transport. RP 309. Aiden’s lung collapsed through this process. RP 311.

Dr. Rebecca Wiester is the Medical Director at the Seattle’s Children’s Hospital Child Protection Program. RP 181. Her job is to consult and make recommendations to the treating physicians. RP 182.

Dr. Kenneth Feldman is Dr. Wiester's colleague who covered her on Aiden's case when she was gone for two weeks. RP 183-4.

Consulting physicians like Dr. Wiester and Dr. Feldman rely on the specialized training of neuroradiologists to help them interpret the CT scans and MRIs, because the radiologists are best trained to read these reports. RP 704. The radiologist who performed the CT scan at Central Washington that was later reviewed by Dr. Wiester and Feldman believed there were hemorrhages of varying ages. RP 200-201, 206, 259, 755-56. Mixed density subdural hematomas can be the result of accidental injury, and it is possible for children to develop subdural hematomas without a traumatic injury. RP 732-733, 1234.

Subdural hemorrhages are believed to be caused by a trauma that tears blood vessels. RP 701. Aiden's subdurals had two densities. RP 695. Dr. Feldman agreed that MRI revealed there could have been multiple injuries that were days or even weeks apart. RP 756. Dr. Feldman acknowledged that babies with existing subdural hematomas can rebleed, and there is not objective data on how frequently subdurals rebleed. RP 727. Dr. Feldman noted this lack of objective data on how frequently subdurals rebleed can be a "legal issue." RP 728.

Dr. Feldman concluded that the scans revealed only slightly or older age hemorrhages but not birth hemorrhages. RP 756. The Children's Hospital doctors rejected other theories of rebleeds from subdural of mixed density, despite evidence supporting that Aiden may have been experiencing seizures before Mr. Sprint called 911 that day. RP 692-3, 757. Some subdurals are asymptomatic. RP 758. And some seizures can be very subtle and missed by a layperson. RP 693. They can be as subtle as a persistent eye deviation. RP 37. When Dr. Wiester interviewed Chalese, she said that sometimes it seemed like Aiden looked off in one direction. RP 692. Mr. Sprint's ex-girlfriend, who spent extended time with Aiden, and witnessed Aiden's seizures while in the hospital, described that she had seen Aiden staring blankly off to the left when she had been with Mr. Sprint and his son. RP 992. She thought this gazing was "right at that edge of concern," but then Aiden would snap out of it. RP 992. Such small changes in behavior could be evidence of a rebleed. RP 1146.

Dr. Patrick David Barnes, Chief of Pediatric Neuroradiology and Co-director of the Pediatric and MRCT Center at the Lucille Packard Children's Hospital and a Professor of Radiology at Stanford School of Medicine, is a pediatric neuroradiologist for a child abuse

team like that to which Drs. Wiester and Feldman belong to at the University of Washington. RP 1088, 1105. He testified as a neuroradiologist expert witness for the defense. RP 1087.

Dr. Barnes explained that imaging like MRI and CT scans do not provide answers themselves, but provide the issues that need to be explored by clinicians like Drs. Wiester and Feldman. RP 1135. An experienced radiologist can shape this evaluation. RP 1135.

Dr. Barnes concurred with the Central Washington and University of Washington radiologists' view that both the CT scan revealed that some of the collection of blood were likely older, as did the MRI. RP 1104, 1153-54. Dr. Barnes explained that it is difficult to determine timing of an acute or subacute hemorrhage from a CT scan. A "recent" hemorrhage could be anywhere from three hours to ten days old. RP 1118-1119. The mixed intensities of the bleeding indicated some bleeding older than seven days and more recent bleeding. RP 1154-55. He opined that some of the blood collections are recent and some likely older. RP 1104-1105.

Dr. Barnes' analysis of the CT scans and MRIs did not rule out accidental trauma, birth trauma, or lack of oxygen from the failed intubation at the hospital that resulted in a collapsed lung that could

have contributed to the hematomas. RP 1116, 1134-1135, 1137-1138, 1143.

Dr. Barnes clarified that updated literature from the American Academy of Pediatrics cites neck injury as an important finding to look for clinically when the symptoms of abusive head trauma are present, because suspicion of this type of injury should result in injury to the neck. RP 1173. There was no evidence of such injury to Aiden's neck. RP 1173.

Discounting the reports of the radiologist at Central Washington and Harborview, that some of Aiden's hemorrhages were old and some fresh, Dr. Wiester opined that the onset of these symptoms would have been closely associated with the time the baby went limp or when the baby was not breathing well. RP 181-2, 192, 200, 207, 213. Dr. Wiester also rejected the Central Washington resident ophthalmologist's and resident physician's opinion that the retinal hemorrhaging was not inconsistent with valsalva retinopathy, which is more consistent with non-accidental trauma. 147, RP 210.

And despite no data on what level of force is necessary to cause subdural hematomas, Dr. Feldman opined, "I think we can reason from animal studies of how injuries like this occur that, again, it's a

rotational acceleration.” RP 729. And Dr. Feldman estimated that in 80% of cases where there is abusive head trauma, there is some other form of injury beyond subdural hematoma, retinal hemorrhage, and brain injury. RP 759. Aiden had no such bruising or external injury. RP 687.

4. Detective Helvey’s criminal investigation is driven by a disputed medical conclusion.

The day after Aiden was admitted to the hospital Detective David Helvey received a referral to investigate suspected child abuse. RP 762. Based on the detective’s conversation with Dr. Feldman and his own experience, he believed the only explanation for Aiden’s injuries was a violent action that would have taken place sometime between when Mr. Sprint picked Aiden up from Chalese’s house on Tuesday afternoon and when Mr. Sprint called 911. RP 777-778.

This presumption drove Detective Helvey’s investigation. RP 766-768. Detective Helvey spoke with a number of Mr. Sprint’s friends and family, including Chalese and Melanie Merritt, and Mr. Sprint’s roommate, Justin Valdez.

Mr. Sprint’s roommate, Justin Valdez, was rarely home, working during the day, and briefly coming home late in the evening, around 10-10:30 pm. RP 814-815. When Mr. Sprint was fighting for

custody of Aiden, Mr. Valdez wrote a letter in support of Mr. Sprint, stating that Mr. Sprint was capable of providing a safe and loving home for his son based on how he had seen him care for him. RP 826-7. However, when Detective Helvey contacted Mr. Valdez about his investigation, Mr. Valdez told the detective Mr. Sprint was rough with the baby. RP 780. Mr. Valdez never saw Mr. Sprint shake the baby. RP 822.

Mr. Valdez's account of Mr. Sprint's parenting was vastly different from the other people who spent a great deal of time with Mr. Sprint and Aiden. Brittney Morrissey was Mr. Sprint's girlfriend when Mr. Sprint was Aiden's primary custodial parent, staying with Mr. Sprint and Aiden for extended periods during the week and weekends. RP 983-984. By the time of trial, Mr. Sprint and Ms. Morrissey had broken up and she wanted nothing to do with him. RP 995. She nevertheless testified that she had no concerns about how Mr. Sprint treated his son. RP 988- 989.

Likewise, despite their contentious custody battle and her antipathy for Mr. Sprint, Chalese testified that she never worried he would harm their son. RP 404, 1457. And Chalese's mother, Melanie Merritt, who shared this animosity towards Mr. Sprint, testified that she

had no concerns that he would harm or injure Aiden. RP 431, 1456-1457.

In addition to extensive interviews, the detective obtained a search warrant for Andrew's home and personal computer, cell phone, and journal to look for evidence that Mr. Sprint abused Aiden. RP 768-775. The detective's investigation revealed no information that Mr. Sprint had ever done anything like the level of violence that would be required to cause Aiden's trauma. RP 768-770, 786.

5. The trial court acquits Mr. Sprint of first, second, and third degree assault, but finds him guilty of fourth degree assault, without evidence he harmfully touched his son.

Despite the heavily disputed testimony about the timing and source of Aiden's injury, the trial court concluded the "injuries suffered by Aiden Merritt occurred shortly before the 911 call" when the child was in the exclusive control of Mr. Sprint. CP 45, FF 2.2. The trial court acquitted Mr. Sprint of first, second, and third degree child abuse because the prosecution failed to prove that Mr. Sprint intentionally or recklessly caused Aiden's injuries. CP 45, FF 2.8. Not specifying any act that would have caused the injury, the trial court found him guilty of assault in the fourth degree, concluding that Mr. Sprint negligently inflicted Aiden's injuries by an intentional assault. CP 45, FF 2.8. The

trial court also imposed \$1450.00 in legal financial obligations, in addition to over \$30,000 in restitution, without making an adequate inquiry into Mr. Sprint's ability to pay. CP 49; RP 1477.

E. ARGUMENT

1. Without evidence that Mr. Sprint harmfully touched his child, his conviction for assault in the fourth degree was based on insufficient evidence.

Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Jussila*, 197 Wn. App. 908, 920, 392 P.3d 1108 (2017) (citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)). Both direct and indirect evidence may support the jury's verdict, and all reasonable inferences are drawn in favor of the State. *Id.* Inferences based on circumstantial evidence must be reasonable and cannot be based on speculation. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To prove assault in the fourth degree, the State must establish that under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. RCW 9A.36.041(1). Courts look to the common law definition of assault. *State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). There are three recognized definitions of "assault": (1) an unlawful touching

(actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Here, the prosecution elected to prove Mr. Sprint unlawfully touched his child, with criminal intent. CP 5.

Under this prong, assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury. *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011) (quoting *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007)). Simple assault requires actual physical striking or touching of another, with or without physical harm. *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993).

In *Ashcraft*, a witness testified that she saw the appellant appear to strike the child, and that the child then sat quietly for the rest of the day, which was abnormal for a child of that age. This led to a reasonable inference that the striking occurred. *Ashcraft*, 71 Wn. App. at 455. The touching was inferred from an observable physical act. Here, there was no reasonable inference that Mr. Sprint engaged in a harmful touching of his son, as alleged by the prosecution. CP 5.

The trial court relied primarily on Mr. Valdez's opinion about Mr. Sprint's parenting and Mr. Sprint's distraught, confused statements to Mr. Valdez and hospital staff in support of its conclusion that Mr. Sprint intentionally assaulted Aiden and negligently inflicted his injury. CP 45, FF 2.8. This was mere speculation that cannot support a finding of harmful touching required for conviction of assault in the fourth degree. *Vasquez*, 178 Wn.2d at 16.

a. Mr. Valdez's claim that Mr. Sprint was rough with Aiden in the past, which did not cause injury, does not establish that Mr. Sprint harmfully touched Aiden on April 16.

The trial court recognized it was unable to determine the nature of the purported harmful touching, if any. RP 1455. Instead, the court relied on Mr. Valdez's opinion that Mr. Sprint "roughly or inappropriately" handled his child on previous occasions. CP 45, FF 2.6. This opinion evidence did not show that Mr. Sprint inflicted injury on his son as charged.

Mr. Valdez did not know what happened the day Aiden was injured. Mr. Valdez was gone all day, not returning home until about 10-10:30 pm. RP 815. Mr. Valdez said that the night before he saw Aiden in his swing when he started coughing up. RP 815. Mr. Sprint immediately rushed over and started to burp his son. RP 816. Mr.

Sprint told Mr. Valdez that it was strange Aiden drank two bottles of formula that night and Mr. Valdez remembered that Aiden burped it all up. RP 816. Mr. Valdez said he was concerned because Mr. Sprint said he thought Aiden was turning blue but Mr. Valdez did not see this. RP 817. Aiden went to bed and Mr. Valdez did not see them again before he went to work the next day. RP 818. Mr. Valdez did not make any observations about Mr. Sprint doing anything but responding to his son's needs that night.

Yet Mr. Valdez testified he “witnessed days of [Mr. Sprint] being really rough with the baby.” RP 820. This was described as rough-handling and not providing enough neck support, in Mr. Valdez's opinion. RP 805-807. The court acknowledged that Mr. Valdez's opinions about Mr. Sprint's previous handling of the baby did not cause injury or necessitate a report of abuse. CP 45, FF 2.6.

The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Mr. Valdez's opinion that Mr. Sprint generally was rough with his son is not evidence that an “actual physical striking or touching of another, with or without physical harm” occurred. *Ashcraft*, 71 Wn. App. at 455. Absent evidence of an actual touching from which the

court could have inferred Mr. Sprint's act, there was insufficient evidence of fourth degree assault.

b. Mr. Sprint's distraught statements were not tacit admissions that established evidence of a harmful touching.

The court also interpreted as "tacit admissions," Mr. Sprint's denial that he shook his baby and equivocal statement that he could not say whether he caused the injury, as evidence that Mr. Sprint negligently inflicted harm on his son. RP 1445; CP 45, FF 2.5.

Evidence of "'tacit' or 'adoptive' admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony." *Holmes v. United States*, 580 A.2d 1259, 1263 (D.C. 1990)(internal citation omitted).

A tacit or adoptive admission requires acquiescence to the statement. *State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725 (1988). In *State v. Scanlan*, a police officer testified at trial about a tacit admission, where the victim's children yelled to the defendant that "she had just beat her father half to death," and the defendant shouted back, "It's not that bad." 2 Wn. App. 2d 715, 733, 413 P.3d 82 (2018). This was admission that an act occurred, and was a tacit admission of guilt.

Id. Mr. Sprint made no such tacit admission. He denied that the 911 call that was played to the court included his statement, “what did not papa do,” and instead said “what does papa do?” RP 1453. The record containing this disputed statement is not transcribed because it was indecipherable. RP 285; Exhibit 56. Thus the court’s finding that the recording stated “what did papa do” is not supported by substantial evidence. CP 45, FF 2.5.

Nor were Mr. Sprint’s statements to Mr. Valdez tacit admissions that he harmfully touched his son. Mr. Valdez testified that when Aiden was at the hospital and Mr. Sprint called him to say where they were, Mr. Valdez accused Mr. Sprint of being responsible for the baby’s injury, to which he said Mr. Sprint responded that he could not say whether he was or was not responsible. RP 820; CP 45, FF 2.5. Mr. Sprint called 911 not knowing what was wrong with his son. He thus accurately stated that he did not know the source of the baby’s head trauma, and its cause remained unknown.

Likewise, Mr. Sprint’s statement to Ms. Brownlee, “great, now I hope nobody thinks I shook my baby” is not a tacit admission, but a natural response to the circumstances based on the limited information provided to him by doctors. CP 45, FF 2.5; RP 167. Prior to leaving the

hospital when Aiden was born, both Chalese and Mr. Sprint watched a video about shaken baby syndrome. RP 368-69. Dr. Thomas Ettinger, the emergency room physician said he would have immediately told Mr. Sprint that the CT exams showed that the baby had severe brain injury and had to be transported to Seattle. RP 313. Dr. Ettinger was required to contact Child Protective Services (CPS) based on the results of the CT scan. RP 318-319. Based on this information, Mr. Sprint's statements show panicked responses to a medical report that he would have every reason to believe will cause him to be suspected of harming his child—not an admission that he did harm his child.

This circumstantial evidence was either “patently equivocal” or “rank speculation” that Mr. Sprint inflicted injury on his son, and was thus insufficient to sustain the court's verdict. *Vasquez*, 178 Wn.2d at 18.

c. The trial court's acquittal of Mr. Sprint for the offenses of assault in the first, second, and third degree because of not knowing what act caused Aiden's injury, also requires acquittal of assault in the fourth degree.

The trial court acquitted Mr. Sprint of intentionally or recklessly causing Aiden's injuries CP 45, FF 2.8. The logic for acquittal as to assault one, two and three must hold for assault in the fourth degree,

because the court simply did not have evidence sufficient to establish “what happened” to Aiden. RP 1445. In its oral ruling, the court found:

I don't think that Mr. Sprint intended to commit the bodily harm to this child. I think it was a frustration that occurred. The question is, is that has the State proven beyond a reasonable doubt that the Defendant recklessly inflicted great bodily harm?

Reckless says a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same circumstances.

Without Aiden there to testify, it's difficult to say what happened. It's difficult to say that he shook Aiden. It's difficult to say that he dropped Aiden. Or difficult to say he threw Aiden on the bed. But I do believe, because of his comments, that he created harm to Aiden. And I do believe that his — that the Court can find that he was negligent. The Court believes he's guilty of Assault of a Child in the 4th Degree.

RP 1444-45. The court's guess that Mr. Sprint acted out of frustration and thus inflicted a negligent injury is no more supported by the evidence than that he acted recklessly. This is because, unlike in *Ashcraft*, where there was an observable action by which a harmful touching could have been inferred, here, there was no evidence of a specific act from which it could be inferred that Mr. Sprint negligently inflicted injury on his son. *Ashcraft*, 71 Wn. App. at 455.

The trial court's speculative summary of its ruling, "I think there's a pretty good chance that abuse occurred. I just couldn't find it beyond a reasonable doubt," requires acquittal for all levels of assault, including assault in the fourth degree. RP 1455.

Absent evidence of a harmful touching, there was insufficient evidence to convict Mr. Sprint of assault in the fourth degree, requiring reversal of his conviction for this offense.

2. This court should reverse the imposition of discretionary legal financial obligations because the trial court did not conduct an adequate inquiry into Mr. Sprint's ability to pay, and there was not evidence he was able to pay.

Without conducting an inquiry into Mr. Sprint's ability to pay, the court imposed \$1,450 in legal financial obligations. CP 48-49.

a. The trial court's inquiry into Mr. Sprint's ability to pay was inadequate.

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay court costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This requires the sentencing court to take into account a defendant's financial resources and the nature of the burden imposed by payment, on the record. *Id.* at 838; RCW 10.01.160(3). And the court must also take into account other debts, including restitution. *Id.*

at 838. The court must also look to the comment in court rule GR 34 for guidance, which allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status. *Id.*

At sentencing, the court made an inadequate inquiry into Mr. Sprint's ability to pay. Previously, the court determined that Mr. Sprint was unable to obtain an attorney without financial hardship. Supp. CP _____, undesignated sub. no. 53. After Mr. Sprint was convicted, the court determined he was indigent. CP 67. The court made no inquiry into whether Mr. Sprint now depended on needs-based assistance programs or whether his household income fell below 125 percent of the federal poverty line. *City of Richland v. Wakefield*, 186 Wn.2d 596, 607, 380 P.3d 459 (2016).

The prosecutor highlighted Mr. Sprint's difficulty in finding and maintaining employment. RP 1462. Mr. Sprint summarized his efforts to find employment, and possible leads for part-time work, but his aspirational work plans did not establish he was employed, or the rate he would earn. RP 1472-1473.

Furthermore, the prosecutor raised the issue of restitution, which he believed would amount to over \$30,000. RP 1467. The prosecutor provided the documentation to the defense, who requested additional

time to review it. RP 1467. A restitution hearing was scheduled for two months after the court entered the judgment and sentence. CP 49. The court imposed \$30,021.55 in restitution subsequent to entry of Mr. Sprint's Judgment and Sentence. CP 69. The court recognized that "Mr. Sprint is going to have a whole bunch of money to pay without burdening him with any more fees." RP 1477. Nevertheless, the court ordered:

- \$200.00 in court costs;
- \$500.00 crime victim assessment;
- \$250.00 fine: \$5000 imposed, with \$4750 suspended.
- \$400.00 fees for court appointed attorney;
- \$100.00 probation fee.

CP 48. This totaled \$1,450.00 in legal financial obligations, including \$750.00 in discretionary fees for the court appointed attorney fee, \$5,000 fine with \$4,740 suspended, and the \$100 probation fee. *See State v. Seward*, 196 Wn. App. 579, 581, 384 P.3d 620 (2016), *review denied*, 188 Wn.2d 1015, 396 P.3d 349 (2017)(describing mandatory costs as RCW 7.68.035(victim penalty assessment (VPA))).

The court imposed these costs without any evidence Mr. Sprint will be able to pay them. Remand for the sentencing court to inquire

into Mr. Sprint's ability to pay legal financial costs is required. *Blazina*, 182 Wn.2d at 839; *see also*, *State v. Ralston*, 185 Wn.2d 1025, 377 P.3d 724 (2016) (granting petition for review on the issue of imposition of discretionary LFOs and remanding the case to the superior court because it did not conduct an individualized inquiry into the appellant's current and future ability to pay in light of the non-exhaustive factors noted in *Blazina* and the factors for determining indigency as described in GR 34); *accord State v. Christopher*, 135 Wn.2d 1001, 369 P.3d 149 (2016); *State v. Como*, 185 Wn.2d 1025, 377 P.3d 730 (2016).

b. The legislature recently amended the legal financial obligation statute to prohibit a court from imposing costs on indigent persons, which would prohibit the court from imposing costs on Mr. Sprint.

The legislature amended the legal financial obligation statutes. Laws of 2018, ch. 269, § 6. Because the amendments to RCW 10.01.160(3) and RCW 36.18.020(2)(h) are remedial and clarifying, they should be applied retroactively to Mr. Sprint. This would require striking \$200 in court costs, the \$400 attorney fees, and the \$4750 suspended fine, of which \$250 was imposed. CP 48.

The legislature recently amended the statutory scheme governing when legal financial obligations may be imposed on an indigent person. While courts must still consider whether a person “is

or will be able to pay” legal financial obligations before they are imposed, the new statute clarifies what “able to pay” means. RCW 10.01.160(3); Laws of 2018, ch. 269, § 6.

Under the revised statute, the court “shall not order a defendant to pay costs” if “the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” Laws of 2018, ch. 269, § 6. If a person is indigent, the court does not further examine the person’s financial resources or the nature of the burden payment of costs would impose. *Id.* The court declared Mr. Sprint indigent for purposes of appeal, and there was no inquiry during sentencing that established a finding to the contrary. CP 67.

c. The amendments prohibiting courts costs on the indigent are remedial and clarifying, and should apply retroactively to Mr. Sprint.

If an amendment is clearly curative or remedial, it will be applied retroactively even though it is completely silent as to legislative intent for retroactive application. *State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000). The changes to the legal financial obligation statutory scheme are remedial and should be applied retroactively because they provide guidance on how to apply existing liabilities. The language of RCW 10.01.160(3) previously directed the

court should not order an individual to pay costs unless he “is or will be able to pay them.” *See* Laws of 2018, ch. 269, § 6. The amendments eliminated this imprecise language and instruct no costs shall be ordered against any individuals found indigent pursuant to RCW 10.101.010(3).

Similarly, the legislature’s directive not to recoup the \$200 filing fee from indigent individuals under RCW 36.18.020(2)(h) is also remedial. In fact, although the Court of Appeals has said the \$200 filing fee is in mandatory in some cases the changes to RCW 36.18.020(2)(h) reflect the practice of some trial courts, which regularly waive the \$200 filing fee for indigent individuals. *See, e.g., State v. Mathers*, 193 Wn. App. 913, 917, 376 P.3d 1163 (2016) (finding the DNA fee and Victim Penalty Assessment fee mandatory but noting the trial court “waived all other LFOs” because the individual was indigent); *but see State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (construing criminal filing fee as mandatory). This Court may apply the amendments to RCW 10.01.160(3) retroactively here, striking the \$400 attorney’s fees, \$200 filing fee, and \$250 (\$4750.00 suspended) fine. CP 48.

d. Even if the amendments do not apply retroactively, the newly amended statute applies to Mr. Sprint because his case is still pending on direct appeal.

Under the common law, pending cases are decided according to the law in effect at the time of the decision. *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015). This rule applies when a case is pending on appeal. If “a controlling law changes” during the pendency of the case, “the appellate court should apply the new or altered law, especially where no vested rights are involved, and the Legislature intended retroactive application.” *Marine Power & Equip. Co. v. Wash. State Human Rights Comm’n Hearing Tribunal*, 39 Wn. App. 609, 620, 694 P.2d 697 (1985). Mr. Sprint’s case is pending on appeal, and thus even if this Court does not find the Legislature’s changes to require retroactive application, the changes would still apply to Mr. Sprint’s case pending on direct appeal.

The court failed to adequately assess Mr. Sprint’s ability to pay the costs it imposed, which requires reversal. And the legislature’s recent amendments prohibit the imposition of costs on Mr. Sprint whether applied retroactively or prospectively. Reversal to either strike Mr. Sprint’s costs or to assess his ability to pay is required.

F. CONCLUSION

The trial court lacked evidence sufficient to find Mr. Sprint committed the offense of assault in the fourth degree absent evidence that Mr. Sprint harmfully touched his child, requiring reversal and dismissal of his conviction. Furthermore, the court failed to make an adequate inquiry into Mr. Sprint's ability to pay the legal financial obligations imposed, and this court should apply the legislature's intent to not impose discretionary fees on indigent persons like Mr. Sprint, providing an additional basis for reversal and remand of his case to the trial court.

DATED this 26th day of June, 2018.

Respectfully submitted,

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2701
E-mail: katebenward@washapp.org

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35561-6-III
)	
ANDREW SPRINT,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> STEVEN CLEM DOUGLAS COUNTY PROSECUTORS OFFICE PO BOX 360 WATERVILLE WA 98858-0360 [sclem@co.douglas.wa.us]	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
--	-------------------	--

<input checked="" type="checkbox"/> ANDREW SPRINT C/O WAP	() () (X)	U.S. MAIL HAND DELIVERY E-MAILED TO CONFIDENTIAL ADDRESS PER REQUEST
--	-------------------	---

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JUNE, 2018.

X _____ 

WASHINGTON APPELLATE PROJECT

June 26, 2018 - 4:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35561-6
Appellate Court Case Title: State of Washington v. Andrew John Sprint
Superior Court Case Number: 14-1-00073-5

The following documents have been uploaded:

- 355616_Briefs_20180626162624D3879924_9337.pdf
This File Contains:
Briefs - Appellants
The Original File Name was washapp.062618-06.pdf
- 355616_Designation_of_Clerks_Papers_20180626162624D3879924_5598.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was washapp.062618-05.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- sclem@co.douglas.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180626162624D3879924