

FILED
Court of Appeals
Division III
State of Washington
8/24/2018 3:47 PM

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	NO. 35561-6-III
Respondent,)	
)	
vs.)	
)	
ANDREW SPRINT,)	
Appellant.)	Douglas County Superior
)	Court No. 14-1-00073-5

RESPONDENT'S BRIEF

W. GORDON EDGAR, WSBA 20799
Deputy Prosecuting Attorney
gedgar@co.douglas.wa.us

STEVEN M. CLEM
Douglas County Prosecutor
P. O. Box 360
Waterville, WA 98858
(509) 745-8535

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES.....	ii
A. INTRODUCTION.....	1
B. ASSIGNMENT OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. AUTHORITY AND DISCUSSION.....	6
1. Assault Fourth Degree.....	7
2. Discretionary Legal Financial Obligations.....	12
E. CONCLUSION.....	14

TABLE OF AUTHORITIES

	<u>Page</u>
CASES	
<u>State Supreme Court</u>	
State v. Bencivenga, 137 Wn.2d 703, 708-09, 974 P.3d 832 (1999)	10
State v. Blazina, 182 Wash. 2d 827, 832–33, 344 P.3d 680, 682 (2015)	13
State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	11
State v. Davis, 175 Wash.2d 287, 344, 290 P.3d 43 (2012), cert. denied, — U.S. —, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013)	13
State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980)	6
State v. Homan, 181 Wn.2d 102, 105–106, 330 P.3d 182 (2014)	11
State v. Kingman, 77 Wn.2d 551, 552, 463 P.2d 638 (1970)	11
State v. McKenzie, 184 Wash. 32, 40, 49 P.2d 1115 (1935)	8
State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992)	7
State v. Stevens, 158 Wash. 2d 304, 314, 143 P.3d 817, 822 (2006)	7
State v. Vasquez, 178 Wash.2d 1, 16, 309 P.3d 318 (2013)	7

Court of Appeals

Johnson v. Whitman, 1 Wash. App. 540, 546, 463 P.2d 207 (1969)	11
State v. Garcia, 20 Wash.App. 401, 403, 579 P.2d 1034 (1978)	7
State v. Jackson, 145 Wash. App. 814, 818, 187 P.3d 321 (2008)	7
State v. Jarvis, 160 Wash.App. 111, 119, 246 P.3d 1280 (2011)	7
State v. Scanlan, 2 Wash.App.2d 715, 733-34, 413 P.3d 82 (2018)	7
State v. Stevenson, 128 Wash.App. 179, 193, 114 P.3d 699 (2005)	11
State v. Thomas, 98 Wash.App. 422, 424, 989 P.2d 612 (1999)	7

A. INTRODUCTION

Defendant was convicted of Assault in the Fourth Degree following a bench trial. At sentencing, in addition to jail time and bench supervision, the trial court also imposed legal financial obligations of fines, fees, costs and restitution. This timely appeal alleges insufficiency of evidence to support the conviction, and improper imposition of legal financial obligations.

B. ASSIGNMENT OF ERROR

Respondent, State of Washington, assigns no errors to this matter and responds only to the issues presented by defendant.

C. STATEMENT OF THE CASE

Defendant is the father of A.M., who was born on February 3, 2014. RP Vol. 1, p. 335. Defendant obtained primary temporary custody of the child shortly after he was born. *Id* at 337. The mother, Chalese Merritt, exercised periodic and regular visitation. *Id*. Defendant and Ms. Merritt were not married and did not reside together. Defendant and the child resided in East Wenatchee along with Mr. Justin Valdez. RP Vol 1, p. 151; RP Vol 2, p. 539.

On April 16, 2014, when the child was only nine weeks old, Defendant called 911 to report a medical emergency with the child. Defendant reported to the 911 dispatcher that the child had spontaneously become unconscious, limp, was breathing funny, had suddenly turned red and was now pale. RP Vol. II, pp. 275 – 286. On the 911 call audio tape, defendant could be heard saying, “What did papa do?” RP Vol 3., pp 1407-08.¹

An ambulance was dispatched and arrived at defendant’s residence a short time later, and EMT Kaila Brownlee provided aid at the scene. RP Vol. I, pp. 149 - 154. The child, who was now not visibly symptomatic was transported to Central Washington Hospital in Wenatchee by the ambulance as a precaution. RP Vol. I, p. 159.

Shortly after arriving at the hospital the child had an absence seizure and was taken immediately in for a CT scan. RP Vol. I, p. 163. After the CT scan was completed the child was returned to the aid room in the hospital; before the CT results were known, Defendant spontaneously said to EMT Brownlee, “Great, now I hope nobody thinks I shook my baby.” RP Vol I, p. 167.

¹ The 911 recording was played twice: during the testimony of Det. David Helvey, RP Vol 1, pp 273-88; and also during the state’s closing argument, RP Vol 3, pp. 1406-08.

While Defendant was still at Central Washington Hospital in Wenatchee with the child, he and his roommate, Mr. Justin Valdez communicated by phone and text messages. RP Vol. 2, pp. 819 – 823. Because Mr. Valdez had witnessed Defendant “being really rough with the baby,” he asked defendant during a heated phone call, “[w]hat did you do?” and then said “don’t sling me this bullshit that you’re not responsible for this.” *Id* at 820. To which defendant responded, “I can’t say that I am or I’m not.” *Id*. Mr. Valdez further testified:

I said, I said tell me — I said tell me you’re not responsible for this. He lives in our house, we- you and I take care of him and tell me that you don’t treat him like he’s just going to fall apart at any day because he might. And he says *no, I’m not always gentle with him.*

Id at 820-21.

Mr. Valdez testified of a later text message from Defendant:

And then when he texted me, he says *baby’s got to get more tests, so I love him and I don’t shake my baby.* And prior to that, I didn’t mention that I didn’t — you know, I didn’t accuse him of shaking the baby or anything like that, he just said that out of the blue.

Id at 821.

Mr. Valdez testified about incidents of defendant rough handling the child such as yelling at the child for crying (RP Vol. 2, p. 807-08), using too much force to burp the child (RP Vol 2, p

803)), and holding the child without using proper neck support (RP Vol. 2, 804-05, 807). Although these incidents did not individually rise to the level of Mr. Valdez reporting them to CPS or law enforcement, they were of such concern that Mr. Valdez would confront and chastise defendant about such actions (RP Vol. 2, p. 806).

The CT scan at CWH revealed severe brain trauma and swelling. The child was flown by helicopter to Harborview Medical Center in Seattle. The child continued to seize in Seattle. The child was ultimately saved, but he has long-lasting physical and speech deficits. See RP Vol. 1, pp. 388-92.

The State's medical witnesses who attended to the child, Dr. Rebecca Weister and Dr. Kenneth Feldman, testified that, in summary, based on the seizures, swelling of the brain, retinal hemorrhages (RP Vol 1, p. 132), and subdural hematoma (bleeding in the brain) (RP Vol.1, pp. 66-69), the timing of the first seizure, the Defendant's version of events (RP Vol. 1, pp. 79-81), and reviewing the child's birth (RP Vol. 1, p. 140) and other medical records and social history, it was their opinion that the child's injuries were not a spontaneous event attributable to a pre-existing medical condition (RP Vol. 1, p. 143; RP Vol. 2, pp. 667-68) and

were instead caused by abusive head trauma (RP Vol. 1, pp. 143-44; RP Vol. 2, p. 690), occurring during a time frame while in the defendant's exclusive care (RP Vol. 1, pp. 83-84). RP Vol. II, 690 (Dr. Feldman); RP Vol. II, p. 777 (Dr. Weister).

The court also heard the testimony of the emergency room physician, the child's mother, both grandmothers, defendant's neighbors and other friends, defendant's medical experts, and the defendant himself.

At the conclusion of testimony, the court acquitted defendant of the charged crime, but instead found him guilty of the lesser included offense of Assault in the Fourth Degree. RP Vol 3, p. 1445. The court entered written findings and conclusions for the bench trial. CP 44.

At sentencing the court imposed six months of jail time, 24 months of bench supervision, and legal financial obligations that consisted of fines, fees, costs, and restitution. CP 47-51. The court inquired of defendant of his work ability when deciding whether to impose discretionary legal financial obligations. RP Vol. 3, pp. 1472-74.

D. AUTHORITY AND DISCUSSION

The state's theory of the case was that defendant was a controlling, manipulative, angry person with an explosive temper, who, when overwhelmed with the duties and burdens of being a first time parent thrust upon him without warning, visited abusive force on his child that caused the child's brain injury.

The defendant's explanation, on the other hand, was that the child's injuries spontaneously occurred without any physical force whatsoever being applied to the child, and that other pre-existing medical causes could not be ruled out.

The court did not fully accept either parties' version, but nevertheless found that defendant had assaulted the child and found him guilty of assault fourth degree. CP 44-46; RP Vol 3, p. 1445.

Because the court rejected defendant's version of events, the issue then is whether there is sufficient circumstantial evidence to support the court's finding that the defendant intentionally assaulted the child.

When reviewing a claim for the sufficiency of the evidence, we consider "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 Wash.2d 216, 221, 616 P.2d 628

(1980). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. “Circumstantial evidence is as reliable as direct evidence.” *State v. Jackson*, 145 Wash. App. 814, 818, 187 P.3d 321 (2008). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wash.2d 1, 16, 309 P.3d 318 (2013).

State v. Scanlan, 2 Wash.App.2d 715, 733-34, 413 P.3d 82 (2018).

1. Assault Fourth Degree

An assault by actual battery is an intentional touching that is harmful or offensive, even if no harm was intended. *State v. Stevens*, 158 Wash. 2d 304, 314, 143 P.3d 817, 822 (2006). “The intent required for assault is merely the intent to make physical contact with the victim, not the intent that the contact be a malicious or criminal act.” *State v. Jarvis*, 160 Wash.App. 111, 119, 246 P.3d 1280 (2011). “ ‘[A] touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.’ ” *State v. Thomas*, 98 Wash.App. 422, 424, 989 P.2d 612 (1999) (quoting *State v. Garcia*, 20 Wash.App. 401, 403, 579 P.2d 1034 (1978) (alteration in original)).

There was overwhelming circumstantial evidence that defendant assaulted his son: There was sufficient medical testimony that A.M.'s brain injuries were caused by force and not the result of accident or preexisting medical conditions. The relied upon medical evidence also demonstrated that A.M. suffered his injuries during a time when he was solely in the care and custody of the Defendant. Defendant had previously demonstrated rough and inappropriate handling of the child. And the defendant tacitly admitted he caused the injuries.

While the defendant denied roughly handling the child, his statements to the EMT and his roommate were found by the court to be "tacit" admissions of his guilt. Tacit admissions can be considered by the trier of fact, and are just one piece in the constellation of evidence taken into account by the trier of fact. According to Black's Law Dictionary, a tacit admission is "an acknowledgement or concession of a fact inferred from either silence or from the substance of what one has said." A tacit admission is also made when a person makes an equivocal response to an accusation which an ordinary person would ordinarily be expected to deny. See e.g. *State v. McKenzie*, 184 Wash. 32, 40, 49 P.2d 1115 (1935)(equivocal reply made by the

defendant in the face of an accusation may be considered “an admission or one not likely to be made by an innocent man”).

In this situation defendant’s comment that “I can’t say that I am or I’m not” is equivocal and certainly not a denial. After all, defendant had previously told 911, an EMT, the medical providers, and the detective unequivocally that A.M. spontaneously convulsed, and that he essentially did not apply any force to the child other than to pat him on the back a couple of times when he spit up (See, e.g., Defendant’s statement to Det. David Helvey, RP Vol 2, pp. 531-35). The court had the opportunity to compare and contrast those outright denials to the statement he made to Mr Valdez. If defendant had not exerted any force whatsoever to the child, it begs the question: Why would he not simply make the same denial to Mr. Valdez that he made to everyone else? The answer for the trier of fact was that defendant’s hedge was an insight into his guilty conscience. See generally RP Vol. 3, pp. 1443-44.

Whether the court correctly characterized Defendant’s statements during the 911 call of “What did papa do?”, his text message to his roommate, and his statement to the EMT as tacit admissions does not lessen the court’s ability to rely upon those

statements and the circumstances surrounding them as circumstantial evidence of a guilty conscience. The court was free to consider any and all of defendant's statements, and to give them such weight, credibility and inferences it felt appropriate. Such is the province of the trier of fact. *State v. Bencivenga*, 137 Wn.2d 703, 708-09, 974 P.3d 832 (1999).

The trial court noted the difficulty of identifying the specific type of act that caused the injuries to the child, but the court determined that it was a forceful event that caused the injury, and that Defendant "created harm" to the child. RP Vol. 3, pp. 1442-1447. As the court noted, it did not believe Mr. Sprint's testimony (RP Vol. 3, p. 1443), and the only other person present was the infant child who could not talk or testify (RP Vol. 3, p. 1444), and so the court was left to make its determination of whether an assault occurred based on circumstantial evidence. And it was the defendant's comments to others that tipped the scale for the trial court to believe that Defendant created the "harm" to the child. RP Vol. 3, p. 1445.

In its written findings the court found that Defendant intentionally assaulted the child, and that the injuries were negligently caused by the intentional assault. CP 44-46.

Defendant complains essentially that the court's oral ruling does not support the written findings. Although the court discussed in its oral ruling that the defendant "was negligent" when he created the harm, it made written findings that defendant intentionally assaulted the child and negligently inflicted the injuries. "Following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105–106, 330 P.3d 182 (2014) (citing *State v. Stevenson*, 128 Wash.App. 179, 193, 114 P.3d 699 (2005)). "Substantial evidence' is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise." *Id.* at 106. This court must defer to the finder of fact in resolving conflicting evidence and credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trial court's oral remarks may be used to clarify formal findings, but they are not themselves findings. *State v. Kingman*, 77 Wn.2d 551, 552, 463 P.2d 638 (1970). Allegedly inconsistent remarks cannot be used to impeach the written findings. *Johnson v. Whitman*, 1 Wash. App. 540, 546, 463 P.2d 207 (1969).

2. Discretionary Legal Financial Obligations (LFO)

The record shows that during the sentencing hearing the Defendant's attorney informed the court that his client "does have a significant amount of money to pay..." RP Vol. 3, pp. 1469-70. The Defendant further informed the judge of his work history, his skills, and that he had the ability to work "to be able to pay any offending fees that I may incur". RP Vol. 3, pp. 1472 - 74.

The court and the party discussed the imposition of certain fines and fees such as attorney's fee, victim's assessment, fine, and a filing fee; but the court agreed to reserve the issue of imposing expert witness fees until a later hearing to determine restitution. *Id* at 1477. The court imposed a lower fine than requested by the state, and imposed a lower attorney's fee, because "Mr. Sprint is going to have a whole bunch of money to pay without burdening him with any more fees." *Id*.

When it came to setting a repayment amount, the court expressly asked Defendant if he could afford to pay the \$50 a month suggest by his attorney, to which the defendant unequivocally said, "yes."

The record shows the judge made an adequate inquiry into defendant's ability to pay his legal financial obligations, and set the

amounts in light of his financial ability and obligations. Defense made no objection to the imposition of financial obligations.

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. It is well settled that an “appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). This rule exists to give the trial court an opportunity to correct the error and to give the opposing party an opportunity to respond. *State v. Davis*, 175 Wash.2d 287, 344, 290 P.3d 43 (2012), cert. denied, — U.S. —, 134 S.Ct. 62, 187 L.Ed.2d 51 (2013).

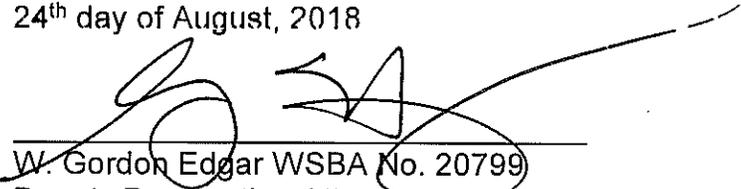
State v. Blazina, 182 Wash. 2d 827, 832–33, 344 P.3d 680, 682 (2015).

The record is clear the court made an inquiry and the defendant volunteered an amount he could pay. This is not a situation where the court simply signed a boilerplate judgment and sentence without conducting an inquiry. There was an inquiry by the court, the defendant had an opportunity to be heard on the matter, the court imposed the LFOs, and the defendant did not object. There was no error. If there was error, it was unpreserved for appeal and this court should deny review. *State v. Blazina*, 182 Wash. 2d 827, 832–33, 344 P.3d 680, 682 (2015).

E. CONCLUSION

Based on the foregoing facts and authorities, the State respectfully requests this court to uphold the verdict, uphold the imposition of legal financial obligations and dismiss this appeal.

Respectfully submitted this
24th day of August, 2018



W. Gordon Edgar WSBA No. 20799
Deputy Prosecuting Attorney

IN THE COURT OF APPEALS, DIVISION III
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,) Court of Appeals no. 35561-6-III
) Douglas County No. 141000735
)
v.)
) PROOF OF SERVICE (RAP 18.5(b))
ANDREW SPRINT,)
) Appellant.

I, W. Gordon Edgar, do hereby certify under penalty of perjury that on August 24, 2018, I provided e-mail service by prior agreement (as indicated), a true and correct copy of Respondent's Brief:

Kate Benward
katebeward@washapp.org
Attorney for Appellant

Signed in Waterville, Washington this 24th day of August, 2018


W. Gordon Edgar, WSBA No. 20799
Douglas County Prosecutor's Office
P.O. Box 360
Waterville, WA 98858
(509) 745-8535
Fax – (509) 745-8670
gedgar@co.douglas.wa.us

Proof of Service

August 24, 2018 - 3:47 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_20180824153415D3219144_4411.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Andrew Sprint Respondents Brief.pdf

A copy of the uploaded files will be sent to:

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

Comments:

Proof of Service attached to Respondent's Brief

Sender Name: Walter Edgar - Email: gedgar@co.douglas.wa.us
Address:
PO BOX 360
WATERVILLE, WA, 98858-0360
Phone: 509-745-8535

Note: The Filing Id is 20180824153415D3219144