

70406-1

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No. 70406-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

K.A.,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2014 MAY 14 AM 10:36

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## **A. ARGUMENT**

**The State failed to prove the absence of self-defense beyond a reasonable doubt.**

**1. Whether it is a finding of fact or conclusion of law, the determination that Kiya's use of force was unreasonable is erroneous.**

The trial court's finding that the bite Kiya used in self-defense was not reasonable force is properly a conclusion of law subject to de novo review. See State v. Read, 147 Wn.2d 238, 242-44, 53 P.3d 26 (2002) ("If the trial court refused to give a self-defense instruction because it found no reasonable person in the defendant's shoes would have acted as the defendant acted, an issue of law, the standard of review is de novo."); State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993) (finding of fact that is actually a conclusion of law is reviewed as a conclusion of law). Here, the issue is whether a reasonable person in Kiya's position would have bit Eric hard enough to only bruise him when Kiya was being held by Eric and Kiya was having difficulty breathing. In determining that Kiya's use of force was unreasonable, the trial court necessarily concluded that no reasonable person in Kiya's position would have acted as she did. Under Read, this is a legal question that is reviewed de novo.

The State contends that the question of the reasonableness of Kiya's action in biting Eric is a finding of fact reviewed for substantial

evidence. Br. of Resp't at 11-12. In support, the State cites State v. Kirvin, 37 Wn. App. 452, 682 P.2d 919 (1984) and State v. Madry, 12 Wn. App. 178, 529 P.2d 463 (1974). In Kirvin, the court remarked that “[w]hen the ‘defense of others’ is properly raised, the trier of fact must determine whether the actor's apprehension of danger and use of force were reasonable.” Kirvin, 37 Wn. App. at 458 (citations omitted). In Madry, the court similarly stated that, “generally the question whether the amount of force used was reasonable is a matter for the jury.” Madry, 12 Wn. App. at 181. The court in Kirvin also noted that in making this determination, credibility and the weight of testimony are also for the trier of fact. Kirvin, 37 Wn. App. at 458. These statements mean only that the trier of fact (the jury or judge in a bench trial) ultimately decides the question of self-defense and that matters of weight and credibility are to be resolved by the fact finder. If the reasonableness of force was a pure question of fact, then the court in Kirvin would not have needed to note that matters of credibility and weight are for the trier of fact.

Even if denominated a finding of fact, there is still not substantial evidence to support it. Eric, an older and taller 16-year-old boy, initiated physical contact by pushing Kiya, a younger and shorter girl. RP 26, 59; CP 23 (FF 12, 14). Fearing further assault, Kiya tried to hit Eric, but missed. RP 63; CP 23 (FF 16). Eric then grabbed Kiya and pinned her

against his chest, making it difficult to breathe. RP 63-64. He did not let go. RP 64. After about 20 seconds, and to escape this dangerous position, Kiya bit Eric on the chest only hard enough to leave a minor transitory bruise. RP 64; ex. 1-2. Under these facts, a fair-minded, rational person would not be persuaded that Kiya's use of force was unreasonable.

**2. The court did not reject Kiya's testimony that Eric held her so tightly that she had difficulty breathing.**

In an effort to bolster its argument that the trial court properly determined Kiya's use of force was unreasonable, the State repeatedly refers this Court to defense proposed finding of fact 21, which the trial court did not adopt. Br. of Resp't at 13, 14, 17, 19. However, this proposed finding merely recounts that "[Kiya] testified that she was being held so tightly that she couldn't really breathe." CP 35 (emphasis added). It does not say, as the State would have this Court believe, that "[Eric] held [Kiya] so tightly that she could not breathe." Br. of Resp't at 13. The record establishes that Kiya testified that Eric forcibly held her against her will and that during this time she could not breathe. RP 64. The court found Kiya's testimony credible. CP 23 (FF 20). That the court did not enter a finding recounting Kiya's testimony is irrelevant.

**3. The court misconstrued the law of self-defense to mean that lawful force is the least possible amount of effective force rather than a reasonable degree of force.**

The court did not find that Kiya was the aggressor. RP 117; CP 24 (court's incorporation of its oral findings and conclusions). The court only rejected Kiya's self-defense claim because it determined that Kiya's biting of Eric was unreasonable force. RP 119-20; CP 24. Before ruling on Kiya's motion for reconsideration, the trial court recited the correct standard. RP 117. However, the court's ruling shows a misunderstanding of this standard. The court reasoned that because Kiya had not proved that she could not have pushed Eric away, biting him hard enough to leave a bruise was unreasonable. RP 120 ("I can't believe that she couldn't push him away."). But Kiya did not have to prove that she could have pushed Eric away rather than bite him. This reasoning also smacks of hindsight and fails to view the situation from the perspective of a reasonable person in Kiya's position. Kiya testified she was stuck and could not breathe properly when pinned by Eric. She resorted to biting only after being held for about 20 seconds. The record shows that the court misconstrued the law and effectively imposed a least amount of effective force standard rather than a reasonable degree of force standard. This explains why the court erroneously rejected Kiya's claim of self-defense.

**4. Applying the correct standard, the evidence is insufficient to establish the absence of self-defense beyond a reasonable doubt, requiring reversal and dismissal.**

Kiya's credible testimony was sufficient to raise the issue of self-defense. State v. Graves, 97 Wn. App. 55, 61, 982 P.2d 627 (1999). This shifted the burden to the State to prove the absence of self-defense beyond a reasonable doubt. Graves, 97 Wn. App. at 61-62. There was insufficient evidence for the State to disprove Kiya's claim of self-defense, requiring reversal. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (sufficient evidence must support all the elements beyond a reasonable doubt).

This case is like State v. Graves, 97 Wn. App. 55, 982 P.2d 627 (1999). There, a boy was grabbed and pinned down by his father. Graves, 97 Wn. App. at 63. For trying to wrestle away, the boy was prosecuted for fourth degree assault. Id. at 57. This Court held there was not sufficient evidence proving the absence of self-defense. Id. at 63.

The State's attempt to distinguish Graves, in a footnote no less, is not compelling. Br. of Resp't at 20 n.7. While there are, of course, factual differences, these differences are not material. That Eric pushed Kiya after she made finger-wagging hand gestures, deemed to be aggressive jabbing motions by the court, is immaterial. RP 62, 112; CP 23 (FF 11, 13-14). The court found Kiya was not the aggressor. RP 117; CP

24 (court's incorporation of oral findings and conclusions). By making physical contact with Kiya first, by pushing her, Eric was the aggressor. CP 23 (FF 12, 14). After Kiya unsuccessfully tried to defend herself from further assault, Eric grabbed her and pinned her against his chest. CP 23 (FF 17); RP 63-64. Because Eric would not let go and she was having difficulty breathing, Kiya then used reasonable force by biting him. As in Graves, this Court should reverse for a lack of sufficient evidence establishing that Kiya's use of force was unlawful.

#### **B. CONCLUSION**

The trial court's determination that Kiya's self-defense claim failed because she used unreasonable force is erroneous. Because Kiya's use of force was reasonable and State failed to disprove her claim of self-defense with sufficient evidence, this Court should reverse the conviction for fourth degree assault and order it dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

DATED this 13th day of May, 2013.

Respectfully submitted,



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70406-1-I
v.	)	
	)	
K. A.,	)	
	)	
Juvenile Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF may, 2014, I CAUSED THE ORIGINAL **REPLY 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:

<input checked="" type="checkbox"/> AMY MECKLING, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> K. A. 2605 S 240 ST #3 DES MOINES, WA 98198	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF MAY, 2014.

X \_\_\_\_\_ 

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