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COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Manuel Penaloza,

Appellant.

Yakima County Superior Court Cause No. 16-1-01263-4

The Honorable Judge Richard H. Bartheld

Appellant's Opening Brief

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ISSUE AND ASSIGNMENTS OF ERROR

1. Mr. Penaloza's conviction was entered in violation of his right to due process under the Fourteenth Amendment and Wash. Const. art. I, §3.
2. The statutes under which Mr. Penaloza was convicted are unconstitutionally vague.
3. The statutory scheme criminalizing second-degree assault in child discipline cases fails to provide fair notice of the conduct that will subject a parent to criminal liability.
4. The statutory scheme criminalizing second-degree assault in child discipline cases fails to provide sufficient standards to prevent arbitrary enforcement.
5. The statutory scheme criminalizing second-degree assault in child discipline cases is so subjective that it violates due process.

ISSUE: Penal statutes are unconstitutionally vague if they (1) allow conviction without giving fair notice of the proscribed conduct, or (2) lack standards and invite arbitrary enforcement. Does the statutory scheme criminalizing second-degree assault in child discipline cases violate due process because it is unconstitutionally vague?

INTRODUCTION AND SUMMARY OF ARGUMENT

Manuel Penaloza was charged with a crime after using corporal punishment to discipline his daughter. Conviction required proof that he caused “substantial” disfigurement and that he used more force than was “reasonable and moderate.”

The court did not tell jurors how to determine if bruises stemming from the incident qualified as “substantial” disfigurement. Nor did the court define the phrase “reasonable and moderate” for the jury.

The statutory scheme, which allows for conviction based on the combination of these two undefined terms, violates due process. When considered together, the two standards do not provide fair notice of what is prohibited. Nor do the two standards provide adequate guidance to guard against arbitrary or ad hoc enforcement.

Because the statutory scheme is unconstitutionally vague, it is void and unenforceable. Mr. Penaloza’s conviction must be reversed and the charge dismissed.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In July of 2016, Manuel Penaloza became concerned for the safety of his teenage daughter, M.P., who insisted on removing her clothes in

front of others. RP 115, 131, 136. M.P. has Down syndrome,¹ and is described by family members as acting younger than she is. RP 51-52, 61, 128. Although M.P. was closely supervised at home, Mr. Penaloza knew that she would one day be able to leave the house on her own.² RP 118, 137, 159.

M.P. had been exposing herself for years, and Mr. Penaloza grew more concerned as her body matured. RP 129-130, 134, 140. He loves his daughter and had come to fear that she would be in danger of sexual assault. RP 159, 163. His own father, who lived with the family, had also become very concerned for M.P.'s safety. RP 115, 118.

Initially, Mr. Penaloza and his spouse tried talking to M.P., explaining that she could not keep removing her clothes in front of others. RP 129. M.P.'s grandfather had also spoken with her, trying to get her not to remove her clothes. RP 116.

Mr. Penaloza also put M.P. in timeouts. RP 116, 133. Like the conversations he had with her, the timeouts had no effect. RP 133.

Years earlier, Mr. Penaloza had voluntarily attended a parenting class with his spouse. RP 126-127. The instructor advised parents to use

¹ Often referred to as Downs syndrome or Down's syndrome.

² He was also concerned that something might happen while she was at school. RP 118-119.

timeouts for discipline, but also told attendees that it was acceptable to use spanking as a last resort. RP 127, 149.

When conversation and timeouts didn't work, Mr. Penaloza decided to spank his daughter. RP 134, 151. He'd also used spanking as a disciplinary measure for his three other children. RP 146.

Mr. Penaloza himself had been spanked with a belt when he was a child. RP 127-128, 133-134, 149, 162. Some of those spankings had produced lacerations and bruises. RP 133. These marks healed over time. RP 163.

Mr. Penaloza's nephew, L., had also been spanked with a belt. RP 53. In a later court hearing, Mr. Penaloza's lawyer revealed that he, too, had been disciplined with a belt as a child, as had his sisters and his own father. RP 189, 191. As he put it in his closing argument:

I got the belt. I'll guarantee you there is other people here who got the belt, probably a lot of you. You probably all know people who got the belt.
RP 189.

Counsel also acknowledged that he used a belt to spank his own son. RP 193-194. Even the judge announced that he could "remember getting hacked in high school back when I was a sophomore," and that his peers had similarly been subjected to corporal punishment in middle school and high school. RP 236-237, 238.

On a Saturday in July, M.P. again removed her clothes in front of others. RP 138-139, 151. Mr. Penaloza told his daughter he needed to talk to her. RP 140. He led her to another room and spent half an hour explaining once more that she shouldn't remove her clothes in front of others.³ RP 140.

After talking to her, he told her to turn around and said, "I'm going to spank you." RP 141. He folded his belt in half, grasped the buckle and the belt tip in one hand, and spanked her with it four or five times.⁴ RP 140-141, 152, 154. Although he tried to strike her on her buttocks, she kept moving and he ended up mostly spanking her on her back and arms. RP 142, 156. He then talked to her for another 30 minutes and put her in a timeout so she could think about their conversation and the spanking. RP 142-143.

After the timeout, he asked M.P. if she were ok, and if she'd listened to what he'd told her. RP 143. She said she had, gave him a hug

³ His nephew, L., was playing a game in the adjoining room. L. confirmed that he overheard Mr. Penaloza talking to his daughter in a "serious" voice. RP 45-46. He also described what sounded like a "spank with a belt." RP 52. He was familiar with the sound because of his own experience being disciplined with a belt. RP 53.

⁴ L., who admitted he wasn't paying attention because he was focused on his game, said that he heard 25 spanks with the belt. RP 57-58. A doctor later testified that some of the marks on M.P.'s skin could have been caused by the belt's buckle. RP 104.

and a kiss, and asked if she could sleep with the other cousins who shared the house with the family. RP 143, 145, 157.

Although Mr. Penaloza did not realize it until two days later, bruises developed on M.P.'s skin.⁵ RP 72, 138, 158. He learned of the bruising during a phone call from his father, who had been asked to bring M.P. to the police station. RP 138.

Mr. Penaloza saw pictures of the bruises a week later and could not believe what they showed. RP 147, 158. After viewing the pictures, he acknowledged that he'd gone too far in disciplining his daughter. RP 161. However, he did not concede that he'd recklessly caused substantial bodily harm, or that he had exceeded the bounds of what might be considered reasonable and moderate discipline. RP 161.

The State charged Mr. Penaloza with second degree assault, alleging that he'd intentionally assaulted M.P. and thereby recklessly caused substantial bodily harm in the form of temporary but substantial disfigurement. CP 4, 16, 18. The case went to trial. In its instructions to the jury, the court did not provide guidance on how jurors should determine if any disfigurement qualified as "substantial." CP 9-26.

⁵ M.P. was also found to have blood in her urine, although it was not a significant amount. RP 85. The small amount of blood detected was not visible; it was discovered through chemical tests. RP 98-99. Only one red blood cell was observed when a sample was viewed with a microscope. RP 99. The doctor who treated M.P. testified that blood in the urine could result from a bruised kidney, but that it could also stem from other causes. RP 86, 99, 101.

Mr. Penaloza argued that the incident involved lawful force authorized by the legislature when it recognized the right of parents to discipline their children. CP 5, 22. The court instructed jurors that physical discipline of a child is lawful “when it is reasonable and moderate.” CP 22.

The court did not define the phrase “reasonable and moderate.” CP 22. Instead, the court permitted jurors to infer from a list of examples that certain acts were unreasonable. CP 22. However, the court made clear that the inference was not binding, and that “it is for [the jury] to determine what weight, if any, such inference is to be given.” CP 22.

The jury convicted Mr. Penaloza as charged, and he appealed. CP 27, 29, 37.

ARGUMENT

MR. PENALOZA’S CONVICTION VIOLATES DUE PROCESS BECAUSE THE STATUTORY SCHEME CRIMINALIZING SECOND-DEGREE ASSAULT IN CHILD DISCIPLINE CASES IS UNCONSTITUTIONALLY VAGUE.

A statute violates due process if it is vague. U.S. Const. Amend. XIV; Wash. Const. art. I, §3; *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001). Vague statutes are void and unenforceable. *Id.*

A criminal law is unconstitutionally vague if it “fails to give ordinary people fair notice of the conduct it punishes, or [is] so

standardless that it invites arbitrary enforcement.” *Johnson v. United States*, --- U.S. ---, ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

A law does not provide fair notice unless it “give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). Statutes that fail to do so “may trap the innocent by not providing fair warning.” *Id.*

A law invites arbitrary enforcement if it “impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *Grayned*, 408 U.S. at 108–09. Due process forbids criminal statutes “that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.” *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984).

In *Johnson*, the United States Supreme Court invalidated the residual clause of a federal sentencing enhancement. *Johnson*, --- U.S. at _____. The provision applied to offenders with a history of felonies involving “conduct that presents a serious potential risk of physical injury to another.” *Id.* Under the statute, courts were required “to picture the kind of conduct that the crime involves in ‘the ordinary case,’ and to judge

whether that abstraction presents a serious potential risk of physical injury.” *Id.*, at ____.

The *Johnson* court found this scheme unconstitutionally vague: “By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at ____.

Here, as in *Johnson*, Mr. Penaloza faced criminal penalties based on the interaction of two undefined standards. First, he was charged with inflicting “substantial bodily harm” in the form of “substantial disfigurement.” RCW 9A.36.021(1)(a); CP 16, 18. No statute defines the quantum of disfigurement that qualifies as “substantial.” *See* RCW 9A.040.110. Nor did the court instruct jurors on how they might decide if the child’s bruises amounted to “substantial” disfigurement. CP 9-26.

Second, the legislature permitted Mr. Penaloza to physically discipline his child, but only to an extent later determined by a jury to be “reasonable and moderate.” RCW 9A.16.100; CP 22. This phrase is not defined in the statute, and no definition was provided for the jury in Mr. Penaloza’s case. CP 22.

Instead, the court gave jurors a list of non-binding examples describing the unreasonable use of force.⁶ CP 22. Jurors were instructed that they “may, but are not required to, infer” that the acts described in the list were unreasonable.⁷ CP 22. The court also instructed jurors that the inference was “not binding on you,” and that it was up to the jury “to determine what weight, if any, such inference [would] be given.” CP 22.

The statutory scheme is unconstitutionally vague. The second-degree assault statute’s failure to explain what is meant by “substantial” disfigurement leaves ordinary people to guess at the range of conduct prohibited in child discipline cases. *Id.* In addition, the undefined “reasonable and moderate” standard provides no guidance and subjects the accused person to ever-changing social norms.⁸

The phrase “reasonable and moderate” has vastly different meanings for people from different generations or from different communities. As the trial court pointed out, society’s expectations regarding child discipline are in flux, and some cultures continue to use forms of physical punishment that are quite extreme. RP 236, 238-239.

⁶ This list did not specifically include spanking with a belt. CP 22.

⁷ The list of examples did not relate the examples to the requirement that discipline be “moderate.” CP 22.

⁸ As noted, jurors were permitted to infer that certain acts of discipline were unreasonable, but they were also told that the weight of such an inference was entirely up to them. CP 22.

Defense counsel, Mr. Penaloza, his nephew L., and the judge himself were all subjected to physical discipline comparable to that used in this case. RP 52-53, 127-128, 133-134, 149, 162, 189, 191, 192-194, 238. However, as the judge noted, pediatricians have now reached a consensus that “any type of corporal punishment is inappropriate.” RP 236; *see* Robert D. Sege, Benjamin S. Siegel, “Effective Discipline to Raise Healthy Children,” *Pediatrics*, Volume 142 Issue 6, December 2018.

Under the current statutory scheme, Mr. Penaloza’s actions would be entirely acceptable to many people. These include parents, such as defense counsel, who use a belt for physical discipline of their own children. This group of people would also include many adults who, as children, received physical discipline like that experienced by Mr. Penaloza, by his lawyer, by L., and by the judge.⁹

Given the diversity of opinions on the subject and the ongoing changes in society’s expectations, the statutory scheme does not give “ordinary people fair notice of the [proscribed] conduct.” *Johnson*, --- U.S. at _____. It allows police officers, judges, and juries “to subjectively decide

⁹ By contrast, another group of people—such as the pediatricians involved in the 2018 policy change—would likely find any degree of corporal punishment improper.

what conduct the statute proscribes or what conduct will comply with a statute in any given case.” *Maciolek*, 101 Wn.2d 259 at 267.

In light of changing customs and the range of behavior that is acceptable in different communities, the two undefined standards create a statutory scheme that is unconstitutionally vague. *Id.* Through its imprecision, the legislature has failed to provide “fair warning” that would allow citizens to discipline their children in a manner that accords with the law. *Grayned*, 408 U.S. at 108–109. It has, instead, delegated basic policy “to policemen, judges, and juries for resolution on an ad hoc and subjective basis.” *Id.*

The two statutes “combin[ed] indeterminacy about how to measure [disfigurement]... with indeterminacy about [what level of force is reasonable and moderate].” *Johnson*, --- U.S. at _____. This “produce[d] more unpredictability and arbitrariness than the Due Process Clause tolerates.” *Id.*, at _____. As with the residual clause at issue in *Johnson*, the statutory scheme here is unconstitutionally vague. *Id.*

Mr. Penaloza’s felony conviction is based on the intersection of two statutes that fail to provide fair notice of proscribed conduct and allow for enforcement “on an ad hoc and subjective basis.” *Grayned*, 408 U.S. at 108–109. The statutes criminalizing second-degree assault in child discipline cases are void and unenforceable. *Williams*, 144 Wn.2d at 203.

Mr. Penaloza's conviction must be vacated, and the case remanded for dismissal. *Id.*

CONCLUSION

After trying other disciplinary tools without success, Manuel Penaloza sought to use corporal punishment on his teenage daughter. He spanked her with a belt, using a degree of force that continues to be acceptable in many communities. Despite this, he was convicted of a felony.

The combination of legal standards that was applied to Mr. Penaloza creates a statutory scheme that is unconstitutionally vague. Because of this, the statutes criminalizing second-degree assault in child discipline cases are void and unenforceable. Mr. Penaloza's conviction must be reversed and the case remanded for dismissal.

Respectfully submitted on May 21, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 21, 2019.



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