NO. 100828-7
COURT OF APPEALS NO. 82559-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

I.J.S.,

Petitioner.

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

The Honorable Joseph Wilson, Judge

PETITION FOR REVIEW

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RULES, STATUTES, AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

I.J.S., the appellant below, seeks review of the Court of Appeals decision, State v. I.JS., noted at ___ Wn. App. 2d ___, 2022 WL 766458, No. 82559-3-I (Mar. 14, 2022).

B. ISSUES PRESENTED FOR REVIEW

1. The Court of Appeals decision indicates that the Washington Supreme Court "misspoke" in State v. Homan, 181 Wn.2d 102, 330 P.3d 182 (2014), regarding the standard of review of findings of fact and conclusions of law for sufficiency of the evidence after a bench trial. Should review be granted under RAP 13.4(b)(1), (2), and (3), to address the conflict between the Court of Appeals decision and Homan and the conflicts the Court of Appeals identifies between Homan and other Supreme Court and Court of Appeals decisions on the review standard for the constitutional sufficiency of the evidence?

2a. Does merely resisting officers' attempts at physical restraint, particularly when officers are acting unlawfully, constitute sufficient evidence of an assault against an officer and does the Court of Appeals affirmative answer to this question conflict with State v. D.E.D., 200 Wn. App. 484, 402 P.3d 851 (2017), such that review should be granted under RAP 13.4(b)(2) and (3)?

2b. Given that police and prosecutors brought this case to punish Mr. S for his unsuccessful attempt to spit on a police officer, and because spitting at someone is not intended to cause bodily injury and would not cause reasonable fear or apprehension of bodily harm, was there insufficient evidence to sustain an assault conviction based on the spitting and should this question be reviewed under RAP 13.4(b)(3) and (4) to provide guidance to state actors who appear to believe that attempted spitting is constitutionally sufficient evidence of an assault?

3. To the extent it is necessary to address whether Mr. S's actions in resisting officers' entry into his home and physical seizure of his person constituted an assault, should the question of whether officers had authority for a warrantless entry of Mr. S's home be reviewed pursuant to RAP 13.4(b)(2) and (3) in light of the conflict in Court of Appeals decisions regarding what level of resistance to unlawful police actions constitutes assault?

C. STATEMENT OF THE CASE

On March 26, 2020, three officers arrived at an Everett apartment complex based on multiple 911 calls about an ongoing domestic violence situation. CP 62, 67, 69, 98 (finding of fact 2); RP 8-9, 23-24. When they arrived, resident Alicia Overstreet showed them a two- to three-second video of an "assault," which showed two unidentified males fist fighting and one unidentified woman attempting to intervene; Ms. Overstreet directed the officers to Unit 52. CP 43, 49, 69, 98 (findings of fact 3-9); RP 10, 24, 38.

Officers went to Unit 52, where 16-year-old I.S. lived with his mother.[1] CP 98 (finding of fact 11). They heard loud screaming coming the apartment. RP 18, 25, 28, 30, 41, 43-45; CP 98-99 (findings of fact 12, 17-19). No weapons had been reported and they saw no weapons. RP 16, 43. They saw no injuries. RP 18, 30, 44. They neither saw nor heard any physical aggression of any kind. RP 16, 29-30, 45. They admitted they had no idea of Mr. S's involvement, who was the "victim," who was the "suspect," or whether a crime had even occurred or was still occurring. CP 99 (finding of fact 24), 100 (conclusion of law 3); RP 15-17.

They nonetheless entered Mr. S's apartment to "control the scene." RP 16-17. Because of the loud yelling and "chaotic" situation, they stated they could not conduct their investigation, which they said prompted them to enter only out of "concern" for the people in the apartment. RP 15, 41. They said they were also

[1] Mr. S and his mother share a surname. To protect Mr. S's identity, given that he is a juvenile, he does not use his mother's name in the briefing but refers to her as his mother.

concerned for an unaccounted-for third person, yet they did not bother to sweep the apartment to look for this person or assuage their supposed concern. RP 33, 48; CP 99 (finding of fact 25). The officers admitted they had training on and knew how to apply for warrants but claimed that the exigent circumstances exception to the warrant requirement justified their entry. RP 19, 21, 27, 42.

Upon entry, Mr. S screamed at officers repeatedly that they had no right to enter or remain in his apartment. RP 15, 17-18. Officers separated Mr. S from his mother, who was very emotional. RP 26; CP 43. When Mr. S leapt over the couch toward where his mother was, officers then grabbled hold of Mr. S, who struggled against their physical contact. CP 43-44, 49, 62, 75-76. Because he would not cease his struggle, officers and Mr. S ended up on the ground, officers knelt on him, and handcuffed him. CP 43-44, 76. Mr. S's mother was screaming at officers not to hurt her son. CP 44, 76.

When he was on top of Mr. S, Sgt. Kevin Fairchild noticed Mr. S attempting to turn to him and noticed he was forming a "loogie." CP 44. As Mr. S spit toward him, Sgt. Fairchild moved out the way, thereby avoiding any contact. CP 44. Based on the spitting, officers believed they had probable cause to arrest Mr. S for assault in the third degree against a law enforcement officer. CP 71, 77

The officers' remaining "investigation" disclosed very little. Apparently, Mr. S and his mother were having a nonphysical fight and a neighbor, Jacob Parejo, intervened. CP 67, 70-71. Words were exchanged between Mr. S and Mr. Parejo, Mr. Parejo exited his truck and began to punch Mr. S, and Mr. Parejo forced Ms. S to the ground where he stood over Mr. S and punched him. CP 45. Mr. S's mother hit Mr. Parejo with her purse in an attempt to cease Mr. Parejo's assault. CP 70-71, 78

No charge was filed against Mr. S with respect to any assault against a private citizen. Instead, the state charged Mr. S

with third degree assault against Sgt.t Fairchild for the attempted spitting. CP 157-58.

Mr. S moved to suppress all evidence of what occurred in his apartment. CP 142-52. Among other things, Mr. S contended that the exigent circumstances exception did not justify entry into his apartment, which was the only warrant exception relied on by the prosecution. CP 142-46.

The trial court rejected the defense arguments and determined that the officers' entry into Mr. S's apartment was lawful under the exigent circumstances exception. It made several findings of fact as cited in the foregoing factual discussion. CP 97-100. However, the trial court found, "The entry was relatively peaceful, and the officers did not push past [Mr. S's mother] to get inside" and "Sgt. Fairchild's entry at the back of the apartment was also peaceful." CP 100 (findings 30 and 31, respectively). The trial court entered five conclusions of law:

> 1. Pursuant to the facts outlined *State v. Smith*[, 165 Wn.2d 511, 199 P.3d 396 (2009)], the exigent circumstance exception applied in this case.
>
> 2. The officers were acting reasonable given the situation at hand.
>
> 3. They did not know who was assaulted, the identification of the parties involved, where the third male was, if anyone posed a danger to those present, the status of anything that occurred, and no one was calm enough to tell them.
>
> 4. It was the officer's duty to enter to deter a possibly ongoing assault, ensure safety, provide help and prevent a suspect fleeing.
>
> 5. The court denies the defense motion to suppress evidence.

CP 100.

The parties proceeded to a bench trial on stipulated facts. CP 83-141. The trial court considered the documentary evidence submitted by the parties and attached this documentary evidence to its findings of fact and conclusions of law. CP 37-82. The trial court entered four findings of fact:

> 1. That on or about March 26, 2020, [I.S.], Respondent herein, did intentionally assault Kevin Fairchild, a law enforcement officer who was performing his official duties at the time of the assault.

> 2. That when Sgt. Fairchild attempted to speak with Respondent about a recent incident he began to fight with officers.
>
> 3. That while Sgt. Fairchild was attempting to physically control Respondent, Respondent spit at Sgt. Fairchild.
>
> 4. The above facts have been proved beyond a reasonable doubt.

CP 37. The trial court also entered two conclusions of law: "1. This court has jurisdiction over this proceeding" and "2. The Respondent is guilty of the crime of" third degree assault against Kevin Fairchild. CP 38.

The trial court sentenced Mr. S to 10 days of confinement, six months of community supervision, and 24 hours of community service. CP 27-28.

Mr. S appealed. CP 6-21. He challenged the sufficiency of the evidence for assault given that no spit made contact with Sgt. Fairchild and was not intended to cause bodily harm and did not cause fear or apprehension of bodily harm. Br. of Appellant, 10-19. He also argued that officers' entry into his house was

unconstitutional. Br. of Appellant, 19-26. As discussed below, the Court of Appeals rejected these arguments and affirmed.

D. ARGUMENT IN SUPPORT OF REVIEW

1. **The Court of Appeals decision expressly refuses to acknowledge State v. Homan as Supreme Court authority, conflicting with the decision and meriting review**

Mr. S quoted the Homan decision in his brief regarding the standard of review of sufficiency claims following a bench trial. Br. of Appellant at 11 (quoting Homan, 181 Wn.2d at 105-06). As the Court of Appeals acknowledged, "Without question, I.J.S. sets forth the standard of review described in Homan. I.J.S., slip op. at 5.

The Court of Appeals proceeded to expressly disagree with the Homan decision and standard of review and contended the sufficiency of the evidence standard from Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and adopted in State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), is the correct standard. I.J.S., slip op. at 6-9 (discussing other

Washington Supreme Court and Court of Appeals cases that apply/adopt federal sufficiency review standard announced in Jackson).

Given that the Court of Appeals decision itself identifies a conflict between its decision and other decisions with the Homan decision, concerning the constitutional issue of the sufficiency of the evidence review standard, review is appropriate under RAP 13.4(b)(1), (2), and (3).

2. **Even under the sufficiency standard espoused by the Court of Appeals, there was insufficient evidence of an assault based on a vague "fighting" reference or based on spitting at but missing an officer**

a. The Court of Appeals decision conflicts with another decision of the Court of Appeals that merely resisting the unlawful actions of police is not assaultive conduct

The Court of Appeals did not address whether spitting and missing is an assault. Instead, it provided mistaken analysis that "a rational trier of fact could conclude that I.J.S. assaulted a law enforcement officer based on Officer Burnett's report that I.J.S.'s [sic] pulled two police officers to the ground and continued to

fight from the ground. Pulling a person to the ground is an intentional and offensive contact." I.J.S., slip op. at 10.

It was not, Mr. S who made contact with the officers, but the other way around. Mr. S had stated to officers that they were not allowed in his home. Officers disregarded Mr. S's constitutional rights, as addressed in Part D.3 below, entered his home, and attempted to separate him from his mother. When he moved toward his mother, officers grabbed him, he fought to get away, they ended up on the ground, he was handcuffed, and he then unsuccessfully tried to spit on an officer.

Mr. S's resistance to the officers' contact with him in his own home, particularly where the officers were illegally in his home, was not an assault or otherwise unlawful conduct. As the Court of Appeals has held in the context of obstructing an officer, "Passive resistance consistent with the lack of a duty to cooperate, however, is not criminal behavior. According, we concluded that D.E.D.'s resistance to being handcuffed and his ensuing struggle to prevent handcuffing did not amount to

obstructing a law enforcement officer." State v. D.E.D., 200 Wn. App. 484, 496, 402 P.3d 851 (2017). There is no obligation to cooperate with police, so there is no obligation to accept their seizure of you. Id. at 494.

The D.E.D. court also compared obstructing to other scenarios, such as resisting arrest or assault. Id. at 496. With regarding to resisting, the court noted the "legislature has only imposed a duty to cooperate with a lawful *arrest*" and "[b]y implication, there is no duty to refrain from resisting an unlawful arrest." Id. at 496 & n.10. The court also reasoned that the resisting statute could not be read to impose a duty of cooperation with a mere detention short of arrest. Id. at 496.

As for assault, the D.E.D. court stressed that a person subjected to unlawful seizure still had a duty not to assault or threaten an officer. Id. But "the behavior of D.E.D. [did not] rise to such levels." Id. In D.E.D., the behavior was described as,

> The officer attempted to handcuff [D.E.D.], but the younger man pulled his arm away and demanded that the officer not touch him. The officer directed

> [D.E.D.] to put his arms behind his back, but the young man refused to comply. He attempted to stiffen his body and pull away from the officer in order to avoid being handcuffed. The officer continued to attempt to handcuff the young man in order to search for a gun. After two minutes, the officer prevailed in overpowering [D.E.D.] and handcuffing him.

Id. at 488.

If the behavior in D.E.D. resisting officers' seizure was not an assault, the behavior here isn't either. Like D.E.D., Mr. S expressly asserted his constitutional rights to officers and told them they were not allowed in his home. When they entered anyway and grabbed ahold of him in an attempt to control all his movements, he struggled to get away, just as in D.E.D. Mr. S supposes this could be described as "fighting" to escape the officers' restraint of him and they did all fall to the ground, which is what the Court of Appeals relied upon, but this general "fighting" to escape the seizure still does not "rise to such levels" of an assault. Compare D.E.D., 200 Wn. App. at 496 with I.J.S., slip op. at 10.

Further, as Mr. S argues in the following section, officers had no lawful authority to be in Mr. S's home. As the D.E.D. court recognized, the law imposes no duty to cooperate with investigating officers, and the legislature recognizes that any duty not to resist officers applies only to lawful arrests, not *unlawful* arrests or detentions. Id. at 496. The detention here following the warrantless entry was unlawful where officers could not point to I.S. as the suspect of criminal activity or meet an exigency exception to the warrant requirement. Especially in these circumstances, Mr. S had no duty to cooperate and his resistance to being physically restrained in his own home did not amount to an assault. The Court of Appeals' contrary conclusion conflicts with D.E.D. on a question of the constitutional sufficiency of the evidence of assault, meriting RAP 13.4(b)(2) and RAP 13.4(b)(3) review.

b. Guidance is needed on whether attempted spitting without contact is an assault under Washington law

The resistance conduct relied on by the Court of Appeals to establish sufficiency is not what the state or the trial court relied on as the basis for the assault. They focused on I.S.'s failed attempt to spit at Sgt. Fairchild, believing that that act was the assault. CP 71, 77 (officers indicating probable cause to arrest for assault in the third degree based on spitting episode); CP 37 (finding of fact 3 that "Respondent spit at Sgt. Fairchild").[2] Everyone was focused on the spitting incident below. Because the government seems to believe that mere spitting and missing is an assault under Washington law, this issue not reached by the Court of Appeals should be reviewed for constitutional sufficiency guidance and guidance to law enforcement about

[2] The trial court also found that "when Sgt. Fairchild attempted to speak with Respondent about a recent incident he began to fight with officers." CP 37. As discussed above and argued below, this is not supported by the record. Br. of Appellant at 17-18. Mr. S first explained to officers that they had no right to be in his home and did not physically resist officers until they grabbed him. Sgt. Fairchild did more than "attempt[] to speak" with Mr. S.

what is and what is not an assault under RAP 13.4(b)(3) and (b)(4).

> Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.

State v. Hupe, 50 Wn. App. 277, 282, 748 P.2d 263 (1988), overruled on other grounds by State v. Smith, 159 Wn.2d 779, 787, 154 P.3d 873 (2007).

There is no question that hitting another person with spit constitutes an assault under the second Hupe definition. "A battery is a consummated assault. Spitting may constitute a battery." State v. Humphries, 21 Wn. App. 405, 409, 586 P.2d 130 (1978) (citation omitted). "'Although minor, [spitting] is an application of force to the body of the victim, a bodily contact intentionally highly offensive.'" Id. (quoting United States v. Frizzi, 491 F.2d 1231, 1232 (1st Cir. 1974)). Thus, if Mr. S's spit had landed on Sgt. Fairchild, that would be assault.

But here, there was no contact. CP 44, 49, 63, 70. Thus, the pertinent questions are whether an unsuccessful attempt to spit at someone evinces (1) an intent to cause bodily injury or (2) an intent to create fear or apprehension of bodily injury that in fact does create a fear or apprehension bodily injury. Although certainly offensive, because spitting is not an act that ordinarily would or could cause bodily injury, the answer to both questions is no. Nor did Sgt. Fairchild or another officer offer evidence that they were actually fearful of bodily injury based on the attempted spitting. There was insufficient evidence of an assault by attempted spitting in this case.[3]

[3] As Mr. S discussed in his Court of Appeals brief, the Ohio Court of Appeals has repeatedly analyzed the precise question of whether attempted spitting constitutes assault under the Ohio assault statute, which is similar to Washington's nonbattery definitions of assault. Br. of Appellant at 13-17. The Ohio courts have correctly concluded that without specific evidence of fear of "physical harm" (the term used in the Ohio statute), spitting on or attempting to spit on an officer is not intended to cause harm nor would it be likely to cause fear of harm, and therefore is not sufficient evidence of assault. State v. Sepulveda, 71 N.E.3d 1240, 1249, 2016 Ohio 7177 (Ohio Ct.

Mr. S was arrested and charged with third degree assault based on his attempt to spit on Sgt. Fairchild. Because the spit made no physical contact and because there was no evidence presented that the spit was intended to or had the potential to cause bodily injury to Sgt. Fairchild or fear or apprehension thereof, the evidence was not sufficient to sustain a conviction for any assault. To provide guidance on whether attempted spitting is constitutionally sufficient evidence of assault under Washington common law, review should be granted under RAP 13.4(b)(3) and RAP 13.4(b)(4).

3. Officers' entry into the home was not authorized by exigent circumstances or any other warrant exception, and Mr. S was entitled to resist officers' illegal physical restraint

Even accepting the Court of Appeals decision that no suppression remedy may follow from officers' unlawful intrusion into Ms. S's home, I.J.S., slip op. at 10-12, Mr. S addresses the unlawfulness of police actions because, as discussed above, it

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App. 2016); State v. Bailey, 83 Ohio App. 3d 544, 546-47, 614 N.E.2d 322 (1992).

bears on whether Mr. S's actions resisting the officers constitute an assault or lawful conduct.

The United States and Washington Constitutions prohibit most warrantless entries into homes. State v. Smith, 165 Wn.2d 511, 517, 199 P.3d 396 (2009). The Fourth Amendment guaranties "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated." Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." To enter a home without a warrant, police must meet one of the """few jealously and carefully drawn exceptions to the warrant requirement."""" Smith, 165 Wn.2d at 517 (quoting State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000) (quoting State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980))). The prosecution bears the burden of proving that the warrantless search meets one of these exceptions and may not use an exception as a pretext to further their

investigation. Smith, 165 Wn.2d at 517; State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999).

Exigent circumstances is one exception to the warrant requirement, and the one relied on in this prosecution. "The rationale behind the exigent circumstances exception 'is to permit a warrantless search where the circumstances are such that obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.'" Smith, 165 Wn.2d at 517 (quoting State v. Audley, 77 Wn. App. 897, 907, 894 P.2d 1359 (1995)). "Exigent circumstances involve a true emergency." State v. Cruz, 195 Wn. App. 120, 125, 380 P.3d 599 (2016).

"We determine whether an exigent circumstance existed by looking at the totality of the situation in which the circumstance arose." Smith, 165 Wn.2d at 518. Six factors guide this analysis:

> "(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to believe that the suspect is on the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended; and (6) the entry [can be] made peaceably."

Id. (alteration in original) (quoting State v. Cárdenas, 146 Wn.2d 400, 406, 47 P.3d 127, 57 P.3d 1156 (2002)).

The exigent circumstances exception was not satisfied here and officers were unlawfully in Mr. S's home when they physically restrained him.

Per the factors, first, officers were shown a three-second video of unidentified males in a fistfight. RP 24-25, 38. This video did not necessarily even show any criminal activity, let alone a grave or violent offense to charge a suspect with. And, as the trial court concluded, officers had no idea who the "suspect" was—officers described the scene as chaotic and freely admitted they had no idea who was the victim and who was the suspect. RP 15; CP 100 (conclusion of law 4 that officers "did not know

who was assaulted, the identification of the parties involved, where the third male was, if anyone posed a danger to those present, the status of anything that occurred"). Officers observed neither assaultive behavior nor any injuries that would support any notion that a grave or violent offense had occurred; they heard screaming and that's it. RP 18, 25, 28, 30, 41, 43-45. Because officers did not have even enough information to identify a suspect let alone a suspect who was suspected of committing any criminal offense, the first factor does not support the exigent circumstances exception.

Neither does the second factor, "whether the suspect is reasonably believed to be armed." Cárdenas, 146 Wn.2d at 406. Officers acknowledged they saw no weapons and had no reports of any weapons. RP 16, 43. There was no immediate danger or emergency.

Similar to the first factor, the third factor—whether officers had reasonably trustworthy information that the suspect was guilty—is not remotely satisfied. Officers did not know who

the suspect was or what had happened; they had absolutely no information that any potential suspect was guilty of anything.

Fourth, there was not a strong reason to believe that the "suspect" was on the premises for the same reason—they had no idea who the suspect was. And, if officers were so concerned by an exigent danger of a suspect being on the premises, they would have thoroughly searched the premises for this supposed suspect. But they admitted they conducted no sweep of the premises, belying the state's theory that there was a true exigent circumstance that justified warrantless entry. RP 33, 48.

The fifth factor, the likelihood of suspect escape, is not met either. Officers arrived and heard an ongoing nonphysical argument, albeit with loud screaming. RP 11-13, 25-26, 30, 39. There was no indication that the people inside the apartment even knew of the officers' presence, let alone that any of them would try to escape from officers. And, when Mr. S did notice the officers, he did not try to escape but correctly asserted that they had no right to be in his apartment. RP 15, 17-18. Officers had

not identified any suspect when they entered so they simply had no reason to believe any suspect would attempt to escape if not swiftly apprehended. The fifth factor, like all the others, supports no exigency.

Sixth, peaceful entry, does not support exigency either. The officers described the fight occurring inside as "chaotic" and they entered in order to "control the scene." RP 15-17. Mr. S repeatedly told officers they had no permission or right to be in his home. RP 15, 17-18. Officers claimed not to know if the assault was over, despite seeing or hearing no assaultive conduct of any kind. RP 21, 25, 39. Emotions were clearly high and one of the residents was asserting his constitutional rights against the officers. The trial court's finding that officers' "relatively peaceful" entry simply because they did not push anyone to enter (findings 30 and 31) is not supported by substantial evidence. The sixth factor also fails to support the exigent circumstances exception.

In sum, not a single factor identified by the Washington Supreme Court in Cárdenas and Smith supports a warrantless entry under the exigent circumstances exception. As the officers' testimony made clear, they entered Mr. S's apartment not for exigency, but to "conduct the investigation." RP 16-18. "The police may not use an exception as a pretext for an evidentiary search," Smith, 165 Wn.2d at 517, yet the police expressly admitted at the suppression hearing that they did just that. The trial court's determination that exigent circumstances justified the warrantless and unlawful intrusion into Mr. S's home is erroneous.

Even accepting that the violation of Mr. S's constitutional rights does not warrant suppression of any evidence, it is pertinent in assessing whether Mr. S's actions undertaken to resist and escape the officers' unlawful actions truly constituted an assault, as discussed above. The D.E.D. decision eschews the notion that one has a duty to cooperate with the unlawful actions of police officers, or that one commits an assault simply by

resisting an unlawful seizure. Because the Court of Appeals decision conflicts with D.E.D. on the issue of whether resisting officers amounted to assaultive conduct, review should be granted pursuant to RAP 13.4(b)(2) and (3), as argued above.

E. CONCLUSION

Because I.S. satisfies all RAP 13.4(b) review criteria, this petition for review should be granted.

DATED this 13th day of April, 2022.

I certify this document contains 4,688 words. RAP 18.17(c)(10).

Respectfully submitted,

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APPENDIX

FILED
3/14/2022
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. I.J.S., Appellant.	DIVISION ONE No. 82559-3-I UNPUBLISHED OPINION

DWYER, J. — Based on an incident during which juvenile I.J.S. attempted to spit at a police officer, the juvenile court found I.J.S. guilty of assault in the third degree. I.J.S. contends that (1) insufficient evidence supports the conviction and (2) the trial court erred in denying I.J.S.'s motion to suppress evidence of the assault. Finding no error, we affirm.

I

On March 26, 2020, Sergeant Fairchild, Officer Burnett, and Officer Wallace responded to several 911 calls about a domestic violence event ongoing at an apartment complex in Everett. A witness at the scene showed officers a short video of two individuals fighting and informed the officers that the individuals in the video had gone to unit 52.

The officers went to unit 52 and heard yelling from inside. Sergeant Fairchild went around to the back of the unit while Officers Burnett and Wallace

stayed at the front door. After Officer Wallace knocked and announced the presence of the Everett Police Department, I.J.S.'s mother opened the front door and yelled that her son had been assaulted and "continued to yell, but [police] were unable to understand what she was saying to us because of how emotional she was." I.J.S. was also yelling in the background.

All three officers entered the apartment and separated I.J.S. and his mother. Sergeant Fairchild and Officer Wallace took I.J.S. into the living room and asked him to sit on the couch. Officer Burnett described the ensuing events as follows in his police report:

> [I.J.S.] began to comply, but the[n] got up and attempted to climb over the couch and go toward his mother. Both officers then took ahold of [I.J.S.] and attempted to sit him back down on the couch. [I.J.S.] was non-compliant with verbal commands and began to resist the officers. [I.J.S.] continued to resist the officers and appeared to be trying to get away from them. [I.J.S.]'s resisting eventually pulled all three of them to the ground. On the ground he continued to fight, attempting to get away from Sgt. Fairchild and MPO N Wallace. While on the ground, Sgt. Fairchild and MPO N Wallace were able to get [I.J.S.] onto his stomach and place him into handcuffs. MPO N Wallace then left Sgt. Fairchild to assist me with [the mother], who was continuing to scream throughout this interaction.
>
> While I was trying to talk to [the mother], I heard her shout, "Don't do that, that's assault of an officer!" This caught my attention and I turned to Sgt. Fairchild who was with [I.J.S.]. I saw that Sgt. Fairchild had his glasses knocked off his face and that he was attempting to put them back on. I later learned that [I.J.S.] had turned his head and spit directly at Sgt. Fairchild's face and then attempted to throw Sgt. Fairchild off him. This had caused Sgt. Fairchild's glasses to get knocked off his head.

Sergeant Fairchild reported that

> [I.J.S.] continued to yell that we needed to leave the apartment. He eventually stood up on the couch and started to leap toward Ofc

Burnett and his mother. MPO Wallace and I grabbed [I.J.S.] and attempted to control his movement. I had his left arm, while MPO Wallace held his right. While giving him commands to stop resisting and to calm down, [I.J.S.] attempted to pull his arms free. In order to better control [I.J.S.], MPO Wallace and I took [I.J.S.] to the living room floor. There I pinned his left arm while MPO Wallace handcuffed his right. I then moved [I.J.S.]'s left wrist to his lower back area where he was handcuffed.

While we were attempting to control [I.J.S.], Ofc Burnett was trying to contain [the mother]. I could hear her yelling about us hurting her son. With [I.J.S.] secured, I told MPO Wallace he could help Ofc Burnett with [the mother]. Once MPO Wallace released [I.J.S.]'s right arm, I moved to sit on top of [I.J.S.]. He continued to move and attempted to get to his right side, facing me. Through my experience (23 years as an Everett Police Officer), I know a person attempting to turn toward an officer will likely attempt to kick or assault them. I used my knees to pin [I.J.S.]'s arms down, while seated on his back. After he complained, and promised to comply with my instructions, I moved to his left side. [I.J.S.] started to yell and call me a "fucking nigga" and similar phrases. At one point, he lifted his head and turned toward me. I saw him form a loogie and start to prepare to spit it at me. At the last second I moved to my right as the loogie went past me by just inches.

Finally, Officer Wallace's described the events as follows:

As I made my way to the kitchen I observed [I.J.S.] began to try and climb over the couch in the direction of [the mother]. We stopped him before he could get into the kitchen. We both took grasp of one of his arms. I am not sure if it was the left or right arm I grabbed. [I.J.S.] was now twisting and trying to get out of our grasp. We then forced [I.J.S.] to the ground and onto his stomach. When I forced him down I did so by applying forward and downward pressure to his shoulder. He resisted going to the ground, but we were able to overpower him. Once he was on the ground I detained him in handcuffs.

As this was going on [the mother] became even more enraged and began screaming at us. [I.J.S.] was trying to buckle and escape our control, but we were able to pin him down. Once we had control of him I left to help Officer Burnett.

[The mother] was still screaming and I tried to get her to calm down to tell me what happened. My back was to [I.J.S.] and Sgt Fairchild. There was still a commotion coming from [I.J.S.] as Sgt

> Fairchild tried to contain him. I then heard the commotion escalate and [the mother] then yelled "Don't do that, that's assault on an officer". I turned my head to see Sgt Fairchild struggling to keep [I.J.S.] down. I went to assist him and held his legs in place. I was then informed by Sgt Fairchild that [I.J.S.] tried spitting in his face.

I.J.S. was charged with assault in the third degree. I.J.S. moved to suppress all evidence of what occurred in the apartment based on the contention that it was the result of a warrantless entry. The trial court concluded both that the exigent circumstances exception to the warrant requirement applied and that the officers' entry into the apartment was lawful.

Following a bench trial on stipulated facts, namely the police reports quoted above, the trial court found I.J.S. guilty as charged.

I.J.S. appeals

II

Initially, we address the sufficiency of the evidence claim. However, in order to do so we must begin by addressing the scope of our review. Relying on our State Supreme Court's decision in State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014), I.J.S. contends that our review is "limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law."[1] This standard, however, conflicts with the sufficiency of the evidence standard for criminal cases announced by the United States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979), and adopted by our Supreme Court in State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Because we believe that

[1] Br. of Appellant at 11.

the Supreme Court misspoke in its Homan decision, we apply the Jackson standard instead.

In Jackson, the Court held that

> [a]fter [In re] Winship[, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970),] the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Woodby v. INS, 385 U.S. [276,] 282[, 87 S. Ct. 483, 17 L. Ed.2d 362 (1966)] (emphasis added). Instead, the relevant question is 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. See Johnson v. Louisiana, 406 U.S. [356,] 362[, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)]. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution.

443 U.S. at 318-19 (footnote omitted).

As previously mentioned, our Supreme Court adopted the Jackson standard in Green, 94 Wn.2d at 220-22. It later applied that standard, unaltered, to the result of a bench trial in State v. Salinas, 119 Wn.2d 192, 201-02, 829 P.2d 1068 (1992).

Without question, I.J.S. correctly sets forth the standard of review described in Homan. Indeed, the Homan court stated that

> 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.

> Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005).[2] "Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Id. We treat unchallenged findings of fact supported by substantial evidence as verities on appeal. Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 169, 795 P.2d 1143 (1990).

181 Wn.2d at 105-06.[3]

The Homan court did not explain that it was intending to overrule the precedent set by Green or Salinas. It is a longstanding principle that when our Supreme Court has expressed a clear rule of law, it "will not overrule such binding precedent sub silentio." State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999); accord Eastwood v. Horse Harbor Found., Inc., 170 Wn.2d 380, 388, 241 P.3d 1256 (2010); Lunsford v. Saberhagen Holdings, Inc., 166 Wn.2d 264, 280, 208 P.3d 1092 (2009). Accordingly, we conclude that Homan did not intend to overrule Salinas or Green with regard to the applicability of the Jackson standard to appellate review for sufficient evidence.

As has been previously explained, the procedure described in Homan is inconsistent with the standard set forth in Jackson in five ways:

> First, Jackson did not distinguish between a conviction resulting from a trial by jury and a conviction resulting from a bench trial. There are not different standards. The same standard applies in all cases, as the "question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence." Jackson, 443 U.S. at 323. However, the Court in Jackson did, in fact, review a conviction resulting from a bench trial. 443 U.S. at 309. Irrefutably, the standard set forth in Jackson is the

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[2] Division Two's Stevenson decision relies on a civil case for this proposition. See Stevenson, 128 Wn. App at 193 (citing Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 792, 98 P.3d 1264 (2004)).

[3] Interestingly, the Homan decision cites Salinas for the proposition that in "claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." Homan, 181 Wn.2d at 106 (citing Salinas, 119 Wn.2d at 201).

correct standard for determining whether a conviction resulting from a bench trial is supported by a constitutionally sufficient quantum of evidence.

Second, the Homan court's standard focuses review on the result reached by the specific trial judge in each case. 181 Wn.2d at 105-06 ("appellate review is limited to determining whether substantial evidence supports the findings of fact"). This is wrong. Jackson requires that a reviewing court determine whether "*any* rational trier of fact" could have found the defendant guilty beyond a reasonable doubt. 443 U.S. at 319. The focus is not on one particular trial judge or one particular juror. To the contrary, it is an objective standard.

Third, the Homan standard limits review of the evidence in the record to evidence set forth in the trial judge's factual findings. 181 Wn.2d at 105-06 ("appellate review is limited to determining whether substantial evidence supports the findings of fact"). Again, this is wrong. The Jackson standard plainly requires a reviewing court to consider *all* of the evidence, not just the evidence credited by the trial judge in findings of fact. 443 U.S. at 319.

Fourth, the Homan standard views only the trial judge's findings of fact in the light most favorable to the prosecution. See 181 Wn.2d at 106 ("We treat unchallenged findings of fact and findings of fact supported by substantial evidence as verities on appeal."). In contrast, the Jackson standard requires "that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." 443 U.S. at 319.

Fifth, the Homan standard requires only "substantial evidence" to support a trial judge's findings of fact supporting a conviction. This is not the same standard as required by the United States Supreme Court. Jackson requires a reviewing court to determine that the record contains sufficient evidence to enable any rational trier of fact to find "the essential elements of the crime [proved] beyond a reasonable doubt." 443 U.S. at 319.

In sum, Homan's sufficiency of the evidence standard for reviewing convictions resulting from bench trials conflicts with the Jackson standard. It harms the prosecution by narrowing the inquiry on review to consider only a portion—rather than all—of the evidence adduced at trial and by relying solely on whether a specific fact finder—as opposed to any rational fact finder—could reasonably convict the defendant. Simultaneously, it harms defendants by supplanting the demanding beyond a reasonable

> doubt standard with the less stringent substantial evidence standard.

State v. Stewart, 12 Wn. App. 2d 236, 246-48, 457 P.3d 1213 (2020) (Dwyer, J., concurring) (footnote omitted).

In addition to the problems noted above, there is yet another serious problem that arises as a result of the application of the Homan standard of review: it penalizes criminal defendants who invoke their right to a jury trial while, at the same time, incentivizing the waiver of that right. This is so because an appellate challenge to the sufficiency of the evidence to support a conviction will be evaluated differently depending on whether the conviction was the result of a decision made by a jury or by a judge. If a jury returned a guilty verdict, all of the evidence admitted at trial will be considered on appeal to determine if sufficient evidence supports the conviction. However, if the conviction results from a trial judge's finding of guilty, only the evidence described in the court's findings of fact—and the "substantial evidence" supporting those findings—can be considered. In other words, less than all of the evidence can be considered. Obviously, the standard of review mandating that less than all of the evidence be considered is more favorable to a defendant than is the standard of review mandating that all of the evidence be considered. In this way, defendants are punished for invoking their right to a jury trial.

There is also no independent state right underlying the substantial evidence standard discussed in Homan. "Washington has adopted the federal standard for sufficiency review." State v. Johnson, 188 Wn.2d

742, 758, 399 P.3d 507 (2017) (citing Green, 94 Wn.2d at 221). Accordingly, when reviewing a criminal conviction, "Washington's *sole* evidentiary sufficiency standard is that which the Fourteenth Amendment requires." State v. Tyler, 195 Wn. App. 385, 394, 382 P.3d 699 (2016), aff'd on other grounds, 191 Wn.2d 205, 422 P.3d 436 (2018).

Thus, we review the sufficiency of the evidence herein to determine "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." Jackson, 443 U.S. at 319.

III

I.J.S. contends that because his attempt to spit on Sergeant Fairchild was unsuccessful there was an insufficient quantum of evidence adduced at trial to support his conviction of assault in the third degree. We disagree.

A person commits assault in the third degree when that person, "under circumstances not amounting to assault in the first or second degree . . . [a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." RCW 9A.36.031(1)(g). Because the term "assault" is not statutorily defined, the common law definition applies. State v. Stevens, 158 Wn.2d 304, 310-11, 143 P.3d 817 (2006).

> Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another

> in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.

Stevens, 158 Wn.2d at 311. The second of these definitions, assault by actual battery, is "'an intentional touching or striking of another person that is harmful or offensive, regardless whether it results in any physical injury.'" State v. Cardena-Flores, 189 Wn.2d 243, 266, 401 P.3d 19 (2017) (quoting Stevens, 158 Wn.2d 314 (Madsen, J., dissenting)).

Regardless of whether spitting at a person (but missing) falls within this common law definition, a rational trier of fact could conclude that I.J.S. assaulted a law enforcement officer based on Officer Burnett's report that I.J.S.'s pulled two police officers to the ground and continued to fight from the ground. Pulling a person to the ground is an intentional and offensive contact. A rational trier of fact could infer from Officer Burnett's report that I.J.S. "continued to fight" and that I.J.S. attempted to cause bodily injury to the police officers that he had just pulled to the ground. Thus, a constitutionally sufficient quantum of evidence supports I.J.S.'s conviction.

IV

Next, I.J.S. contends that the trial court erred by denying his motion to suppress his criminal conduct in the apartment because the police entered the apartment without a warrant. As there is no evidence at issue that was lawfully subject to suppression, even if no exception to the warrant requirement applied, we disagree.

We review the denial of a motion to suppress to determine whether substantial evidence supports the trial court's findings of fact and whether the

findings of fact support the trial court's conclusions of law. State v. Boisselle, 194 Wn.2d 1, 14, 448 P.3d 19 (2019). We may affirm the trial court on any ground supported by the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

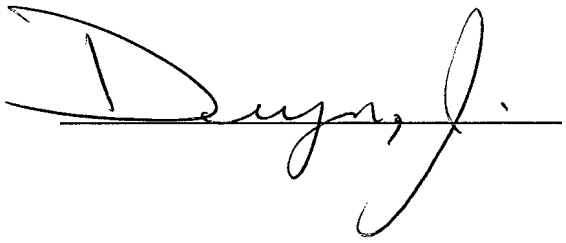
Here, the evidence I.J.S. sought to suppress is evidence of his own behavior after officers entered the apartment. But such evidence is not subject to the exclusionary rule. "Even if the entry or arrest by law enforcement officers was unlawful, the exclusionary rule does not foreclose admission of evidence of the assaults where the officers are identified as such, are performing official duties in good faith, and there was no exploitation of any constitutional violation." State v. Mierz, 127 Wn.2d 460, 475, 901 P.2d 286 (1995).[4]

Rather, the exclusionary rule extends only to the fruits of the unlawful search or seizure resulting from the illegal actions of the police. State v. Aydelotte, 35 Wn. App. 125, 131-32, 665 P.2d 443 (1983) (citing Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). "It is not a 'but for' rule of causation leading to suppression of all evidence obtained after the improper conduct." State v. D.E.D., 200 Wn. App. 484, 491, 402 P.3d 851 (2017) (citing Wong Sun, 371 U.S. at 487-88).

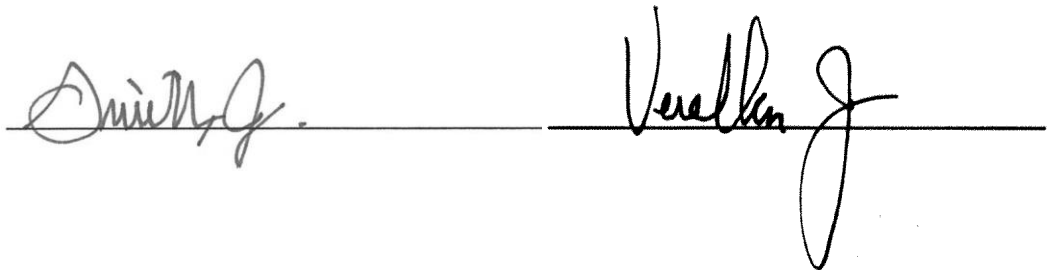
[4] I.J.S. also suggests, without assigning error, that the case should be dismissed because the "undisputed facts show outrageous misconduct by the officers in question." Br. of Appellant at 29. I.J.S. concedes that our Supreme Court held in State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997), that individuals "faced only with a loss of freedom" may not use force to resist illegal police behavior. I.J.S. argues that "Valentine seems to be based on an outmoded and unrealistic view of how police commonly treat the citizenry they suspect of crime." Br. of Appellant at 27. We leave an analysis of Valentine's continued viability to the Supreme Court. See State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Moreover, I.J.S.'s claim that the officers engaged in undisputed "outrageous misconduct" is simply not supported by the record.

Accordingly, we need not address whether the trial court properly ruled that exigent circumstances justified the warrantless entry into the apartment. As evidence of I.J.S.'s assault of an officer was not subject to exclusion, the trial court did not err by denying his motion to suppress.

Affirmed.



WE CONCUR:



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