

70014-6

70014-6

COURT OF APPEALS  
STATE OF WASHINGTON

2013 JUN 27 PM 4:13

NO. 70014-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

C.P.,

Appellant.

REC'D

JUN 27 2013

King County Prosecutor  
Appellate Unit

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

The Honorable Barbara Mack, Judge

BRIEF OF APPELLANT

DAVID B. KOCH  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	4
THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE ASSAULT CONVICTION.....	4
D. <u>CONCLUSION</u> .....	7

## TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Green</u> 94 Wn.2d 216, 616 P.2d 628 (1980) .....	4
<u>State v. Hickman</u> 135 Wn.2d 97, 954 P.2d 900 (1998) .....	7
<u>State v. Parker</u> 81 Wn. App. 731, 915 P.2d 1174 (1996) .....	5
<u>FEDERAL CASES</u>	
<u>In re Winship</u> 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) .....	4
<u>Jackson v. Virginia</u> 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) .....	4
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
11 Washington Pattern Jury Instructions WPIC 35.50 (2008) .....	5
RCW 9A.36.041 .....	2, 5
Restatement (Second) of Torts § 19, (1965) .....	5

A. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support appellant's conviction for assault in the fourth degree.

2. The trial court erred when it entered that portion of finding of fact 6 in which it found appellant had committed an assault, and conclusions of law II-IV, in which it found the elements of assault proved.<sup>1</sup>

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault for bumping his shoulder against his sister's chest after she intentionally provoked him. Assault requires proof of an offensive touching. Did the State fail to prove under the circumstances that an ordinary person would have been offended by the shoulder bump?

2. Where the evidence revealed no offensive touching, did the trial court err when it concluded the State had proved assault?

---

<sup>1</sup> The court's written findings and conclusions are attached to this brief as an appendix.

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged juvenile appellant C.P. with one count of assault in the fourth degree, in violation of RCW 9A.36.041. CP 1.

Evidence at trial revealed that on the morning of April 25, 2012, 18-year-old Shandel Parmenter and her 15-year-old brother, C.P., argued over C.P.'s desire to have friends over to the Issaquah apartment they shared with their mother. RP 12, 33-34, 37. Their mother, Misie Parmenter, was still asleep in her bedroom. RP 15. Shandel went and told her mother about C.P.'s plan, and Mrs. Parmenter agreed with Shandel that it was not a good idea. RP 37.

Shandel left her mother's room and continued to argue with her brother, informing him that their mother said he could not have his friends over. C.P. was angry and called Shandel a "tattletale." RP 37-38, 52. Shandel put down a coffee cup she had been holding and began to waive and flail her arms about a foot from where C.P. was standing. RP 36-37, 51, 53, 59, 61-62. Taking advantage of one of C.P.'s known "triggers," and aware it was "really going to piss [her] brother off," Shandel told him to "suck dick." RP 54-55.

In response, C.P. gave Shandel a "shoulder check," knocking his shoulder into her chest. RP 34, 38-39, 55-56. Given what she

had said, Shandel was not “that surprised” by C.P.’s reaction. RP 55-56. At 6’ 2” tall, Shandel is taller than her younger brother, although he outweighs her, and she could “beat him into a bloody pulp.” RP 29-30, 39, 61. Instead, she began taunting him, repeatedly telling C.P. he was going to jail. RP 25, 56.

From her bedroom, Mrs. Parmenter heard her children arguing loudly, and heard C.P. say, “I did not hit you, I pushed you.” RP 15, 18, 23-24. Shandel picked up the home telephone to call 911, but C.P. pulled the phone cord from the wall. Shandel then grabbed her cell phone, walked outside, and placed the call. RP 18-20, 26, 34, 40. Shandel lied to the 911 operator. RP 56-57. She was angry and falsely reported that C.P. punched her in the face, hoping police would then prioritize the matter. RP 50-51, 59-60.

C.P. put on a tee shirt and shorts and left. RP 20-21, 41. Police arrived and took photos of Shandel’s chest, documenting some redness. RP 45-48, 67-68. Shandel was not crying or otherwise upset; she just appeared angry. RP 71-72. C.P. returned to the apartment that evening. RP 21, 48.

At the close of evidence, defense counsel argued C.P.’s use of force was not unlawful. CP 75. Counsel focused, in part, on the fact Shandel intentionally taunted C.P., flailing her arms close to him

and using a derogatory trigger she knew would make him angry. Only in light of these provocations did C.P. react with physical contact. RP 75-76.

The Honorable Barbara Mack nonetheless found the charge proved, imposing six months' supervision and 30 hours of community service. RP 78-80, 87; CP 7, 12-14, 23-25. C.P. timely filed his Notice of Appeal. CP 26.

C. ARGUMENT

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE ASSAULT CONVICTION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The State charged C.P. with assault in the fourth degree. "A person is guilty of assault in the fourth degree if, 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). An assault:

is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

11 Washington Pattern Jury Instructions, WPIC 35.50 (West 2008); see also State v. Parker, 81 Wn. App. 731, 736-37, 915 P.2d 1174 (1996) (discussing elements).

As discussed in the comment to WPIC 35.50, the Restatement (Second) of Torts further explains the "offensive" requirement:

In order that contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.

Restatement (Second) of Torts § 19, comment (a) (1965) (emphasis added).

In S.P.'s case, the State failed to offer evidence from which a

reasonable trier of fact could conclude that the physical contact with his sister was offensive. Given the context in which the touching occurred, a reasonable person would not deem it “unwarranted by the social usages prevalent at the time and place.” Shandel intended to trigger a reaction from C.P. and successfully did so. She even conceded she was not “that surprised” by C.P.’s decision to bump her after she waived her arms near him and told him to “suck dick.” RP 55-56.

Judge Mack properly found that “Shandel Parmenter used offensive language towards [C.P.]. Shandel Parmenter knew that the language could provoke [C.P.] and it did in fact provoke him.” CP 24 (finding 5). But she erred when she concluded C.P.’s response was not justified or reasonable to the extent this is a conclusion the touching was offensive. CP 25 (conclusion II.2). Under the circumstances of the intentional and effective provocation, a reasonable person would not have been offended by C.P.’s relatively minor physical response.

Because the State failed to offer sufficient evidence from which a reasonable trier of fact could have concluded that C.P.’s actions were offensive, the trial court erred when it found an assault. The conviction cannot stand. It must be reversed and dismissed

with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

D. CONCLUSION

This Court should reverse based on insufficient evidence.

DATED this 27<sup>th</sup> day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'D. B. Koch', is written over a horizontal line.

DAVID B. KOCH  
WSBA No. 23789  
Office ID No. 91051

Attorneys for Appellant

## **APPENDIX**



**FINDINGS OF FACT**

The following events took place in King County, Washington

1 On or about April 25, 2012, Misie Parmenter was living at home with her two children, her son, Cole Parmenter, and her daughter, Shandel Parmenter

2 That morning, Cole Parmenter and Shandel Parmenter had a conversation that turned into an argument about whether or not a friend of Cole Parmenter could come to the house That argument took place in the kitchen

3 Misie Parmenter was sleeping in her room at that time Shandel Parmenter went to her Mother's room, to tell her mother what was going on

4 When Shandel Parmenter returned to the kitchen area, Cole Parmenter called her a tattletale

5 The argument between Shandel Parmenter and Cole Parmenter escalated, and Shandel Parmenter used offensive language towards Cole Parmenter Shandel Parmenter knew that the language could provoke Cole Parmenter and it did in fact provoke him

6 Subsequently, Cole Parmenter assaulted Shandel Parmenter by shoulder-checking her in the chest, causing her pain, and leaving a red mark

7 Although Misie Parmenter was not present at the time of the assault, she heard yelling Misie Parmenter heard Cole Parmenter say, "I didn't hit you, I pushed you " This caused Misie Parmenter to jump out of bed to see what was going on Misie Parmenter saw Cole Parmenter and Shandel Parmenter arguing in the kitchen

8 Shandel Parmenter grabbed a land-line telephone to call 911, and Cole Parmenter ripped the phone cord out of the wall Shandel Parmenter grabbed her cell phone from her jacket to call 911

9 Shandel told the 911 operator the respondent had struck her in the face, knowing that the statement was false

10 At that point, Cole Parmenter left the house He did not return until later that evening

11 Officer J Steele of the Issaquah Police Department responded to the scene shortly after the incident Officer Steele took photographs of Shandel Parmenter The photographs show red marks on her chest consistent with her testimony that the respondent shoulder-checked her

12 Shandel Parmenter's testimony is corroborated by photographs of her injury, as well as Misie Parmenter's testimony that she heard Cole Parmenter say that he pushed Shandel Parmenter

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

**CONCLUSIONS OF LAW**

**I**

The above-entitled court has jurisdiction of the subject matter and of the respondent, who was born on February 7, 1997, in the above-entitled cause

**II**

The following elements of Assault in the Fourth Degree have been proven by the State beyond a reasonable doubt

- 1 That on or about April 25, 2012, the Respondent, Cole Parmenter, assaulted Shandel Parmenter,
- 2 While Shandel's offensive language may have provoked the Respondent, his response was neither justified nor reasonable, and
- 3 That this occurred in King County, Washington

**III**

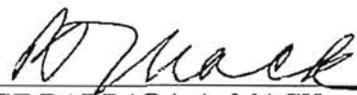
The Respondent is guilty of the crime of Assault in the Fourth Degree as charged in Count I of the original Information

**IV**

Judgment should be entered in accordance with Conclusion of Law III

In addition to these written findings and conclusions, the Court incorporates herein its oral findings and conclusions as reflected in the record

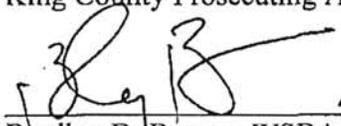
Signed this 1 day of March, 2013



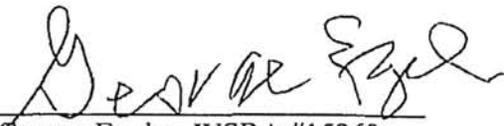
JUDGE BARBARA A MACK

Presented by

Daniel T Satterberg  
King County Prosecuting Attorney

  
Bradley D Bowen, WSBA #41765  
Deputy Prosecuting Attorney

Approved as to Form  
Presentation Waived

  
George Eppler, WSBA #15268  
Attorney for Respondent

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

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 70014-6-I
	)	
COLE PARMENTER,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27<sup>TH</sup> DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] COLE PARMENTER  
1621 KRAUSE ROAD  
RAYMOND, WA 98577

SIGNED IN SEATTLE WASHINGTON, THIS 27<sup>TH</sup> DAY OF JUNE, 2013.

x Patrick Mayovsky