

66131-1

66131-1

NO. 66131-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

A.R.S.  
(D.O.B. 1/25/1992),

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Ricky Shipllett and Matt Cecil found themselves in a scuffle with a group of people after Cecil punched someone who was pestering him. A.R.S. was one of the only people present that Cecil recognized during this extended fight. After hearing from several witnesses with incomplete or inconsistent testimony about what occurred during the incident, the juvenile court found A.R.S. was involved in one portion of the assault against Shipllett. However, A.R.S. did not and could not have caused all of Shipllett's injuries. The court did not explain what, if any, injuries A.R.S. caused. Because second degree assault requires the reckless infliction of substantial bodily harm, and the court did not find A.R.S. was responsible for such injuries, his conviction was not adequately proven. The case may be remanded for imposition of a fourth degree assault conviction.

B. ASSIGNMENTS OF ERROR.

1. The court did not find the State proved all essential elements of second degree assault.

2. The State failed to prove all essential elements of second degree assault.

3. The court did not enter mandatory written findings of fact and the belated entry of written findings tailored to the issues raised on appeal prejudices A.R.S.'s right to appeal as guaranteed by Article I, section 22 of the Washington Constitution.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. In a juvenile court adjudication, the judge must enter findings detailing the evidence that it found proved each essential element of the offense charged. After hearing convoluted testimony, the juvenile court judge did not find the State proved the essential element of recklessly causing substantial bodily harm. Where the court's findings rest on its credibility determinations and resolution of conflicting evidence, and it did not find the State proved an essential element of the offense, do those findings show that the State fail to prove A.R.S. committed the charged offense?

2. JuCR 7.11(c) requires the court to make findings on the record explaining the factual basis of any juvenile adjudication, and JuCR 7.11(d) requires the court to set out its findings in written form if the case is appealed. A.R.S. appealed his adjudication but the court has not entered written findings. If the prosecution tries to remedy this error by entering belated findings that elaborate upon the court's oral ruling, is it unduly prejudicial for the court to enter

findings that are tailored to remedying the deficiencies raised on appeal?

D. STATEMENT OF THE CASE.

One summer night in 2009, A.R.S. and many other young people were at Green Lake. 2RP 87, 166, 4RP 558.<sup>1</sup> Ricky Shiplett and Matt Cecil went there, planning on meeting friends. 2RP 164. Before Shiplett arrived at Green Lake, he either bought or shoplifted beer from a nearby 7-11 store even though he was not yet of the legal age to purchase alcohol.<sup>2</sup> 2RP 310-11; 4RP 462-64, 470.

Cecil and Shiplett found themselves being pestered by Johnny Dawson Harris, who begged them for beer or money. 2RP 166. Cecil and Shiplett walked away to find their friends Michael Burge and Ryan Ira. 2RP 170. Harris followed, and asked for beer or money in a more assertive tone. 2RP 171. After exchanging words, Shiplett and Harris may have pushed each other, then Cecil punched Harris, knocking him to the ground. 2RP 9-98, 171.

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<sup>1</sup> The verbatim report of proceedings (RP) consists of five consecutively paginated volumes of transcripts.

<sup>2</sup> Although Shiplett denied buying or stealing beer, the court found that he had purchased the beer, illegally, and considered his failure to "fess up" to this as a factor discounting his credibility. 5RP 654.

Harris's friends approached as Harris was knocked to the ground and Cecil stood over him. 2RP 99, 173. Harris's friends asked Cecil why he had knocked down Cecil and then tussled with Cecil and Shiplett. 2RP 173-74. Neither Cecil nor Shiplett had clear or consistent recollections of what happened, but Shiplett recalled being punched in the face numerous times by a large Hispanic male with a tattoo on his upper arm. 2RP 131-35, 174-78, 223, 225.

Burge and Ira approached as their friends were fighting. 4RP 501. Ira grabbed the person fighting Shiplett from behind. 4RP 503. Ira did a "rear naked choke" on this person, which restricts oxygen to the brain, and enabled Shiplett to escape from this person's hold. 4RP 503. Two others hit Ira after he performed the chokehold. 4RP 504. Ira thought A.R.S. was the person who was punching Shiplett, but Cecil, who knew A.R.S., did not believe A.R.S. was involved in this part of the incident. 2RP 176, 182; 4RP 501. Critically, A.R.S. did not have the tattoo that Shiplett and Cecil saw on the person with whom Shiplett fought. 2RP 135, 174.

Shiplett's friends hurried toward Burge's car in the nearby parking lot. 2RP 137, 178. Shiplett did not recall getting into the car, but Ira thought he entered and then left the car. 2RP 138,

142-44; 4RP509, 511. At the car, Harris and several of his friends tried to pull Cecil's bike out of the open hatchback door and pounded on the car's windows. 2RP 179; 3RP 377; 4RP 510. A.R.S. punched Cecil in the face one time while Cecil was in the car. 2RP 181; 3RP 378. A.R.S. participated in pounding on the car's window. 2RP 184; 3RP 380; 4RP 510. Due to the group of people pounding on the windows, one of the car's windows shattered. 4RP 510.

Shiplett told his friends to leave even though five or six males were still nearby. 2RP 144. Shiplett backed up as several people approached him, including A.R.S. and Harris. 2RP 146. Shiplett fell down as he backpedaled. 2RP 146. He saw A.R.S. and other people kick him before he lost consciousness. 2RP 146.

Burge and Ira called 911 after driving a short distance away. 4RP 513. Police arrived and found Shiplett disoriented and confused. 3RP 390. He had broken his nose, cut his lip, and briefly lost consciousness. 2RP 158-59. He had normal results on neurological tests but had trouble remembering all of the details of the incident. 2RP 114, 120-21; 3RP 224.

The prosecution charged A.R.S. with two counts of second degree assault, involving Shiplett and Cecil, respectively, and one

count of malicious mischief in the third degree for the broken car window. CP 40-41. After a fact-finding hearing, the juvenile court judge found A.R.S. not guilty of assaulting Cecil. 5RP 650-51. The judge also found A.R.S. not guilty of assaulting Shiplett in the early part of the incident, based on the State's failure to prove A.R.S. was the person who punched Shiplett, and if A.R.S. assaulted Shiplett or Cecil, it was in justifiable defense of the assault on Harris. 5RP 651-54. The court found A.R.S. had intentionally kicked Shiplett in the later part of the incident and thus found him guilty of second degree assault based on this later incident. 5RP 654-55. It also found he participated in breaking the car window, adjudicating him guilty of third degree malicious mischief. 5RP 655.

The court rejected A.R.S.'s request for a manifest injustice sentence below the standard range based on A.R.S.'s lack of criminal history and the important role he played in helping care for his family. 5RP 670. It imposed a standard range term of 15 to 36 weeks in confinement. 5RP 672-73.

E. ARGUMENT.

THE COURT DID NOT FIND THE STATE PROVED  
ALL ESSENTIAL ELEMENTS OF SECOND  
DEGREE ASSAULT

Ricky Shiplett was punched in the face, and later kicked in the face and torso, during the course of two extended incidents involving a number of participants. Although the court found A.R.S. participated in the later assault by kicking Shiplett, it also found he was not guilty of the earlier assault when Shiplett was repeatedly hit in the face.

The court's findings were limited to determining that A.R.S. was involved in an intentional assault. It did not find that the State proved A.R.S. recklessly inflicted substantial bodily harm as a direct result of this assault. Because Ricky was punched and hit in the early part of the incident, which involved a substantial struggle, his injuries may have stemmed from that part of the incident. The court did not find that Ricky's injuries were caused by the assault for which A.R.S. was convicted. The court's failure to find this essential element means the State did not adequately prove the charged offense.

1. The court's findings must establish that the State met its burden of proving each essential element of a crime beyond a reasonable doubt. In a trial for a juvenile offense, the court is required to determine whether the prosecution proved each essential element beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 311, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1970) (quoting In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)); U.S. Const. amend. 14; Const. art. I, § 22; see RCW 13.40.130(1) (“[a]t the adjudicatory hearing it shall be the burden of the prosecution to prove the allegations of the information beyond a reasonable doubt”).

At the end of the fact-finding hearing, the juvenile court judge must state his or her findings on the record. JuCR 7.11(c) provides, “The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.” See also RCW 13.40.130(4).<sup>3</sup>

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<sup>3</sup> RCW 13.34.130(4) provides:  
The court shall record its findings of fact and shall enter its decision upon the record. Such findings shall set forth the evidence relied upon by the court in reaching its decision.

JuCR 7.11(c) is mandatory, and exists separately from the requirement of written findings in JuCR 7.11(d). See State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (word “shall” in a statute creates imperative duty); RAP 1.2(b) (when a word indicating “must” is used in a court rule, it emphasizes that failure to perform act in timely way involves severe sanctions); see also State v. Charlie, 62 Wn.App. 729, 731, 815 P.2d 819 (1991) (“Our courts have held that ‘JuCR 7.11(c) . . . impose[s] a requirement that cannot be ignored.’” (quoting State v. Fellers, 37 Wn.App. 613, 616, 683 P.2d 209 (1984))).

The court’s findings at the end of a fact-finding adjudication must state “the ultimate facts for each element of the offense charged” and “the evidence upon which the court relied” in making a decision. State v. Litts, 64 Wn.App. 831, 835, 827 P.2d 304 (1992); JuCR 7.11(c); (d). In addition to entering an oral ruling that explains the evidence relied upon as proof of each essential element, the court must enter a written ruling if the adjudication is appealed. JuCR 7.11(d).

A court’s findings should treat each element separately and indicate the factual basis for each of the ultimate conclusions. State v. Jones, 34 Wn.App. 848, 851, 664 P.2d 12 (1983) (citing

State v. Russell, 68 Wn.2d 748, 750, 415 P.2d 503 (1966)). The juvenile court did not enter written findings and its oral ruling contains no finding of fact explaining that A.R.S. recklessly inflicted substantial bodily harm upon the complainant Ricky Shiplett.

2. The court did not find the State proved all essential elements of second degree assault. To find A.R.S. guilty of second degree assault, the court was required to find A.R.S. intentionally assaulted Shiplett and “thereby recklessly inflict[ed] substantial bodily harm.” RCW 9A.36.021(1)(a); CP 40.

A fact-finder may not conflate the requirement of an intentional assault with the separate element of recklessly causing substantial bodily injury. State v. Hayward, 152 Wn.App. 632, 645, 217 P.3d 354 (2009). Both elements must be separately proven to the fact-finder to establish the commission of a second degree assault.

A person acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur, and that disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation. RCW 9A.08.010(c). Juveniles are held to the standard of a reasonable juvenile of the same age and circumstances. See State v. Marshall, 39 Wn.App.

180, 183-84, 692 P.2d 855 (1984) (15-year-old defendant convicted of manslaughter held to the standard of a reasonable 15-year-old).

Here, the court did not explain what evidence proved that A.R.S. recklessly inflicted substantially bodily harm upon Shiplett. 5RP 654-55. After finding A.R.S. acted with the intent to assault Shiplett, the court did not identify any ultimate facts establishing the essential element of recklessly inflicting substantial bodily injury. 5RP 655.

The court's findings for this essential element are particularly pivotal in this case. The court evaluated and resolved conflicting and ambiguous evidence about how Shiplett was injured. 5RP 651-55. The court also found A.R.S. was not criminally liable for all of Shiplett's injuries. 5RP 651, 655.

An appellate court "must defer to the fact-finder on any issues of conflicting testimony, witness credibility, and persuasiveness of the evidence." State v. Thomas, 150 Wn.2d 821, 875, 83 P.3d 970 (2004). This was not a straightforward case where the basis of the court's findings could be plainly inferred from the evidence. The court heard a variety of different accounts of what occurred and who did what. It explicitly found Shiplett's own

testimony considerably unreliable. 5RP 654, 655 (“I discounted Ricky [Shiplett]’s testimony considerably.”). Shiplett not only had memory problems, but he also “does not fess up” to significant events that would have painted him in a bad light. 5RP 654. The court similarly discounted testimony from the only other witness who was present during the entire incident, Matt Cecil. The court explained, “I’ve discounted Matt’s testimony to some degree, as well.” 5RP 655. In addition to hearing different accounts of who did what, the court rejected the State’s theory that A.R.S. was a repeated aggressor. 5RP 589, 651. Instead, it concluded that Shiplett was partly to blame for the combat that occurred in the early part of the incident and any injuries he suffered then could not be the basis for conviction. 5RP 651.

Shiplett had been punched in the face multiple times that night before the assault for which A.R.S. was convicted. 2RP 131-35. The court found A.R.S. was not liable for whatever injuries Shiplett sustained in this earlier fight. 5RP 651. Shiplett himself was either the aggressor or a mutual combat participant. There is no question that Shiplett was punched in the face numerous times in this earlier combat. 2RP 131-34.

The court's failure to find the ultimate facts necessary for a conviction are fatal. The absence of findings of fact is interpreted as a finding against the party with the burden of proof. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); In re Marriage of Olivares, 69 Wn.App. 324, 334, 848 P.2d 1281, rev. denied, 122 Wn.2d 1009 (1993).

The court's oral ruling explaining the basis of its verdict merely stated,

the Court finds that at least some of those substantial injuries were caused by the kicking. In any event, A[R.S.] was the actor, it was intentional, it was malicious, it occurred in King County on or about July 27, 2009; and the State has proven it did not occur as a result – as a result of defense of self or defense of others.

5RP 656. The court did not explain what injuries Shiplett suffered as the result of the later assault. It did not find A.R.S. recklessly caused substantial bodily harm as a result of the later assault. It did not set forth the evidence underlying any finding that A.R.S. recklessly caused substantial bodily harm as required. The court's failure to explain how the State proved A.R.S. committed each element of second degree assault undermines the validity of the conviction and shows the State did not meet its burden of proof. See Litts, 64 Wn.App. at 835.

Without identifying a factual basis supporting the essential element of recklessly causing substantial bodily injury, the court did not find the prosecution proved all elements of second degree assault. This Court cannot now determine the facts established at trial when the trial court's decision rested on its evaluation of witness credibility and its resolution of conflicting accounts of the incident. Thomas, 150 Wn.2d at 875.

3. The court's failure to file written findings of fact may not be used to prejudice A.R.S.'s right to appeal. The trial court is required to file written findings of fact relating to each material element of the offense. JuCR 7.11(d). The court has not entered written findings in the case at bar.

The purpose of written findings is not merely to assist, but to enable an appellate court's review of questions presented on appeal. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998); State v. Alvarez, 128 Wn.2d 1, 16, 904 P.2d 754 (1995). Our Constitution requires a meaningful appeal in any case in which such an appeal is sought. Const. art. I, § 22. A.R.S. is required to prepare his appeal based solely on the court's oral ruling, which was entered more than six months ago. The court's failure to file

findings requires reversal if it prejudices the appellant. Charlie, 62 Wn.App. at 732-33.

A.R.S. would be prejudiced by the court's entry of findings of fact now, if belated findings include facts not included in its oral ruling made immediately after the adjudication hearing when the array of conflicting testimony was fresh in the judge's mind. The prosecution should not be permitted to add facts to tailor its arguments on appeal to speak to additional findings not made by the trial court when it announced and explained its decision.

4. The remedy is vacate the adjudication and permit entry of a disposition for the lesser offense of fourth degree assault. When a fact-finder found the State proved the elements of a lesser offense, the court may enter a judgment for the lesser offense. In re Personal Restraint of Heidari, \_ Wn.App. \_, 2011 WL 229032, \*5 (2011). Here, the court's ruling is only sufficient to establish the State proved an intent to assault and some resulting injury. These findings meet the elements of fourth degree assault, and A.R.S.'s conviction for second degree assault should be vacated. See RCW 9A.36.041; see also State v. Garcia, 146 Wn.App. 821, 830, 193 P.3d 181 (2008). His case may be remanded for entry of an adjudication on the lesser offense.

F. CONCLUSION.

For the foregoing reasons, A.R.S. respectfully requests this Court reverse his adjudication for second degree assault based on the State's failure to prove an essential element and remand for entry of a finding for fourth degree assault.

DATED this 15<sup>th</sup> day of February 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66131-1-I
v.	)	
	)	
A.R.S.,	)	
	)	
Juvenile Appellant.	)	

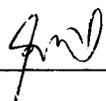
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF FENRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2011.

X \_\_\_\_\_ 

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