

No. 65993-6-1

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

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STATE OF WASHINGTON,

Respondent,

v.

KIAHNU D. (d.o.b. 2/6/94),

Appellant.

2011 FEB 28 PM 4:37  
CLERK OF COURT  
JULIE A. HARRIS  
COURT OF APPEALS  
DIVISION ONE  
1000 4TH AVENUE  
SEATTLE, WA 98101

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

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BRIEF OF APPELLANT

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## A. INTRODUCTION

Ida Dorsey, mother of appellant Kiahnu D., got mad at Kiahnu because of his poor school attendance. Kiahnu left the house for a couple of hours after the argument with his mother. When he returned, his mother opened the door only partway and told him he was not welcome in the home. However, she had not made any arrangements for her dependent child to stay elsewhere.

According to Ms. Dorsey, Kiahnu kept trying to push the door open and she kept trying to push it closed. She told him to stop because as she was trying to push the door closed and he was trying to push the door open, the door hurt her stomach, where she had recently had surgery. Kiahnu continued trying to enter the home. Ms. Dorsey said that Kiahnu did not push the door aggressively, but only “gradually” and “steadily”. Ms. Dorsey said that Kiahnu’s purpose in pushing the door was to enter the home. But she did not want him in the home and she called the police.

The police arrested Kiahnu. He was convicted of fourth-degree assault for continuing to push the door open after his mother told him to stop.

The conviction should be reversed. The State failed to prove criminal intent and failed to prove unlawful touching.

## **B. ASSIGNMENTS OF ERROR**

1. The juvenile court erred in concluding that Kiahnu “did unlawfully and intentionally touch his mother, Ms. Ida Dorsey, and that touching was offensive.” CP 42 (Conclusion of Law II).

2. The juvenile court erred in concluding that the State proved Kiahnu committed fourth-degree assault beyond a reasonable doubt .

## **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. In order for a court to find a person guilty of the crime of fourth-degree assault, the State must prove the individual intentionally assaulted another person. Here, the State presented evidence that on April 25, 2010, Ida Dorsey had an argument with her 16-year-old son, Kiahnu, that Kiahnu left the house for a couple of hours, that when he returned he knocked on the locked door and waited silently for 5-10 minutes before Ms. Dorsey opened it, that Ms. Dorsey had packed a duffel bag for Kiahnu and told him not to come in the house, that Ms. Dorsey had made no arrangements for her son to stay anywhere else that night, that Kiahnu gradually pushed on the door in order to enter his home, and that Ms. Dorsey repeatedly told him to stop pushing on the door because she was pushing it back against him and the pressure of the door hurt her

stomach. The State presented no evidence that Kiahnu intended to do anything other than enter the home. Did the State fail to present sufficient evidence to prove Kiahnu intentionally assaulted his mother?

2. In order for a court to find a person guilty of the crime of fourth-degree assault, the State must prove an unlawful touching. A touching is not unlawful if it was either legally consented to or otherwise privileged. A child is privileged to enter his own home unless the parent expressly and unequivocally ordered the child out of the home and provided alternative means of assuring that the parent's statutory duty of care is met. Here, the mother acknowledged that she made no arrangements for Kiahnu to stay elsewhere when she told him to leave the house and tried to block the door. The mother also acknowledged that Kiahnu touched only the door, not her, that he pushed it gradually, not aggressively, and that he did so with the purpose of entering the home. Did the State fail to prove unlawful touching because Kiahnu was privileged to enter his own home?

#### D. STATEMENT OF THE CASE

On April 25, 2010, Ida Dorsey was resting in her bed when her 16-year-old son, appellant Kiahnu D., entered the room to talk

with her. RP 29; CP 40-41 (Findings of Fact 1, 2, 4). The two argued about Kiahnu's poor school attendance. RP 29. Kiahnu left the house for a couple of hours, and returned around 3:30 in the afternoon. RP 30; CP 41 (Finding of Fact 6).

The door was locked, and Kiahnu did not have a key. RP 15; CP 41 (Finding of Fact 6). Kiahnu knocked on the door and waited quietly for 5-10 minutes for someone to open the door. RP 16, 22, 31. Finally, Kiahnu's mother opened the door, but she had packed a duffel bag for him and told him to leave the house. RP 15-16, 30-31, 37; CP 41 (Findings of Fact 10, 13). She had not made arrangements for Kiahnu to stay somewhere else, but she tried to hand him the duffel bag and close the door. RP 16-18, 22, 31, 38, 40; CP 41 (Findings of Fact 11, 13). Ms. Dorsey did these things even though she knew that parents are responsible for providing shelter for their children until they are 18 years old. RP 38. Ms. Dorsey's boyfriend was also in the room but did not help Ms. Dorsey close the door against her son. RP 37; CP 41 (Finding of Fact 16).

Kiahnu did not have anywhere else to stay, so he kept trying to enter the house. RP 32-34, 38; CP 41 (Findings of Fact 11, 12, 15). According to Ms. Dorsey, Kiahnu "gradually" pushed the door

open, and was not pushing it aggressively. RP 34. But she still resisted his entry, and tried to keep him from pushing the door open. RP 32, 17-18, 37; CP 41 (Finding of Fact 7). She repeatedly told him to stop pushing the door open because the door was hurting her stomach, where she had had surgery three weeks prior. RP 32; CP 40-41 (Findings of Fact 3, 14). According to Ms. Dorsey, Kiahnu kept “steadily” pushing the door open. RP 34.

Ms. Dorsey threatened to call the police in order to keep her son from entering their home. RP 34. Kiahnu said, “fine, call the police.” RP 34. He entered the home, and Ms. Dorsey called the police. Kiahnu sat at the dining room table while the family waited for the police. RP 34. When the police arrived, Ms. Dorsey told Kiahnu to wait outside while she spoke to the officers. Kiahnu waited outside, and the officers eventually arrested him. RP 34.

Kiahnu was charged with fourth-degree assault for pushing the door against his mother in order to get inside. CP 1. Ms. Dorsey was not charged with assault for pushing the door against her son in order to keep him out.

At trial, Ms. Dorsey and her boyfriend testified as described above. In closing, Kiahnu argued the State failed to prove its case because the alleged victim – his own mother – testified that Kiahnu

was simply steadily pushing on the door in order to gain entry into the home. Thus, the State failed to prove intent to assault. RP 45-46. The defense pointed out that this was just a 16-year-old who wanted to come home because he did not have anywhere else to stay. RP 48.

The juvenile court nevertheless concluded the State proved assault beyond a reasonable doubt. CP 42. Kiahnu timely filed a notice of appeal. CP 37.

#### E. ARGUMENT

##### THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT KIAHNU COMMITTED FOURTH-DEGREE ASSAULT.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each 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). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to

support a conviction only if, “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 v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

This Court reviews a trial court’s decision following a bench trial to determine whether substantial evidence supports the court’s findings of fact, and whether the findings support the conclusions of law. State v. Hovig, 149 Wn. App. 1, 8, 202 P.3d 318 (2009).

Here, the trial court’s findings do not support its conclusion that the State proved assault beyond a reasonable doubt.

b. The State produced insufficient evidence to prove assault because the alleged victim testified that Kiahnu simply pushed on the door gradually in order to enter his own home. Kiahnu was charged with one count of fourth-degree assault, in violation of RCW 9A.36.041, for intentionally assaulting his mother, Ida Dorsey. CP 1. RCW 9A.36.041 provides:

(1) 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.

(2) Assault in the fourth degree is a gross misdemeanor.

The State must prove intent to assault. State v. Robinson, 58 Wn. App. 599, 606, 794 P.2d 1293 (1990), rev. denied, 116 Wn.2d 1003 (1991).

Three common-law definitions of assault are recognized: (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 capable of inflicting harm. State v. Frohs, 83 Wn. App. 803, 813, 924 P.2d 384 (1996). Here, the trial court concluded the State proved the second type of assault – an unlawful touching with criminal intent. CP 42. That conclusion is erroneous. Indeed, the State proved neither unlawful touching nor criminal intent, and a failure of proof on either element alone would require reversal.

As to intent, Ida Dorsey testified, and the trial court found, that Kiahnu simply kept pushing on the door in order to get inside his own home. RP 34; CP 41. His mother testified that he did not push aggressively, but only pushed gradually and steadily. RP 34. She testified that she was offended by Kiahnu's statement that she could go ahead and call the police; contrary to the State's argument

in closing, she never testified that she was offended by his pushing on the door. RP 34. And although Ms. Dorsey testified that she told Kiahnu the door was hurting her because he was pushing on it and she was pushing back, she also testified that Kiahnu's reason for pushing on the door was to get inside the house where he lived. RP 32, 38. Thus, the State failed to prove criminal intent.

The State also failed to prove unlawful touching. A touching is not unlawful if it was either legally consented to or otherwise privileged. State v. Jarvis, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2011 WL 481030 at \*2 (February 11, 2011). Here it is undisputed that Kiahnu did not touch his mother directly but merely pushed on the door in order to get inside. Kiahnu was privileged to push the door open to enter his own home. See State v. Howe, 116 Wn.2d 466, 468-69, 805 P.2d 806 (1991) (juvenile's conviction for burglary of parental home cannot be sustained unless parent expressly and unequivocally orders juvenile out of parental home and provides some alternative means of assuring that parent's statutory duty to provide shelter is met).

Parents have a statutory duty to provide for their dependent children. RCW 26.20.035; Howe, 116 Wn.2d at 469. Indeed, a parent commits the crime of family nonsupport if she willfully omits

to provide shelter to a dependent child. RCW 26.20.035(1); Howe, 116 Wn.2d at 469. Thus, although a parent may revoke a child's privilege to enter the family home, the revocation is not effective unless the parent has made other provisions for the child's shelter and care. Howe, 116 Wn.2d at 470.

Howe involved three consolidated cases in which children had been convicted of burglary for entering their family homes after their parents had kicked them out, and stealing items therein. Id. at 468. The Supreme Court noted that a child's entry into the family home could not be unlawful if the child was privileged to be there, and that by default a child is privileged to enter the family home because the parent has a duty to provide shelter. Id. at 469. The Court held that a parent revokes the privilege only by (1) explicitly communicating the revocation, and (2) providing necessary care for the child through alternative arrangements. Id. at 468-69.

Thus, the Court affirmed one child's burglary conviction because the father had taken the child to a state-appointed shelter prior to prohibiting his entry into the family home. Id. at 472. The Court affirmed a second child's burglary conviction where the father had placed the child in a temporary home through the Department of Social and Health Services prior to barring the door to his house.

Id. at 475. But the Court reversed a burglary conviction for a child whose mother had changed the locks and told him he could not come home, but had not arranged for an alternative place for him to stay. Id. “Since she failed to fulfill her statutory duty to provide for Michael, she could not revoke his privilege to enter the family home. Therefore, his entry was lawful, and his conviction is reversed.” Id.

Similarly here, Ms. Dorsey acknowledged that she failed to fulfill her duty to provide alternative shelter arrangements for Kiahnu. RP 38. The trial court found that “Ms. Dorsey did not make any arrangements for another location for Kiahnu to spend the night.” CP 41 (Finding of Fact 11). Thus, Kiahnu was privileged to enter the home. Howe, 116 Wn.2d at 468-69. Kiahnu did nothing more than push on the door steadily to enter the home. CP 41; RP 34. His touching of the door was therefore privileged, and was not unlawful. For this reason, too, the State failed to prove assault.

c. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Kiahnu committed fourth-degree assault, the judgment may not stand. State v. Spruell, 57 Wn. App.

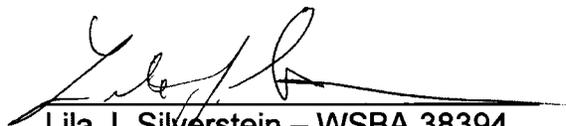
383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is reversal and dismissal of the charge with prejudice.

F. CONCLUSION

For the reasons set forth above, Kiahnu respectfully requests that this Court reverse the order finding him guilty of fourth-degree assault and dismiss the charge with prejudice.

DATED this 25<sup>th</sup> day of February, 2011.

Respectfully submitted,

  
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Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65993-6-I
v.	)	
	)	
KIAHNU D.,	)	
	)	
Juvenile Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF FEBRUARY, 2011, 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	(X)	U.S. MAIL
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**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2011.

X \_\_\_\_\_ *gru*

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