Supreme Court No. 97266-4

Court of Appeals No. 35561-6-III

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREW SPRINT,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Andrew Sprint, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 35561-6-III, issued on April 25, 2019, pursuant to RAP 13.3 and RAP 13.4(b)(1), (3), and (4). The opinion is attached.

B. ISSUES PRESENTED FOR REVIEW

1. The prosecution elected to prove Mr. Sprint guilty by alleging an actual physical striking or touching of another, with or without physical harm. Mr. Sprint seeks review of his conviction for assault in the fourth degree under RAP 13.4(b)(3) because the court lacked sufficient evidence that he harmfully touched his child.

2. The Court of Appeals ruled that the discretionary $5000 "fine," $4750 of which was suspended in Mr. Sprint's case, could be imposed whether or not Mr. Sprint was indigent, based on that Court's holding in *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). Mr. Sprint seeks review of this decision that allows the court to impose a discretionary fine without consideration of his ability to pay because it is

contrary to this Court's analysis in *State v. Ramirez.*[1] RAP 13.4(b)(1) and (4).

C. STATEMENT OF THE CASE

Andrew Sprint and Chalese Merritt knew each other from the local theater group they were involved in and dated briefly, engaging in sexual intercourse. RP 329, 331. They did not keep in touch after their casual relationship ended. RP 333. Chalese[2] did not know she was pregnant with Mr. Sprint's child until five months into the pregnancy. RP 332-33, 402. Even when she knew Mr. Sprint was the father of the baby, she did not tell him until the day the baby was born. RP 340, 402, 1299.

Chalese had not planned to keep the baby and chose not to see the baby after was born. RP 341. When she learned Mr. Sprint wanted to be a father and did not intend to waive his parental rights, she decided she also would be involved with her son. RP 342.

Mr. Sprint assumed he would take the baby home from the hospital with him because he wanted to be a parent and Chalese did not. RP 1063, 1304-05. The baby ended up going home to Chalese's parents' home over Mr. Sprint's objection. RP 343, 1308.

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[1] *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

[2] Chalese Merritt's first name will be used to avoid confusion with the other witnesses who share the same last name. No disrespect is intended.

Twenty-one-year old Chalese lived with her parents, Melanie and John Merritt. RP 345. They had an open door policy for Mr. Sprint to visit the baby[3] whenever he wanted. RP 1308. Mr. Sprint went to their house nearly every day, where he would stay 6-10 hours. RP 1308-1309, 1316.

Mr. Sprint wanted to be able to bring the baby back to his apartment, but Chalese's family opposed this, and they fought over custody. The court eventually granted Mr. Sprint full custody, and limited Chalese's visits to 90 minutes every other day. RP 357, 1317, 1322.

1. The baby is taken to the hospital.

One morning, when the baby was about nine and a half weeks old, Mr. Sprint called 911, reporting that he was getting ready to feed his son, when he saw the baby was not breathing well and went limp. RP 157, 274-278.

While on the phone with the 911 operator, Mr. Sprint observed that Charles's breathing improved. RP 286. When the EMT arrived, the baby appeared normal. RP 155. Mr. Sprint still chose to have the EMTs take Charles to the hospital for monitoring. RP 159. He followed in his own vehicle, so that he could drive them home afterwards. RP 172-3.

Within a few minutes of arriving at the hospital, medical staff observed that Charles had a blank stare, which medical staff recognized to

[3] The baby will be referred to with the pseudonym "Charles."

be an "absence seizure." RP 162. Such seizures are a result of "altered mental status," and can be very subtle, sometimes not even apparent to caregivers. RP 38.

Doctors at Central Washington Hospital immediately ran a CT scan. RP 163. The CT scan revealed edema, subdural hematomas, and retinal hemorrhaging. RP 188. This triad of symptoms is referred to as "abusive head trauma" in the medical community. RP 686. These symptoms used to be referred to as "shaken baby syndrome" but this term was changed, because without evidence of impact to the head, causation of the injury cannot be determined. RP 687.

Charles needed to be transported from Wenatchee to Harborview, in Seattle, and doctors began the process of anesthetizing and intubating him for transport. RP 309. Charles's lung collapsed through this process. RP 311.

Dr. Rebecca Wiester is the Medical Director at the Seattle's Children's Hospital Child Protection Program. RP 181. Her job is to consult and make recommendations to the treating physicians. RP 182. Dr. Kenneth Feldman is Dr. Wiester's colleague who covered her on Charles's case when she was gone for two weeks. RP 183-4.

Consulting physicians like Dr. Wiester and Dr. Feldman rely on the specialized training of neuroradiologists to help them interpret the CT

scans and MRIs, because the radiologists are best trained to read these reports. RP 704. The radiologist who performed the CT scan at Central Washington that was later reviewed by Dr. Wiester and Feldman believed there were hemorrhages of varying ages. RP 200-201, 206, 259, 755-56. Mixed density subdural hematomas can be the result of accidental injury, and it is possible for children to develop subdural hematomas without a traumatic injury. RP 732-733, 1234.

Subdural hemorrhages are believed to be caused by a trauma that tears blood vessels. RP 701. Charles's subdurals had two densities. RP 695. Dr. Feldman agreed that MRI revealed there could have been multiple injuries that were days or even weeks apart. RP 756. Dr. Feldman acknowledged that babies with existing subdural hematomas can rebleed, and there is not objective data on how frequently subdurals rebleed. RP 727. Dr. Feldman noted this lack of objective data on how frequently subdurals rebleed can be a "legal issue." RP 728.

Dr. Feldman concluded that the scans revealed only slightly or older age hemorrhages but not birth hemorrhages. RP 756. The Children's Hospital doctors rejected other theories of rebleeds from subdural of mixed density, despite evidence supporting that Charles may have been experiencing seizures before Mr. Sprint called 911 that day. RP 692-3, 757. Some subdurals are asymptomatic. RP 758. And some seizures can

be very subtle and missed by a layperson. RP 693. They can be as subtle as a persistent eye deviation. RP 37. When Dr. Wiester interviewed Chalese, she said that sometimes it seemed like Charles looked off in one direction. RP 692. Mr. Sprint's ex-girlfriend, who spent extended time with Charles, and witnessed Charles's seizures while in the hospital, described that she had seen Charles staring blankly off to the left when she had been with Mr. Sprint and his son. RP 992. She thought this gazing was "right at that edge of concern," but then Charles would snap out of it. RP 992. Such small changes in behavior could be evidence of a rebleed. RP 1146.

Dr. Patrick David Barnes, Chief of Pediatric Neuroradiology and Co-director of the Pediatric and MRCT Center at the Lucille Packard Children's Hospital and a Professor of Radiology at Stanford School of Medicine, is a pediatric neuroradiologist for a child abuse team like that to which Drs. Wiester and Feldman belong to at the University of Washington. RP 1088, 1105. He testified as a neuroradiologist expert witness for the defense. RP 1087.

Dr. Barnes explained that imaging like MRI and CT scans do not provide answers themselves, but provide the issues that need to be explored by clinicians like Drs. Wiester and Feldman. RP 1135. An experienced radiologist can shape this evaluation. RP 1135.

Dr. Barnes concurred with the Central Washington and University of Washington radiologists' view that both the CT scan revealed that some of the collection of blood were likely older, as did the MRI. RP 1104, 1153-54. Dr. Barnes explained that it is difficult to determine timing of an acute or subacute hemorrhage from a CT scan. A "recent" hemorrhage could be anywhere from three hours to ten days old. RP 1118-1119. The mixed intensities of the bleeding indicated some bleeding older than seven days and more recent bleeding. RP 1154-55. He opined that some of the blood collections are recent and some likely older. RP 1104-1105.

Dr. Barnes' analysis of the CT scans and MRIs did not rule out accidental trauma, birth trauma, or lack of oxygen from the failed intubation at the hospital that resulted in a collapsed lung that could have contributed to the hematomas. RP 1116, 1134-1135, 1137-1138, 1143.

Dr. Barnes clarified that updated literature from the American Academy of Pediatrics cites neck injury as an important finding to look for clinically when the symptoms of abusive head trauma are present, because suspicion of this type of injury should result in injury to the neck. RP 1173. There was no evidence of such injury to Charles's neck. RP 1173.

Discounting the reports of the radiologist at Central Washington and Harborview, that some of Charles's hemorrhages were old and some fresh, Dr. Wiester opined that the onset of these symptoms would have

been closely associated with the time the baby went limp or was not breathing well. RP 181-2, 192, 200, 207, 213. Dr. Wiester also rejected the Central Washington resident ophthalmologist's and resident physician's opinion that the retinal hemorrhaging was not inconsistent with valsalva retinopathy, which is more consistent with non-accidental trauma. 147, RP 210.

And despite no data on what level of force is necessary to cause subdural hematomas, Dr. Feldman opined, "I think we can reason from animal studies of how injuries like this occur that, again, it's a rotational acceleration." RP 729. And Dr. Feldman estimated that in 80% of cases where there is abusive head trauma, there is some other form of injury beyond subdural hematoma, retinal hemorrhage, and brain injury. RP 759. Charles had no such bruising or external injury. RP 687.

2. The criminal investigation is driven by a disputed medical conclusion.

The day after Charles was admitted to the hospital Detective David Helvey received a referral to investigate suspected child abuse. RP 762. Based on the detective's conversation with Dr. Feldman and his own experience, he believed the only explanation for Charles's injuries was a violent action that would have taken place sometime between when Mr. Sprint picked Charles up from Chalese's house on Tuesday afternoon and when Mr. Sprint called 911. RP 777-778.

This presumption drove Detective Helvey's investigation. RP 766-768. Detective Helvey spoke with a number of Mr. Sprint's friends and family, including Chalese and Melanie Merritt, and Mr. Sprint's roommate, Justin Valdez.

Mr. Sprint's roommate, Justin Valdez, was rarely home, working during the day, and briefly coming home late in the evening, around 10-10:30 pm. RP 814-815. When Mr. Sprint was fighting for custody of Charles, Mr. Valdez wrote a letter in support of Mr. Sprint, stating that Mr. Sprint was capable of providing a safe and loving home for his son based on how he had seen him care for him. RP 826-7. However, when Detective Helvey contacted Mr. Valdez about his investigation, Mr. Valdez told the detective Mr. Sprint was rough with the baby. RP 780. Mr. Valdez never saw Mr. Sprint shake the baby. RP 822.

Mr. Valdez's account of Mr. Sprint's parenting was vastly different from the other people who spent a great deal of time with Mr. Sprint and Charles. Brittney Morrissey was Mr. Sprint's girlfriend when Mr. Sprint was Charles's primary custodial parent, staying with Mr. Sprint and Charles for extended periods during the week and weekends. RP 983-984. By the time of trial, Mr. Sprint and Ms. Morrissey had broken up and she wanted nothing to do with him. RP 995. She nevertheless testified that she had no concerns about how Mr. Sprint treated his son. RP 988-989.

Likewise, despite their contentious custody battle and her antipathy for Mr. Sprint, Chalese testified that she never worried he would harm their son. RP 404, 1457. And Chalese's mother, Melanie Merritt, who shared this animosity towards Mr. Sprint, testified that she had no concerns that he would harm or injure Charles. RP 431, 1456-1457. The detective's investigation revealed no information that Mr. Sprint had ever done anything like the level of violence that would be required to cause Charles's trauma. RP 768-770, 786.

3. The trial court acquits Mr. Sprint of first, second, and third degree assault, but finds him guilty of fourth degree assault, without sufficient evidence that he harmfully touched his son.

Despite the heavily disputed testimony about the timing and source of Charles's injury, the trial court concluded the "injuries suffered by Charles Merritt occurred shortly before the 911 call" when the child was in the exclusive control of Mr. Sprint. CP 45, FF 2.2. The trial court acquitted Mr. Sprint of first, second, and third degree child abuse because the prosecution failed to prove that Mr. Sprint intentionally or recklessly caused Charles's injuries. CP 45, FF 2.8. Not specifying any act that would have caused the injury, the trial court found him guilty of assault in the fourth degree, concluding that Mr. Sprint negligently inflicted Charles's injuries by an intentional assault. CP 45, FF # 2.8. The trial court also imposed $1450.00 in legal financial obligations, in addition to

over $30,000 in restitution, without making an adequate inquiry into Mr. Sprint's ability to pay. CP 49; RP 1477.

The court of Appeals affirmed Mr. Sprint's conviction, finding there was sufficient circumstantial evidence to convict Mr. Sprint. Slip op. at 13. The Court reversed for the court to either strike the discretionary legal financial obligations or determine Mr. Sprint's ability to pay under *State v. Blazina*.[4] However, the Court of Appeals did not order remand for an inquiry into Mr. Sprint's ability to pay the $5000 fine, $4750 of which the trial court suspended, based on the pre-*Ramirez* holding in *State v. Clark*. Slip op. at 15.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Mr. Sprint's conviction for assault in the fourth degree is based on insufficient evidence, warranting review under RAP 13.4(b)(3).

Evidence is sufficient if a rational trier of fact could find each element of the crime beyond a reasonable doubt. *State v. Jussila*, 197 Wn. App. 908, 920, 392 P.3d 1108 (2017) (citing *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)). Both direct and indirect evidence may support the jury's verdict, and all reasonable inferences are drawn in favor of the State. *Id.* Inferences based on circumstantial evidence must be

[4] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

reasonable and cannot be based on speculation. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

To prove assault in the fourth degree, the State must establish that 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). Courts look to the common law definition of assault. *State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). There are three recognized definitions of "assault": (1) an unlawful touching (actual battery); (2) an attempt with unlawful force to inflict bodily injury upon another, tending but failing to accomplish it (attempted battery); and (3) putting another in apprehension of harm. *State v. Elmi*, 166 Wn.2d 209, 215, 207 P.3d 439 (2009). Here, the prosecution elected to prove Mr. Sprint unlawfully touched his child, with criminal intent. CP 5.

Under this prong, assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury. *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011) (quoting *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007)). Simple assault requires actual physical striking or touching of another, with or without physical harm. *State v. Ashcraft*, 71 Wn. App. 444, 455, 859 P.2d 60 (1993).

In *Ashcraft*, a witness testified that she saw the appellant appear to strike the child, and that the child then sat quietly for the rest of the day, which was abnormal for a child of that age. This led to a reasonable inference that the striking occurred. *Ashcraft*, 71 Wn. App. at 455. The touching was inferred from an observable physical act. Here, there was no reasonable inference that Mr. Sprint engaged in a harmful touching of his son, as alleged by the prosecution. CP 5.

The trial court relied primarily on Mr. Valdez's opinion about Mr. Sprint's parenting and Mr. Sprint's distraught, confused statements to Mr. Valdez and hospital staff in support of its conclusion that Mr. Sprint intentionally assaulted Charles and negligently inflicted his injury. CP 45, FF 2.8. This was mere speculation that cannot support a finding of harmful touching required for conviction of assault in the fourth degree. *Vasquez*, 178 Wn.2d at 16.

a. Mr. Valdez's claim that Mr. Sprint was rough with Charles in the past, which did not cause injury, does not establish that Mr. Sprint harmfully touched Charles on April 16.

The trial court recognized it was unable to determine the nature of the purported harmful touching, if any. RP 1455. Instead, the court relied on Mr. Valdez's opinion that Mr. Sprint "roughly or inappropriately" handled his child on previous occasions. CP 45, FF 2.6.

The court of Appeals rejected Mr. Sprint's claim that this generalized opinion of how he previously held his baby was insufficient evidence that an "actual physical striking or touching of another, with or without physical harm" occurred. *Ashcraft*, 71 Wn. App. at 45; *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972) (The existence of a fact cannot rest upon guess, speculation or conjecture). Slip op. at 13. Absent evidence of an actual touching from which the court could have inferred Mr. Sprint's act, there was insufficient evidence of fourth degree assault.

b. Mr. Sprint's distraught statements were not tacit admissions that established evidence of a harmful touching.

The court also interpreted as "tacit admissions," Mr. Sprint's denial that he shook his baby and equivocal statement that he could not say whether he caused the injury, as evidence that Mr. Sprint negligently inflicted harm on his son. RP 1445; CP 45, FF 2.5.

Evidence of "'tacit' or 'adoptive' admissions is replete with possibilities for misunderstanding, and the cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony." *Holmes v. United States*, 580 A.2d 1259, 1263 (D.C. 1990)(internal citation omitted).

A tacit or adoptive admission requires acquiescence to the statement. *State v. Neslund*, 50 Wn. App. 531, 551, 749 P.2d 725 (1988). Mr. Sprint made no such tacit admission. He denied that the 911 call that

was played to the court included his statement, "what did not papa do," and instead said "what does papa do?" RP 1453. The record containing this disputed statement is not transcribed because it was indecipherable. RP 285; Exhibit 56. Thus the court's finding that the recording stated "what did papa do" is not supported by substantial evidence. CP 45, FF 2.5.

The Court of Appeals rejected Mr. Sprint's claim that this circumstantial evidence was either "patently equivocal" or "rank speculation" that Mr. Sprint inflicted injury on his son, and was thus insufficient to sustain the court's verdict. *Vasquez,* 178 Wn.2d at 18. Slip op. at 11-12.

c. The trial court's acquittal of Mr. Sprint for the offenses of assault in the first, second, and third degree because of not knowing what act caused Charles's injury, also requires acquittal of assault in the fourth degree.

The trial court acquitted Mr. Sprint of intentionally or recklessly causing Charles's injuries CP 45, FF 2.8. The logic for acquittal as to assault one, two and three must hold for assault in the fourth degree, because the court simply did not have evidence sufficient to establish "what happened" to Charles. RP 1445. In its oral ruling, the court found:

> I don't think that Mr. Sprint intended to commit the bodily harm to this child. I think it was a frustration that occurred. The question is, is that has the State proven beyond a reasonable doubt that the Defendant recklessly inflicted great bodily harm?

> Reckless says a person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same circumstances.
>
> Without Charles there to testify, it's difficult to say what happened. It's difficult to say that he shook Charles. It's difficult to say that he dropped Charles. Or difficult to say he threw Charles on the bed. But I do believe, because of his comments, that he created harm to Charles. And I do believe that his –- that the Court can find that he was negligent. The Court believes he's guilty of Assault of a Child in the 4th Degree.

RP 1444-45. The court's guess that Mr. Sprint acted out of frustration and thus inflicted a negligent injury is no more supported by the evidence than that he acted recklessly. This is because, unlike in *Ashcraft,* where there was an observable action by which a harmful touching could have been inferred, here, there was no evidence of a specific act from which it could be inferred that Mr. Sprint negligently inflicted injury on his son. *Ashcraft*, 71 Wn. App. at 455.

The trial court's speculative summary of its ruling, "I think there's a pretty good chance that abuse occurred. I just couldn't find it beyond a reasonable doubt," requires acquittal for all levels of assault, including assault in the fourth degree. RP 1455.

Absent evidence of a harmful touching, there was insufficient evidence to convict Mr. Sprint of assault in the fourth degree, requiring reversal of his conviction for this offense.

2. The Court of Appeals' decision that allows a $5000 criminal fine to be imposed without inquiry into a defendant's ability to pay is contrary to this Court's analysis in *Ramirez,* necessitating review under RAP 13.4(b)(1) and (4).

The trial court imposed $1450 in legal financial obligations without analyzing Mr. Sprint's ability to pay. The Court of Appeals reversed to either strike the discretionary LFOS or for the court to determine Mr. Sprint's ability to pay. Slip op. at 15-17. But the appellate court determined that the discretionary criminal fine, which in this case permits the court to impose a fine of up to $5000.00 for a gross misdemeanor conviction, was not subject to consideration of a defendant's ability to pay. Slip op. at 15 (citing *Clark,* 191 Wn. App. at 376). For Mr. Sprint, the court imposed the entire $5000 fine but suspended $4750, requiring payment of $250. CP 58.

RCW 9A.20.021(2) provides the maximum term and fine for a gross misdemeanor offense, including a fine of not more than $5000. *Clark,* decided before *Ramirez,* determined that even though this general statutory fine is discretionary, it does qualify as a "cost" within the meaning of RCW 10.01.160(3), and so the trial court is not required to conduct an inquiry into the defendant's ability to pay this fine. *Clark,* 191

Wn App. at 376. *Clark* should no longer be good law after *Ramirez*, which affirms a court's duty to inquire into a person's current and future ability to pay prior to imposing discretionary LFOs. *Ramirez*, 191 Wn.2d at 746. Mr. Sprint seeks review by this Court of the Court of Appeals' decision that is in conflict with existing Supreme Court case law. RAP 13.4(b)(1) and (4).

E. CONCLUSION

Based on the foregoing, Mr. Sprint respectfully requests review by this Court.

Respectfully submitted this the 28th day of May 2019.

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

STATE OF WASHINGTON, Respondent, v. ANDREW JOHN SPRINT, Appellant.	)	No. 35561-6-III UNPUBLISHED OPINION

FEARING, J. — Andrew Sprint appeals his conviction for fourth degree assault of a child, his infant son. He also challenges the imposition of legal financial obligations. We affirm the conviction, but remand for a determination of whether to impose some of the financial obligations.

FACTS

Andrew Sprint and Chalese Merritt begat a son, Charles, on February 3, 2014. Charles is a pseudonym. This appeal concerns Sprint's alleged assault on his son on April 16, 2014.

Andrew Sprint and Chalese Merritt met during a musical theatre production of Sweeney Todd. Sprint was eight years the senior to Merritt. The two began dating in April 2013 and engaged in sexual intercourse. Sprint and Merritt ended their brief

romance in July 2013, and the two had limited contact thereafter. In October 2013, Merritt learned that she conceived a child with Sprint. She did not share the news with Sprint.

As a 21-year-old prospective mother, Chalese Merritt arranged through Mike Magnotti, a friend of both Merritt and Andrew Sprint, for her baby to be adopted. On February 3, 2014, Merritt gave birth to a healthy baby boy, Charles. Magnotti phoned Sprint the day of Charles' birth and informed him that he was a father. Sprint immediately signed pleadings agreeing to adoption, but he changed his mind later that day and rescinded his signature on February 4. When Merritt learned Sprint wanted to raise Charles, she also decided to parent her son rather than consenting to adoption. Charles went home with Merritt from the hospital.

Chalese Merritt resided with her parents, and Andrew Sprint visited Charles, in the month after his birth, at the Merritt abode. Sprint spent six to ten hours with Charles every day. On March 5, 2014, Sprint, by court order, obtained primary temporary custody of Charles. The custody order limited Merritt's visitation with Charles to ninety minutes every other day. Merritt typically retrieved Charles from Sprint's apartment and took the infant to her parent's residence for visitation.

On April 16, 2014, when Charles was approximately nine weeks old, Andrew Sprint called 911 to report a medical emergency with Charles. Sprint reported to dispatch that Charles was unconscious and limp, did not breathe right, had earlier turned the color

red, and now appeared pale. While on the phone with the 911 operator, Sprint observed that Charles' breathing had improved, but he remained unconscious. While being recorded, Sprint commented: "What's up, little guy? What hurts? What did papa do? What did papa do? I didn't — I don't know." Report of Proceedings (RP) (Aug. 15, 2017) at 1408.

Emergency medical technician (EMT) Kaila Brownlee and her work partner arrived via ambulance at Andrew Sprint's apartment and provided aid at the scene. When Brownlee assessed the situation, she observed no anomalies in Charles. Sprint spontaneously said to Brownlee: "Great, now I hope nobody thinks I shook my baby." RP (Aug. 7, 2017) at 167.

Andrew Sprint, as a precaution, directed Kaila Brownlee to transport Charles to Wenatchee's Central Washington Hospital. After arriving at the hospital, Charles underwent an absence seizure, and emergency nurses rushed him for a CT scan. An absence seizure differs from the typical seizure in that the patient does not shake, but becomes fixated with a blank expression. The CT scan revealed edema, subdural hematomas, and retinal hemorrhaging. Central Washington Hospital physicians anesthetized and intubated Charles for airlift to Seattle. Charles' lung collapsed during this procedure.

Before Charles flew to Seattle, Andrew Sprint, while at the hospital, spoke by phone with and texted his roommate, Justin Valdez. Valdez had occasionally, before

April 16, witnessed Sprint being rough with Charles. Valdez asked during a heated phone call: "What did you do?" Valdez added: "don't sling me that bullshit that you're not responsible for this." RP (Aug. 9, 2017) at 820. Sprint replied, "I can't say that I am or I'm not." RP (Aug. 9, 2017) at 820. According to Valdez:

> And then when he [Andrew Sprint] texted me, he says baby's got to get more tests, so I love him and I don't shake my baby. And prior to that, I didn't mention that I didn't—you know, I didn't accuse him of shaking the baby or anything like that, he just said that out of the blue.

RP (Aug. 9, 2017) at 821.

Seattle physicians saved Charles' life. Charles, however, suffers from permanent speech and mental deficits. The child wears a brace on his right arm.

PROCEDURE

The State of Washington charged Andrew Sprint with assault of a child in the first degree. The trial court found Sprint indigent and appointed a public defender. The superior court conducted a bench trial.

During trial, the State presented two medical witnesses, Dr. Rebecca Weister and Dr. Kenneth Feldman, from Seattle's Children's Hospital Child Protection Program, who cared for the child. Both opined that Charles' injuries did not occur spontaneously from a pre-existing defect, but resulted from abusive head trauma while in Andrew Sprint's care and control. Kenneth Feldman averred that the MRI revealed possible multiple injuries days or even weeks apart. Both doctors rejected the possibility of subdural rebleeds,

despite evidence that Charles may have experienced seizures before Sprint called 911 on April 16. Brittney Morrisey, Andrew Sprint's estranged girlfriend, and Chalese Merritt testified to Charles' staring to one side.

Dr. Kenneth Feldman, during trial, opined that injuries suffered by Charles occurred from a rotational acceleration. Nonetheless, he estimated that in eighty percent of medical cases of abusive head trauma, some other form of injury occurs beyond subdural hematoma, retinal hemorrhage, and brain injury. Feldman conceded that Charles suffered no bruising or external injury consistent with trauma.

Dr. Patrick David Barnes, Chief of Pediatric Neuroradiology at Lucille Packard Children's Hospital and a Professor of Radiology at Stanford School of Medicine, testified for Andrew Sprint. David Barnes concurred with Kenneth Feldman that both the CT scan and MRI revealed that a collection of blood in Charles' brain occurred days before April 16. Barnes explained the difficulty in assessing the timing of an acute or subacute hemorrhage from a CT scan, and he opined that a "recent" hemorrhage could be from three hours to ten days old. Dr. Barnes' analysis of the CT scans and MRIs did not rule out accidental trauma, birth trauma, or lack of oxygen from the failed intubation at the hospital. Barnes added that literature from the American Academy of Pediatrics deems a finding of neck injury to be an important method of confirming abusive head trauma. Charles' medical records showed no neck injury.

During trial, the State played the 911 audio tape. The trial court also heard

testimony from Justin Valdez, Andrew Sprint's roommate. Valdez testified about incidents wherein Sprint roughly burped Charles, yelled at the child for crying, and held Charles without using proper neck support. Valdez testified that he witnessed "days of [Sprint] being really rough with the baby." RP (Aug. 9, 2017) at 820. Valdez repeatedly used the word "free-floating" when describing Charles' head as Sprint held him under the arms. RP (Aug. 9, 2017) at 807-08. Valdez often confronted Sprint about mistreatment of Charles, and Sprint ignored the concerns.

Chalese Merritt and her mother, Melanie Merritt, testified at trial. Both expressed no concern that Andrew Sprint would harm Charles. Andrew Sprint's former and estranged girlfriend, Brittney Morrissey, testified that she observed Sprint care for his son and never saw any rough treatment of the son.

Andrew Sprint testified in his defense. He did not accuse anyone of hurting Charles. Sprint denied ever shaking, dropping, or slamming Charles. He admitted to being overwhelmed at times when Charles fussed and being frustrated with Chalese Merritt regarding her lack of care for their son.

Andrew Sprint, during his testimony, denied that he asked during the emergency call: "What did papa do?" He averred that he commented: "What does papa do?" RP (Aug. 15, 2017) at 1453.

The trial court acquitted Andrew Sprint of assault of a child in the first degree. The court instead found Sprint guilty of the lesser included offense of assault in the

fourth degree.

The trial court entered the following findings of fact and conclusions of law:

II. FINDINGS OF FACT

The following facts were found beyond a reasonable doubt:

2.1 Andrew Sprint was the custodial parent of nine[-]week[-]old [Charles], when on April 16, 2014, [Charles] suffered injuries that caused him to have seizures, subdural hematoma, retinal hemorrhages, and swelling of the brain.

2.2 Medical testimony supports the court's finding that the injuries suffered by [Charles] occurred shortly before the 911 call and during the time when [Charles] was in Andrew Sprint's sole and immediate care and control.

2.3 While there was medical testimony from the defense experts that there may have been other possible causes for the injuries that were not, in their opinion, adequately explored, none of those experts ruled out abusive trauma.

2.4 The court finds that [Charles] suffered his injuries due to non-accidental trauma.

2.5 Andrew Sprint's unsolicited comments overheard during the 911 call of "What did papa do?", and to the emergency medical technician Kaila Brown[lee] of people thinking he "shook the baby["], and in a text message to his roommate Justin Valdez that "I don't shake my baby"; and his statement in a phone call to Mr. Valdez of "I can't say that I did, and I can't say that I didn't" in response to Mr. Valdez' question of whether Sprint caused the injuries—the court finds these statements to be tacit admissions by Sprint that he was the cause of [Charles's] injuries.

2.6 Andrew Sprint, on other occasions, was observed by Justin Valdez roughly and inappropriately handling the child, such as using too much force when burping the child, holding the child in the air without giving proper neck support, and yelling at the child for crying. Even though such prior actions did not cause injury to the child or a report of abuse by Mr. Valdez, this information supports the court's finding that Andrew Sprint intentionally assaulted [Charles].

2.7 Andrew Sprint intentionally assaulted [Charles][.]

2.8 The State did not prove beyond a reasonable doubt that Andrew Sprint either intentionally or recklessly caused the injuries. The court finds

> that the injuries were negligently inflicted by Andrew Sprint's intentional assault.
>
> III. CONCLUSIONS OF LAW
>
> 3.1 Andrew Sprint intentionally assaulted [Charles]. The circumstances of this assault do not rise to the level of assault in the first, second, or third degree.

Clerk's Papers (CP) at 45-46.

The trial court sentenced Andrew Sprint to three hundred sixty four days' confinement with one hundred and eighty four suspended, contingent upon twenty-four months of supervision. One hundred and eight days' of actual confinement was ordered. During the sentencing hearing, the trial court heard from the prosecution, defense counsel, and Andrew Sprint about legal financial obligations and restitution. The prosecutor mentioned the payment of approximately $30,000 in restitution. The trial court scheduled a restitution hearing to occur two months later. Defense counsel remarked to the court that Sprint faced paying tens of thousands, if not hundreds of thousands of dollars, in restitution, presumably for medical bills. Counsel added that Sprint possesses a significant amount of money to pay.

During sentencing, Andrew Sprint commented that he worked during the last three years at a restaurant as a cook and for two months he performed electrical work. He mentioned the difficulty of finding employment with a pending felony. Sprint later remarked that he worked part time at the Bremerton Symphony and that the Innocence

Project of Washington offered him housing and employment. Sprint claimed he had the ability to work to pay "any offending fees" ordered. RP (Aug. 15, 2017) at 1474.

During sentencing, the trial court did not ask Andrew Sprint about his income at the symphony or his possible income at the Innocence Project. The court did not inquire about Sprint's debt obligations. The defense registered no objection to the imposition of legal financial obligations.

The trial court imposed a $200 criminal filing fee, a $500 crime victim assessment, a $250 fine, $400 for a court appointed attorney, and a $100 probation fee, for a total of $1,450 in legal financial obligations. The court later imposed $30,021.55 in restitution.

After imposition of his sentence, Andrew Sprint informed the trial court that his financial status had not changed since the filing of charges. The trial court again found Sprint indigent and determined he had a right to pursue his appeal at public expense.

LAW AND ANALYSIS

Sufficiency of Evidence

Andrew Sprint assigns error to his conviction and to the imposition of legal financial obligations. As to his conviction, Sprint argues that insufficient evidence supported his conviction for fourth degree assault. He claims, in part, that a conviction demands direct evidence of his harmfully touching Charles. He challenges his statements to others as tacit admissions of harming Charles, and he faults the trial court for relying

on Justin Valdez's testimony of earlier behavior. Sprint argues that reliance on his statements and Valdez's testimony constitutes mere speculation that cannot support a finding of harmful touching. Conversely, the State contends that overwhelming circumstantial evidence supports the conviction.

When reviewing a claim for insufficiency of the evidence, this court asks whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). We draw all reasonable inferences from the evidence in favor of the prosecution and interpret the evidence most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We deem circumstantial evidence as reliable as direct evidence. *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). The trier of fact may rely exclusively on circumstantial evidence to support its decision. *State v. Jackson*, 145 Wn. App. at 818. Nevertheless, inferences drawn from circumstantial evidence must be reasonable and cannot be based on speculation. *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

The controlling statute, RCW 9A.36.041, declares:

> 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.

Because the criminal code does not define assault, our courts apply common law

definitions of assault. *State v. Abuan*, 161 Wn. App. 135, 154, 257 P.3d 1 (2011). Washington law recognizes three definitions of assault: (1) an unlawful touching with criminal intent, (2) attempt, with unlawful force, to inflict bodily injury on another, and (3) placing another in apprehension of harm. *State v. Jarvis*, 160 Wn. App. 111, 117-18, 246 P.3d 1280 (2011). The State relies on the first definition in the prosecution of Andrew Sprint. The intent required for assault is simply the intent to make physical contact with the person, not the intent that the contact be malicious or criminal. *State v. Jarvis*, 160 Wn. App. at 119. Sprint cites no decision that requires direct evidence of a striking of the victim in order to prove an unlawful touching with criminal intent.

In challenging his conviction, Andrew Sprint seeks to recharacterize some of the testimony, on which the trial court relied. Sprint contends that he never asked: "What did papa do?" while on the phone with emergency dispatch. He requests that we accept his testimony that he said "What does papa do?" RP (Aug. 15, 2017) at 1453. Nevertheless, the trial court, not us, determines the facts.

Andrew Sprint further argues that the record containing this disputed statement is not transcribed and is indecipherable. Sprint cites to page 285 of the report of proceedings. Sprint correctly notes that the word "(Indiscernible)," appears on that page. Nevertheless, the 911 call played a second time during the State's closing argument clearly broadcasted: "What's up, little guy? What hurts? What did papa do? What did papa do?" RP (Aug. 15, 2017) at 1408. Thus, the trial court could reasonably conclude,

based on the evidence, that Sprint asked: "What did papa do?"

Andrew Sprint, relying on *State v. Scanlan*, 2 Wn. App. 2d 715, 733, 413 P.3d 82, *reviewed granted*, 191 Wn.2d 1026, 428 P.3d 1171 (2018), argues that he made no tacit admission of guilt when he asked: "What did papa do?" while on the line with 911. In *Scanlan*, a police officer testified at trial about a statement wherein the victim's children yelled to Theresa Scanlan that "she had just beat her father half to death," and Scanlan yelled back, "It's not that bad." *State v. Scanlan*, 2 Wn. App. 2d at 733. The court held that the defendant's statement constituted a tacit admission of guilt. Sprint argues that he made no such similar admission.

We know of no legal rule that defines what constitutes a tacit admission of guilt or of any legal test that assists in discerning a tacit admission. Andrew Sprint cites and proposes no rule or standard. Absent such a rule or test, we defer to the trier of fact as to what statements of an accused qualify as a tacit admission.

We note other possible tacit admissions by Andrew Sprint. Sprint answered Justin Valdez's question about what caused the injuries: "I can't say that I did, and I can't say that I didn't." CP at 45. Sprint, without any solicitation, commented to EMT Kaila Brownlee: "Great, now I hope nobody thinks I shook my baby." RP (Aug. 7, 2017) at 167. In his brief, Sprint posits his personal opinion as to why these statements were not tacit admissions. He provides no citation to authority to support the argument.

The trial court, as trier of fact, held the prerogative to determine whether Andrew

Sprint's statements constituted nonsensical panicked responses under extreme stress or whether the remarks acted as tacit admissions of guilt in causing Charles' serious injuries. The trier of fact assesses the weight, credibility, and inferences of testimony. *State v. Bencivenga*, 137 Wn.2d 703, 708-09, 974 P.2d 832 (1999).

Andrew Sprint argues that Justin Valdez's claim that Sprint roughly handled Charles does not establish that he harmfully touched Charles on April 16, 2014. He further contends that his own statements to the 911 operator, to Valdez, and to emergency medical technician Kaila Brownlee did not admit harmful touching.

While citing *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972), Andrew Sprint states that a fact cannot rest upon guess, speculation, or conjecture. According to Sprint, because Valdez did not witness Sprint touch Charles on April 16, Valdez's general opinion that Sprint was rough is not evidence of an assault on his child. Nevertheless, no decision requires direct proof of a harmful touching. Also, we do not need to decide whether Valdez's testimony, by itself, constitutes sufficient evidence to convict. Sprint's comments to others, his opportunity to harm Charles, and the lack of other caretakers provides additional circumstantial evidence to convict.

Finally, Andrew Sprint argues that the findings of fact elucidate a logical flaw in the court's conclusions of law. He contends that, without evidence of "what happened," the trial court cannot infer a mental state of negligence for assault in the fourth degree. Sprint emphasizes that the trial court agreed that it would only be guessing that Sprint

acted intentionally or recklessly when injuring Charles. In turn, the trial court would also be speculating whether Sprint acted negligently.

While the trial court, in its oral ruling and in the findings of fact, commented that Sprint was "negligent," the court did not need to find any mental state to convict Sprint of assault in the fourth degree. Unlike the requisite mental state that a defendant must intentionally or recklessly cause injury for an assault in the first and second degree, the intent required for assault in the fourth degree is simply the intent to make physical contact with the person, not the intent that the contact be a malicious or criminal act. *State v. Jarvis*, 160 Wn. App. at 119 (2011).

Ample evidence supports that Andrew Sprint had frequent physical contact with Charles and harmfully touched Charles. Charles was in Sprint's sole custody for the majority of the days leading up to the 911 call, and even Sprint's medical expert could not rule out abusive head trauma.

Andrew Sprint's trial court needed to rely heavily on circumstantial evidence. The court noted that only two people witnessed the conduct of Sprint: Sprint and Charles, who could not talk or testify. After viewing the evidence and listening to all of the witnesses, the trial court did not believe Sprint and felt that his testimony was not always truthful. The trial court, as finder of fact, relied on substantial evidence when convicting Andrew Sprint.

Legal Financial Obligations

Andrew Sprint assigns error to the trial court's imposition of legal financial obligations, while arguing that the sentencing court failed to adequately inquire into his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The State answers that the sentencing court sufficiently inquired into Sprint's ability to pay financial obligations. The State also asks that we decline review of this second assignment of error because Sprint never objected to imposition of the obligations before the sentencing court. We exercise our discretion under *State v. Blazina*, 182 Wn.2d at 832, and address this assignment of error.

The trial court imposed a $200 criminal filing fee, a $500 crime victim assessment, a $250 fine, $400 for a court appointed attorney, and a $100 probation fee, for a total of $1,450 in legal financial obligations. The court later imposed $30,021.55 in restitution.

Andrew Sprint mistakenly labels the $250 fine as a discretionary legal financial obligation subject to his ability to pay. We disagree. This court has held that "a fine is not a court cost subject to the strictures of RCW 10.01.160(3) and the trial court is not required to conduct an inquiry into the defendant's ability to pay." *State v. Clark*, 191 Wn. App. 369, 376, 362 P.3d 309 (2015). Therefore, we affirm the $250 fine. We also affirm the nondiscretionary $500 crime victim assessment.

The 2018 Washington State Legislature adopted House Bill 1783 that transformed

the $200 criminal filing fee into a discretionary legal financial obligation to be imposed only if the defendant possesses the ability to pay. Our Supreme Court decided *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) on September 20, 2018. The decision declares the statutory amendments found in House Bill 1783 to apply prospectively to cases on direct appeal at the time the amendment was enacted. *State v. Ramirez*, 191 Wn.2d at 747. The $400 court appointed attorney fee and the $100 probation fee always qualified as discretionary legal financial obligations.

Under RCW 10.01.160(3), the trial court is not authorized to order a defendant to pay discretionary costs unless he will be able to pay them. Accordingly, "a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes" legal financial obligations. *State v. Blazina*, 182 Wn.2d at 830. Notably, "the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry." *State v. Blazina*, 182 Wn.2d at 838. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay, and the court must consider the defendant's other debts.

Andrew Sprint's sentencing court did not make an individualized inquiry into Andrew Sprint's current and future ability to pay. Sprint commented about a possible job and a current job, but the court did not inquire into Sprint's income from either job. The court knew of the high sum of restitution, but the court did not ask about Sprint's other

debts, if any. The trial court appointed public counsel to represent Sprint at trial, and the court later entered an order of indigency authorizing him to seek review at public expense. Because the record does not show that the sentencing court made an adequate inquiry into Sprint's ability to pay, we remand for a new sentencing hearing if the State chooses not to strike the $200 filing fee, the $400 attorney fees, and the $100 probation fee. If the State chooses to strike the three financial obligations, Andrew Sprint need not appear in court for any hearing to strike.

CONCLUSION

We affirm Andrew Sprint's conviction for fourth degree assault of a child. We remand to the sentencing court to determine Andrew Sprint's ability to pay discretionary legal financial obligations.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35561-6-III
	)	
ANDREW SPRINT,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF MAY, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** 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 28TH DAY OF MAY, 2019.

X_____

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