

64999-0

64999-0

NO. 64999-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

G.S.

Appellant.

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COURT OF APPEALS
DIVISION ONE

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

The Honorable Carol Schapira

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The juvenile court erroneously entered Finding of Fact 4, which is unsubstantiated or contradicted by the evidence on the record.

2. The juvenile court erroneously entered Finding of Fact 9, which is unsubstantiated or contradicted by the evidence on the record.

3. The juvenile court erroneously entered Finding of Fact 15, which is unsubstantiated or contradicted by the evidence on the record.

4. The juvenile court erroneously entered Conclusion of Law II, which is unsubstantiated or contradicted by the evidence on the record.

5. The juvenile court erroneously entered Conclusion of Law IV, which is unsubstantiated or contradicted by the evidence on the record.

6. The juvenile court erroneously entered Conclusion of Law VI, which is unsubstantiated or contradicted by the evidence on the record.

7. The State failed to provide sufficient evidence that G.S. committed assault in the third degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. JuCR 7.11(a) requires that the juvenile court must find the allegations in the information beyond a reasonable doubt. Several Findings or portions of Findings of Fact were not supported by the evidence at the adjudicatory hearing. Did the trial court err in entering these Findings?

2. The State must prove each element of the crime beyond a reasonable doubt. To convict G.S. of assault in the third degree, the State had to prove he acted intentionally. Without proof that he possessed the requisite intent, did the court err in convicting G.S.?

C. STATEMENT OF THE CASE.

At approximately 9 a.m. on October 15, 2008, G.S. and a friend were waiting for a Metro Transit bus to take them to high school. RP 130. A bus came but passed without stopping. *Id.* G.S. testified the bus driver did not signal or gesture to them as she drove by. *Id.* G.S., who is African American, testified he has experienced racial profiling from a bus driver in the past and believed that was happening again here. RP 131-32. The driver, Dyan Fix, testified she passed the bus stop in accordance with Metro policy, because her bus was full and she knew another bus

would follow shortly. RP 9, 25. G.S. accepted that explanation, although he did not realize it at the time of the incident. RP 130.

A second bus did indeed arrive shortly and picked up G.S. and his friend. RP 132. The two youths got off at the next stop in order to confront Ms. Fix. RP 133. G.S. testified that while other passengers disembarked, he stood on the sidewalk by the door of Ms. Fix's bus and asked her why she had passed them by. RP 133-34. He testified he yelled, but did not use profanity or call Ms. Fix names, and that she responded angrily, seeming "mad" and "scared." RP 133, 138. As the bus doors began to close and the bus started to move, G.S. picked a cigarette butt from the ground and threw it, intending to hit the bus. RP 134-35, 139. The cigarette butt entered the bus and apparently hit Ms. Fix in the face. RP 134.

Ms. Fix testified that when G.S. confronted her he used profanity and called her names. RP 10-11. She testified he "flicked" two objects at her, which she later believed to be a cigarette and a bottle cap, and one hit her lip. RP 11, 14-15. G.S. and his friend then ran away. RP 14. In response, Ms. Fix put on her emergency brake and, abandoning a bus full of about 60 passengers, chased the two youths down the street. RP 16-17.

Ms. Fix reported the incident and after driving to the end of her line, went off duty for the rest of the day. RP18. She testified she did not provide a description of the youths to anyone until later, when she identified the youths in person. RP 33.

King County Sheriff's Deputy Brian Barnes testified he responded to a radio call reporting an assault on a bus driver and describing one of the two suspects as a black male with a black backpack and black beanie. RP 70-71. He did not know where this description had originated. RP 83. Deputy Barnes spoke on the telephone with the unnamed Metro Transit coordinator who reported the incident, and then with Ms. Fix and her supervisor. RP 79-80. He testified one of them provided him a description of the suspects at that time, which he assumed was broadcast over the radio and received by the Seattle Police Department. RP 72. Very shortly thereafter, Seattle Police officers reported they were holding two possible suspects near the scene of the incident. *Id.*

Deputy Barnes testified he told Ms. Fix that people fitting the description she gave were being held, and asked her to come make an identification. RP 72-73. He apparently did not advise her she was under no obligation to make an identification. RP 87-88. Ms. Fix's supervisor brought her to 23rd Avenue and Jefferson Street,

where she identified G.S. as the assailant. RP 73. At trial, she testified she mainly remembered the assailant's clothing (which she described as a black hoody) and was "pretty sure" she had identified the right person. RP 35-36. She also acknowledged she was "confused" on that day. RP 37. Ms. Fix complained of a cut on the inside of her lip, which she believed was caused by the object hitting the outside of her lip and pushing her lip against her braces, but Deputy Barnes did not see anything to photograph. RP 84.

Deputy Barnes took statements from Ms. Fix and G.S. RP 73, 75. G.S., in custody and having been advised of his *Miranda* rights, admitted to throwing a cigarette at Ms. Fix, but stated, "I didn't mean to hurt her or anything, I swear to God." RP 77, 86.

The Honorable Carol Schapira adjudicated G.S. guilty of assault in the third degree and imposed a standard range sentence of 15-36 weeks. CP 9-15.

1. THE TRIAL COURT IMPROPERLY ENTERED FINDINGS OF FACT UNSUBSTANTIATED OR CONTRADICTED BY THE EVIDENCE ON THE RECORD.

a. Findings of Fact must be supported by proof

beyond a reasonable doubt. A trial court's factual findings are of great assistance to a reviewing court. However, when reviewing conclusions of law based on findings of fact, a reviewing court must still determine whether the lower court's findings of fact are supported by substantial evidence, and if so, whether the findings support the conclusions of law. *State v. Sommerville*, 111 Wn.2d 524, 534, 760 P.2d 932 (1988); *State v. Graffius*, 74 Wn. App. 23, 29, 871 P.2d 1115 (1994). Substantial evidence exists to support a finding of fact when the record contains a sufficient quantity of evidence to persuade a fair-minded person of the truth of the declared premise. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987); *Graffius*, 74 Wn. App. at 29.

JuCr 7.11 requires that the juvenile court enter written Findings of Fact setting forth the ultimate facts as to each element of the crime, proven beyond a reasonable doubt, and the evidence the court relied on in reaching its decision. The court failed to do that here.

b. Findings of Fact 4, 9, and 15 are unsubstantiated or contradicted by the evidence in the record. The following Findings of Fact contain assertions not supported by the evidence in the record:

Fix, though she could not recall doing so in court, *gave a description to her supervisor* of the two young men that was later dispatched to officers in the area.

CP 6 (FF 4) (emphasis added). In fact, the evidence on the record does not establish that Ms. Fix provided a description to her supervisor. Ms. Fix did not remember doing so, and the supervisor did not testify. The court apparently made this assumption based on the fact that a description was somehow available before Deputy Barnes spoke to Ms. Fix, but that does not establish the source of the description. The court's unsupported finding appears, falsely, to add legitimacy to police work that was, at the least, poorly documented.

Seattle Police Officer Harold Dentinger testified that he arrived and spotted two youths matching the description and turned his car around to make the stop. *Before he could do so he watched another officer pull up to the youths and conduct the stop.*

CP 6 (FF 9) (emphasis added). This was not Officer Dentinger's testimony. He testified he could not recall whether he or another officer stopped the youths first. RP 46.

The respondent put an object or objects into motion *with the intent of hitting Fix*, and those objects did in fact hit Fix. *The respondent did not hit her accidentally.*

CP 6 (FF 15) (emphasis added). As discussed below, the evidence does not prove G.S. had assaultive intent.

“[A] judge abuses his or her discretion when findings of fact supporting the discretionary [evidentiary] decision are not supported by the evidence.” *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000) “; see also *State v. Ramires*, 109 Wn. App. 749, 757, 37 P.3d 343 (2002) (“An evidentiary decision may be an abuse of discretion if it is based upon facts that are not supported by the evidence”). The juvenile court abused its discretion by failing to find facts based on the evidence presented.

c. Reversal and dismissal is the appropriate remedy.

Reversal may be warranted where the facts are not supported by the evidence. *State v. Stimson*, 41 Wn. App. 385, 391, 704 P.2d 1220 (1985) (citing *Mood v. Banchemo*, 67 Wn.2d 835, 838, 410 P.2d 776 (1966)). Because the court entered findings not supported by the evidence, the conviction should be reversed and dismissed.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT G.S. COMMITTED ASSAULT IN THE THIRD DEGREE.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. JuCR 7.11(a); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *Seattle v. Gellein*, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime charged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Id.*

b. Insufficient evidence was presented to convict G.S. of assault in the third degree. G.S. was charged with assault in the third degree under RCW 9A.36.031(1)(b). CP 1. To convict G.S., the State was required to prove beyond a reasonable doubt that, “under circumstances not amounting to assault in the first or second degree” G.S. assaulted

a person employed as a transit operator or driver... by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault[.]

RCW 9A.36.031.

The State was also required to prove intent, a non-statutory element of assault. *State v. Kruger*, 116 Wn.App. 685, 692, 67 P.3d 1147, *rev. denied*, 150 Wn.2d 1024 (2003); see also *Mullaney v. Wilbur*, 421 U.S. 624, 699, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) (State must prove mental state associated with the crime charged). Intent is a non-statutory element of assault.

G.S. admitted to throwing the cigarette butt and acknowledged at trial that he sometimes has difficulty controlling his anger and he knew he should have stayed on the other bus. . RP 77, 135. However, he maintained that he “never meant to hurt” Ms. Fix and only intended to throw the cigarette butt at the bus, not

the driver. RP 133, 135. Negligence alone is insufficient to convict for assault in the third degree as charged. *State v. Krup*, 36 Wn.App. 454, 458, 676 P.2d 507 (1984). The State was still required to prove G.S. "acted with an intent or design to create in his victim's mind a reasonable apprehension of harm." *Id.* The fact that an object or objects hit Ms. Fix in the face cannot prove G.S. possessed assaultive intent, only that he acted negligently when he threw a cigarette butt at the bus out of anger, as he admits.

The juvenile court found G.S. "meant to be angry at [Ms. Fix.] He did set something in motion that did hit her." RP 163. But these findings do not establish the intent required for assault. G.S. does not dispute these facts. The issue is whether he intended to create in Ms. Fix's mind "a reasonable apprehension of harm." The juvenile court leapt to that conclusion without sufficient evidence, and the State presented no evidence from which a reasonable trier of fact could find such intent. The juvenile court therefore erred in convicting G.S. of assault in the third degree.

c. This case should be reversed and remanded for entry of the lesser-included misdemeanor. In closing, defense counsel requested the lesser-included misdemeanor of unlawful conduct in a transit vehicle. RP 147. RCW 9.91.025(1)(i) provides:

A person is guilty of unlawful transit conduct if, while on or in a transit vehicle or in or at a transit station, he or she knowingly... [u]nreasonably disturbs others by engaging in loud, raucous, unruly, harmful, or harassing behavior;

Consideration for a lesser included offense is warranted

where: (1) each element of the lesser offense must necessarily be proved to prove the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). *State v. Berlin*, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). In order to convict for assault, the State must prove the defendant “acted with an intent or design to create in his victim's mind a reasonable apprehension of harm,” which necessarily includes one of the elements of unlawful conduct in a transit vehicle: that the defendant “knowingly... [u]nreasonably disturb[ed] others by engaging in ... harmful, or harassing behavior.” For assault in the third degree, the State must prove the victim was a transit officer performing her official duties; this necessarily implies one of the elements of unlawful conduct in a transit vehicle: that the defendant committed the offense at a transit facility (which includes bus stops, as in this case) or in a transit vehicle. The legal prong is therefore satisfied. The factual prong is

clearly satisfied, as the evidence establishes beyond a reasonable doubt that G.S. committed the misdemeanor.

The juvenile court did not address the lesser-included offense, having found intent to commit assault. The court erred, requiring reversal of the felony and entry of a disposition for the misdemeanor.

D. CONCLUSION

For the foregoing reasons, G.S. respectfully requests this Court reverse his conviction or, in the alternative, reverse and remand with instructions to enter a disposition for unlawful conduct in a transit vehicle.

DATED this 9th day of August, 2010.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64999-0-I
v.)	
)	
G.W.S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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