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64579-0

NO. 64579-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

Tyra Kusack,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LEROY MCCULLOUGH, JUDGE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

GRETCHEN HOLMGREN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

2/19/13
TJG

TABLE OF CONTENTS

A. ISSUE PRESENTED.....	1
B. SUMMARY OF THE CASE	
1. Procedural History.....	1
2. Substantive Facts.....	2
C. ARGUMENT	
THE EVIDENCE IS SUFFICIENT TO SUPPORT TYRA KUSACK'S ASSAULT CONVICTION.....	3
D. CONCLUSION	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. Bockman, 37 Wn. App. 474, 495, 682 P.2d 925 (1984).....7

State v. Bynum, 76 Wash.App., 262, 884 P.2d 10 (1994),
review denied, 126 Wash.2d 1012, 89 P.2d 1089 (1995).....9

State v. Carothers, 84 Wn.2d 256, 260-61, 525 P.2d 731
(1974).....6, 7, 8

State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000).....6

State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984).....6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....5

State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984).....6

State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992).....5

State v. McDonald, 90 Wn. App. 604, 611, 953 P.2d 470 (1998)....7

State v. Negrin, 37 Wn. App. 516, 524, 681 P.2d 1287 (1984),
review denied 102 Wn.2d 1002 (1984).....5

State v. Ramires 109 Wash.App. 749, 767, 37 P.3d 343,
352 (2002).....9

State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 717 (2000).....6

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....5

State v. Trujillo, 112 Wn. App. 390, 404, 49 P.3d 935,
rev. denied, 149 Wn.2d 1002 (2002).....6

Stringfellow v. Stringfellow, 56 Wash.2d 957, 959, 350 P.2d
1003, 353 P.2d 671 (1960).....9

Statutes

Washington State:

RCW 9A.36.031(1)(f).....	5
RCW 9A.08.020(3)(a)(ii).....	6
RCW 9A.08.020.....	6

A. ISSUE PRESENTED

1. Did the evidence presented at trial support the trial courts ruling that the respondent, together with others, assaulted Kierstyn Frederick, causing bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On July 14, 2009, the appellant, Tyra Kusack, was charged by information in King County Superior Court, Juvenile Division with Assault in the Fourth Degree for his actions on June 14, 2009. CP 1. On September 23, 2009, the information was amended to charge Tyra Kusack with Assault in the Third Degree. CP 4.

The trial was held before the Honorable Leroy McCullough on September 22, 2009 and September 29, 2009. RP 3, 52. After hearing testimony from witnesses, examining the exhibits presented and hearing argument from counsel, Judge McCullough determined that Tyra Kusack was guilty of Assault in the Third

Degree. RP 140. Judge McCullough entered written findings of fact and conclusions of law on December 8, 2009. ¹

2. SUBSTANTIVE FACTS

On June 14, 2009, Kierstyn Frederick was with some friends at Lake Meridian Park. RP 21. Also present were Margarita Saldana, Tyra Kusack, Candice Mercer, and Nicole St. Clair. RP 22-23. An argument occurred and Saldana assaulted Frederick by punching her. Frederick pushed Saldana down, and at this time, all four girls present, including Tyra Kusack, started beating up Frederick. RP 23, 25. Frederick stated that she was on the ground, unable to do anything, while the girls kicked and punched her. RP 23. Able to get free, Frederick fled to a nearby bathroom and attempted to call the police. RP 24. Saldana followed and knocked the phone out of her hand. RP 24. Up against the door, Frederick continued getting punched, eventually falling to her knees where she was kicked and punched in the head. RP 25. One of Frederick's friends intervened at this time, and the four girls left the park and went to the bus stop. RP 25. From beginning to end, Frederick estimated that the fight lasted five to ten minutes. RP 42.

¹ The trial court's written trial findings and conclusions are attached to this brief as Appendix A

Police arrived a few minutes later and detained Margarita Saldana, Tyra Kusack, Candice Mercer, and Nicole St. Clair. Frederick was able to identify all four as having taken part in the beating with 100% certainty. RP 27. Injuries sustained by Frederick as a result of the assault included damage to her jaw and bruises to her hip and knee. RP 29. As a result of the injury to her jaw, Frederick was unable to eat solid foods for a month and still suffered some pain at the time of the trial. RP 31.

At the conclusion of Tyra Kusack's fact finding on September 29, 2009, Judge McCullough orally found that an assault against Ms. Frederick did take place, the assault was accomplished by a group (of which Kusack was a part of), acting in concert, kicking and hitting Ms. Frederick, causing the requisite pain and suffering for a conviction of Assault in the Third Degree. RP 140.

C. **ARGUMENT**

THE EVIDENCE IS SUFFICIENT TO SUPPORT TYRA KUSACK'S ASSAULT IN THE THIRD DEGREE CONVICTION

The only issue raised by the appellant on appeal concerns whether or not the respondent caused the requisite amount of damage to Kierstyn Frederick to be convicted of the crime of Assault in the Third Degree. Despite the appellant's claims, there

can be no doubt the Court made oral findings that the respondent acted with others to intentionally injure Ms. Frederick and as a result caused her bodily harm accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering. After hearing testimony and argument from the state and defense, the court convicted the appellant of Assault in the Third Degree, finding that she, as part of a group, intended to commit the crime of assault. This Court should affirm that holding.

Defense counsel alleges that the trial court erred when it found that the appellant was guilty of the crime of Assault in the Third Degree because there was insufficient evidence to prove that the appellant caused the requisite damage required by law for Assault in the Third Degree. They acknowledge that there is no doubt that the appellant did assault Frederick and that Frederick experienced the required pain and suffering. The basis for their argument is that the state did not prove that the appellant, as a principle, caused that pain and suffering as there was testimony that the respondent only hit Frederick in the stomach, and not anywhere near the face. RP 38-39. Their argument focuses on a perceived lack of finding by the Court of accomplice liability, arguing that the absence of those exact words infer that the Court

in fact rejected that theory and found the respondent guilty as a principle. This claim is a “manifest error” affecting a constitutional right. State v. Lynn, 67 Wn. App. 339, 835 P.2d 251 (1992). To challenge the sufficiency of evidence on appeal requires no objection at the time of trial and can be raised for the first time on appeal. State v. Negrin, 37 Wn. App. 516, 524, 681 P.2d 1287, review denied 102 Wn.2d 1002 (1984).

When a challenge is made regarding sufficiency of the evidence, a conviction will be upheld if the appellate court, viewing the evidence in the light most favorable to the state, is satisfied that there is sufficient evidence to convince a rational trier of fact that the appellant was guilty of the crime charged beyond a reasonable doubt. Using this test, it is not necessary for the State to convince the appellate court that the appellant is guilty beyond a reasonable doubt – just that at the time, a rational trier of fact could. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).

A person is guilty of the crime of Assault in the Third Degree if “with criminal negligence, causes bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering.” RCW 9A.36.031(1)(f). If more than one

person participates in an assault against someone, the court may consider the theory of accomplice liability. A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, they aid or agree to aid such other person in planning or committing it. RCW 9A.08.020(3)(a)(ii). An accomplice must act with the knowledge that he is promoting or facilitating the crime for which he is eventually charged. State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000); State v. Trujillo, 112 Wn. App. 390, 404, 49 P.3d 935, rev. denied, 149 Wn.2d 1002 (2002). However, while an accomplice must have general knowledge of a co-participant's substantive crime, he need not have specific knowledge of every element of the crime. State v. Roberts, 142 Wn.2d 471, 512, 14 P.3d 717 (2000).

A person who is an accomplice in the commission of a crime is guilty of that crime to the same extent as the principal. RCW 9A.08.020; State v. Carothers, 84 Wn.2d 256, 260-61, 525 P.2d 731 (1974), overruled on other grounds by State v. Harris, 102 Wn.2d 148, 685 P.2d 584 (1984). See also State v. Davis, 101 Wn.2d 654, 658-59, 682 P.2d 883 (1984). Being an accomplice in the commission of a crime is not an alternate means of committing

the crime, nor is accomplice liability an element of the crime. Carothers, 84 Wn.2d at 262-64; State v. Bockman, 37 Wn. App. 474, 495, 682 P.2d 925 (1984). Rather, the elements of the crime are the same for both the principal and his accomplice. State v. McDonald, 90 Wn. App. 604, 611, 953 P.2d 470 (1998).

In this case, the appellant was charged by amended complaint as, together with others, assaulting Ms. Frederick.² Testimony revealed that four girls participated in this attack. While Margarita Saldana could be described as the ringleader, given she was the first to hit Ms. Frederick, there is no question that the other three, including the appellant, did in fact participate and facilitate the assault. Ms. Frederick describes generally four girls being present and being kicked and beaten by all four girls. RP 23. Specifically, the appellant was described as standing behind Saldana, stepping forward, yelling, and jumping in. This was acknowledged by the Court, when in his oral findings, Judge McCullough stated: "there was a group activity that this appellant was in fact a part of that group, including the kicking, including the hitting" and that "the parties acting in concert" prior to finding the appellant guilty. RP 140. While not referencing the term 'accomplice liability'

specifically, the court clearly understood the statutory requirements and acknowledged that all parties acted together in this intentional assault, and did not attribute exact injuries to specific individuals. Based on the fact that accomplice liability is not an alternate means of committing the crime, nor does it change the elements, it is not necessary for the court to specify who did what, distinguish levels of guilt, or determine which participant acted as a principal and which acted as an accomplice. The legislature has acknowledged that anyone who participates in the commission of a crime should be charged as a principle, regardless of the specific nature of his involvement as the elements remain the same. Carothers, 84 Wash.2d at 264, 525 P.2d 731 (1974). In this case, after reviewing the appellant's actions, as well as those of the group, plus the injury suffered, Judge McCullough determined that the state had proved beyond a reasonable doubt that the appellant was guilty of Assault in the Third Degree.

In their argument, the appellant lists no case law that supports the position that absent the specific words, an inference can be made that the Court rejected the theory. Rather, the appellant simply argues that this Court may not substitute its

² The Amended Information is attached to this brief as Appendix B

judgment for that of the trial court. Stringfellow v. Stringfellow, 56 Wash.2d 957, 959, 350 P.2d 1003, 353 P.2d 671 (1960). That is not the case here. The court is not being asked to review a new theory or make a finding, but rather review the record in an attempt to ascertain the intent of the trial court. State v. Ramires, 109 Wash.App. 749, 767, 37 P.3d 343, 352 (2002). Where written findings are thought to be incomplete, the court may rely on the trial courts oral findings for purposes of review. State v. Bynum, 76 Wash.App., 262, 884 P.2d 10 (1994), review denied, 126 Wash.2d 1012, 89 P.2d 1089 (1995). Here, there can be no question as the Court found, after significant argument from both sides, that the appellant was acting in concert with others and was guilty of assault. This is supported in detail by the written findings with specific references to the intentional actions of the appellant, her participation, the actions of others, and the injury suffered. There are no magic words, only a clear conclusion by the Court that the appellant was as responsible as those she acted with for the injuries suffered by Ms. Frederick.

The State agrees with the trial courts assessment that the appellant acted in concert with the other girls present and was responsible for the injuries sustained in the attack. For all the

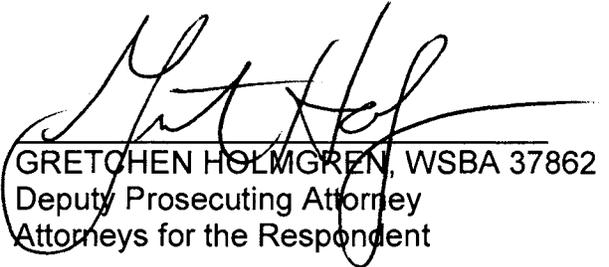
foregoing reasons, the appellant's conviction for Assault in the Third Degree should be affirmed.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that the Court find that the evidence was sufficient to support the adjudication of guilty of the charge of Assault in the Third Degree.

DATED this 10th day of June, 2010.

RESPECTFULLY submitted,

By: 
GRETCHEN HOLMGREN, WSBA 37862
Deputy Prosecuting Attorney
Attorneys for the Respondent

APPENDIX A

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KING COUNTY
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SEATTLE WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs

TYRA KUSACK
B D 11/2/91,

Respondent

No 09-8-02545-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
PURSUANT TO JuCR 7 11(d)

THE ABOVE-ENTITLED CAUSE having come on for fact-finding on September 29, 2009, before Judge LeRoy McCullough, in the above entitled court, the State of Washington having been represented by Rule 9 Intern Kyle Daly & Deputy Prosecuting Attorney Jeremy Lazowska, the respondent appearing in person and having been represented by her attorney Brian Beattie, the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law

FINDINGS OF FACT

- 1 On June 14, 2009, Kierstyn Frederick was walking with her brother Cody Frederick in Lake Meridian Park in Kent, King County, Washington She was approached by a group of individuals including the respondent, the respondent's sister Candice Mercer, and the respondent's friends Margarita Saldana and Nicole St Clair
- 2 After a hostile exchange of words Saldana attacked Frederick and punched her in the jaw Frederick attempted to defend herself, at which point several other individuals, including the respondent, began attacking Frederick as well The respondent hit Frederick while she was on the ground

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO JuCR7 11(d) - 1

Daniel T Satterberg, Prosecuting Attorney
Juvenile Court
1211 E Alder
Seattle Washington 98122
(206) 296 9025 FAX (206) 296 8869

ORIGINAL

- 3 When Frederick attempted to flee, several individuals, including Saldana and the
 2 respondent, followed her and continued to hit her near the bathroom of the park. The
 3 respondent and her friends then left the park and walked eastbound on Kent Kangley Rd to
 4 a bus stop nearby.
- 4 Kent Police Officer Matthew Lorette responded to the area and spotted a group of youths
 5 matching the description of the suspects he had received from dispatch at a bus stop. He
 6 noticed that the respondent was sweating. He engaged the respondent and her friends in
 7 conversation. Soon thereafter Kent Police Officer Jeffrey Kluzak arrived, spoke briefly with
 8 Lorette, and then drove to the park to investigate further.
- 5 Frederick's brother, Cody, arrived at the bus stop and informed Officer Lorette that the girls
 7 at the bus stop were the ones who beat his sister. Officer Lorette then detained the
 8 respondent, Saldana, Mercer, and another of the respondent's friends, Nicole St. Clair.
- 6 Officer Kluzak arrived at the park bathroom to find Kierstyn Frederick sitting down and
 9 crying. Her face was red and her jaw appeared to be swelling. He transported Frederick to
 10 the bus stop to conduct a show-up identification. Frederick positively identified all four
 11 girls, including the respondent, as the ones who attacked her.
- 7 Later that day Frederick's friend, Lacey Kibbsgard, was at another bus stop in Kent when
 12 she was approached by the respondent and her friends. The respondent told Kibbsgard that
 13 her friend Kierstyn had just been beaten up and that if Kibbsgard said anything to the police
 14 the same would happen to her.
- 8 As a result of the beating, Frederick sustained contusions to her head and an injury to her
 15 jaw. She was unable to open her mouth or eat solid foods comfortably for more than a
 16 week.

And having made those Findings of Fact, the Court also now enters the following

CONCLUSIONS OF LAW

I

The above-entitled court has jurisdiction of the subject matter and of the Respondent, TYRA
 KUSACK, who was born 11-2-1991, in the above-entitled cause.

II

The State has proven the following elements of Assault in the Third Degree, contrary to
 RCW 9A 36 031(1)(f), beyond a reasonable doubt.

- a That on or about the 14th day of June, 2009, the respondent Tyra Kusack caused
 bodily harm to Kierstyn Frederick,

FINDINGS OF FACT AND CONCLUSIONS OF LAW
 PURSUANT TO JuCR7 11(d) - 2

Daniel T Satterberg, Prosecuting Attorney
 Juvenile Court
 1211 L Alder
 Seattle Washington 98122
 (206) 296 9025 FAX (206) 296 8869

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- b That the bodily harm was accompanied by substantial pain that extended for a period of time sufficient to cause considerable suffering,
- c That the respondent acted with criminal negligence,
- d That the act occurred in King County, Washington

In making these findings, the court relied upon the testimony of witnesses and evidence introduced at trial

III

The respondent is guilty of Assault in the Third Degree

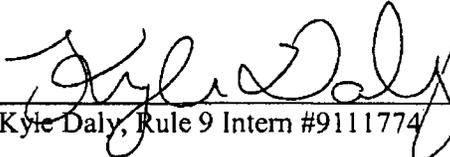
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Judgment should be entered in accordance with Conclusion of Law II In addition to these written findings and conclusions, the Court hereby incorporates its oral findings and conclusions as reflected in the record

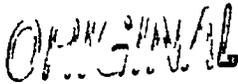
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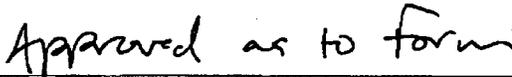


Judge LeRoy McCullough



Kyle Daly, Rule 9 Intern #9111774





Brian Beattie, WSBA #35753
Attorney for Respondent Tyra Kusack

APPENDIX B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DEPARTMENT

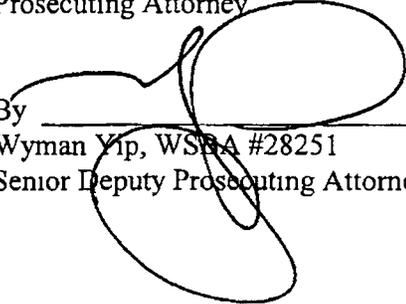
THE STATE OF WASHINGTON,)	
	Plaintiff,)
v)	No 09-8-02545-4
)	
TYRA ANNE LYNN KUSACK,)	AMENDED INFORMATION
BD 11/02/91,)	
)	
	Respondent)
)	

I, Daniel T Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse TYRA ANNE LYNN KUSACK of the crime of **Assault in the Third Degree**, committed as follows

That the respondent, TYRA ANNE LYNN KUSACK, together with others, in King County, Washington on or about June 14, 2009, with criminal negligence did cause bodily harm accompanied by substantial pain that did extend for a period sufficient to cause considerable suffering to Kierstyn Frederick,

Contrary to RCW 9A 36 031(1)(f), and against the peace and dignity of the State of Washington

DANIEL T SATTERBERG
Prosecuting Attorney

By 
Wyman Yip, WSBA #28251
Senior Deputy Prosecuting Attorney (B/wp1)

ORIGINAL

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. TYRA KUSACK, Cause No. 64579-0-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Janice Schwarz
Name Janice Schwarz
Done in Kent, Washington

6/10/10
Date

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