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NO. 65631-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

LAHRAJ G.,
(A Minor Child)

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 3

1. THE STATE'S DESTRUCTION OF EVIDENCE DEPRIVED LAHRAJ G. OF DUE PROCESS 3

a. The State failed to preserve material evidence 3

b. Due Process requires the government preserve evidence 4

c. Because the State failed to preserve material exculpatory evidence, this court must dismiss Lahraj's conviction 5

2. THE STATE DID NOT PROVE EACH ELEMENT OF LAHRAJ'S OFFENSES BEYOND A REASONABLE DOUBT 6

a. The State was required to prove the elements of the offenses beyond a reasonable doubt 6

b. the State did not prove Lahraj committed an assault 7

c. The court's unsupported findings must be stricken 8

d. The Court must dismiss Lahraj's conviction 9

E. CONCLUSION 10

TABLE OF AUTHORITIES

Washington Supreme Court

State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996) 5, 6

State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) 8

State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517 (1994) 4, 5

Washington Court of Appeals

Seattle v. Fettig, 10 Wn.App. 773, 519 P.2d 1002 (1974) 5

State v. Graffius, 74 Wn.App. 23, 871 P.2d 1115 (1994) 9

State v. Shelley, 85 Wn.App. 24, 929 P.2d 489 (1997) 7

State v. Tyler, 138 Wn.App. 120, 155 P.3d 1002 (2007) 7

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 6

Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988) 5, 6

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) .....

California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984) 4

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 6

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 6, 9

A. ASSIGNMENTS OF ERROR.

1. The trial court denied Lahraj G. his right to due process when it refused to dismiss the matter as a result of the government's destruction of evidence.

2. In the absence of proof beyond a reasonable doubt of each element, the juvenile court deprived Lahraj G. of due process when it found him guilty of fourth degree assault.

3. In the absence of substantial evidence to support it, the court erred in entering Finding of Fact I.11.

4. To the extent it is a finding of fact, and in the absence of substantial evidence to support it, the court erred in entering Conclusion of Law II.2.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. The Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the government preserve materially exculpatory evidence. If the government destroys exculpatory evidence, dismissal is required regardless of whether the government acted in bad faith. Where there is contradictory evidence of the event and the government nonetheless failed to preserve a video tape of the incident, did the government fail to

preserve materially exculpatory evidence depriving Lahraj G. of due process?

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State prove each element of an offense beyond a reasonable doubt. To convict a person of fourth degree assault, the State must prove he intentionally had a harmful or offensive contact with another. Where the supposed victim testified the touching was not harmful, and the evidence establishes she was not offended, did the State offer sufficient evidence to convict Lahraj G. of fourth degree assault?

C. STATEMENT OF THE CASE.

Michelle Jacobson is an experienced educator at Rainier Beach High School who works in the school's Behavior Intervention Program. 5/10/10 RP 46. That program is designed to teach identified students social and study skills and anger management, in addition to substantive coursework. Id.

Ms. Jacobsen saw one of her students, Lahraj G., returning late from lunch. 5/10/10 RP 48. Because she believed her special needs students were better served by being in the classroom rather than dealing with the administrative requirement of obtaining a

pass for returning late, Ms. Jacobsen had made it her practice to intercept her students and give them the necessary passes to hurry them on to class. 5/10/10 RP 48. Consistent with that practice, Ms. Jacobsen approached Lahraj G. to give him a pass. Id. When she did so, however, Lahraj pushed her out of his way. Id.

Afterward, school security sent Lahraj home. 5/10/10 RP 62-63 He was subsequently suspended from school. 5/10/10 RP 72.

Although Ms. Jacobsen was not interested in pursuing criminal charges against one of her students, 5/10/10 RP 44-45, the State charged Lahraj with fourth degree assault. CP 2.

The juvenile court found Lahraj guilty. CP 33.

D. ARGUMENT.

1. THE STATE'S DESTRUCTION OF EVIDENCE DEPRIVED LAHRAJ G. OF DUE PROCESS.

a. The State failed to preserve material evidence.

Seattle Police Officer Eric Beseler viewed a surveillance video of the incident. CP 31. The school district forwarded an electronic copy of the video by email to the officer. CP 31-32. The officer received a second copy by mail. CP 32. The officer did not save the electronic version, and it was apparently deleted automatically

by his email account. Id. Due to some fault in the recording ,the mailed version could not be displayed. Id. When the officer later attempted to obtain a new copy from the school, he was told the tape had been destroyed. Id.

The trial court denied Lahraj's motion to dismiss the case for destruction of evidence, concluding the evidence was never in the State's control and therefore the officer had not acted in bad faith. 5/10/10 RP 47.

b. Due Process requires the government preserve evidence. The due process clauses of the State and Federal Constitutions guarantee a criminal defendant the right to a fair trial and a meaningful opportunity to present a defense. California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Wittenbarger, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires the government disclose to a defendant material evidence. Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Due process also requires the government preserve such evidence. Trombetta, 467 U.S. at 485-87.

Evidence is "materially exculpatory" if: (1) its exculpatory value is apparent before the evidence was destroyed; and (2) the

evidence's nature leaves no reasonably available means to obtain comparable evidence. Trombetta; 467 U.S. at 489; Wittenbarger, 124 Wn.2d at 475. Where evidence is materially exculpatory, whether the government acted in good or bad faith is irrelevant. Arizona v. Youngblood, 488 U.S. 51, 57, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988); State v. Copeland, 130 Wn.2d 244, 279, 922 P.2d 1304 (1996). If the State destroys "materially exculpatory" evidence, the criminal charges against a defendant must be dismissed. Wittenbarger, 124 Wn.2d at 475.

c. Because the State failed to preserve material exculpatory evidence, this court must dismiss Lahraj's conviction. Ms. Jacobson testified to her version of events, a recitation which Lahraj disputed. The videotape which the State destroyed was a visual record of this disputed event and was thus plainly material.

In a similar case, this Court reversed a driving under the influence conviction where the police negligently failed to preserve a videotape of the defendant's performance of field tests. Seattle v. Fettig, 10 Wn.App. 773, 775, 519 P.2d 1002 (1974). This Court noted the officer's testimony was the sole evidence of the defendant's guilt, and because the missing tape would either confirm or rebut the witness's claims the videotape was material.

Id. So too, the destroyed tape here would have either rebutted or confirmed Ms. Jacobson's recollection of events and was material to Lahraj's case.

Because the tape was materially exculpatory evidence, the State's failure to preserve it, regardless of bad faith, requires reversal. Youngblood, 488 U.S. at 57; Copeland, 130 Wn.2d at 279.

2. THE STATE DID NOT PROVE EACH ELEMENT OF LAHRAJ'S OFFENSES BEYOND A REASONABLE DOUBT

a. The State was required to prove the elements of the offenses beyond a reasonable doubt. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Evidence is sufficient only if, in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. the State did not prove Lahraj committed an assault. To convict Lahraj of fourth degree assault, the State was required to prove he assaulted Ms. Jacobson. RCW 9A.36.041; CP 2. An assault is an intentional touching or striking of another person that is harmful or offensive. State v. Tyler, 138 Wn.App. 120, 130, 155 P.3d 1002 (2007) (citing State v. Shelley, 85 Wn.App. 24, 28-29, 929 P.2d 489 (1997)). A touching or striking is offensive when it offends an ordinary person who is not unduly sensitive. See e.g. WPIC 35 .50.

Ms. Jacobson testified she was not harmed by Lahraj's actions. 5/10/10 RP 50. The court found "the testimony from . . . Michelle Jacobsen was credible." Nonetheless the trial court concluded "the assault was a harmful touching of Michelle Jacobson." CP 33 (Conclusion of Law II.2). That conclusion is unsupported by and is in fact contrary to the evidence at trial.

Beyond that unsupported conclusion, the trial court's oral and written findings are silent as to whether the touching here was offensive. "In the absence of a finding on a factual issue [a reviewing court] must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue". State v. Armenta, 134 Wn.2d 1, 14, 948 1280 (1997) (citing Smith

v. King, 106 Wn.2d 443, 451, 722 P.2d 796 (1986)). But it is more than a presumption here; the record is devoid of facts from which the court could have made the factual findings necessary to support a conclusion that the touching was an assault.

Ms. Jacobson did not testify that she found the actions offensive, nor did the State ever pose such a question to her. In fact, Ms. Jacobson did not believe it was necessary to refer the matter to police, and only did so after speaking with school administrators. 5/10/10 RP 54-56. Even after police became involved, Ms. Jacobson did not want to see Lahraj prosecuted. 5/10/10 RP 44-45. She only testified because of the State's insistence on prosecuting such minor misconduct. 5/10/10 RP 45. Ms. Jacobson's actions a following the incident indicate she did not take offense to the touching. Once again, the court found Ms. Jacobson's testimony was credible. If the victim does not believe the touching was offensive it cannot matter what another person may believe. The State did not prove the offense beyond a reasonable doubt.

c. The court's unsupported findings must be stricken. A court's findings of fact must be supported by substantial evidence State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the finding's truth. State v. Graffius, 74 Wn.App. 23, 29, 871 P.2d 1115 (1994).

The court found Lahraj "fled the scene." CP 32. However, the only testimony regarding what occurred after the event came from Lahraj, who testified school security personnel instructed him to go home. 5/10/10 RP 62-63. Thus, there is not sufficient evidence to support the court's finding that Lahraj fled.

As discussed previously, and to the extent it is a finding of fact, the court's conclusion that the touching was harmful, Conclusion of Law II.2, is not supported by substantial evidence.

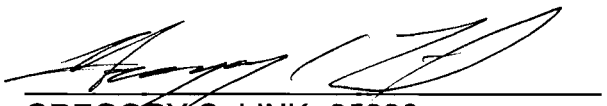
d. The Court must dismiss Lahraj's conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Because the State did not prove Lahraj's contact with Ms.

Jacobson was either harmful or offensive, this Court must reverse his conviction.

E. CONCLUSION.

For the reasons above, this Court must reverse Lahraj's convictions.

Respectfully submitted this 24th day of November, 2010.



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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65631-7-I
v.	)	
	)	
LAHRAJ G.,	)	
	)	
Juvenile Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF NOVEMBER, 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:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF NOVEMBER, 2010.

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