

No. 35899-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

K.M.S.,

Appellant

OPENING BRIEF OF APPELLANT

NEIL M. FOX
WSBA No 15277
Cohen & Iaria
1008 Western Ave. Suite 302
Seattle WA 98104

Phone: 206-624-9694
Fax: 206-624-9691
e-mail: nmf@cohen-iarria.com

ANN M. CAREY
WSBA No. 17101
Carey & Lillevik PLLC
2003 Western Ave. Ste. 203
Seattle WA 98181

206-859-4550
206-441-6014
AnnCarey@CareyLillevik.com

FILED
COURT OF APPEALS
07 JUL 23 PM 11:54
STATE OF WASHINGTON
BY [Signature]

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE 3

 1. Procedural History 3

 2. General Substantive Facts 5

 3. Facts Related to Jurisdiction 9

D. ARGUMENT 11

 1. Kuhyar Sajjadi’s Actions Were Not Reckless 11

 a. The Trial Court’s Findings Are Inadequate 14

 b. There is Insufficient Evidence of
 Recklessness 18

 2. There Was Insufficient Evidence to Support a
 Finding that Kuhyar Sajjadi Inflicted Substantial
 Bodily Harm 20

 3. The State Failed to Prove that the Alleged Assault
 Occurred Within Pierce County or the State of
 Washington 25

E. CONCLUSION 29

TABLE OF CASES

	Page
<i>Washington Cases</i>	
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995)	15,17
<u>State v. Ashcraft</u> , 71 Wn. App. 444, 859 P.2d 60 (1993)	23
<u>State v. BJS</u> , 72 Wn. App. 368, 864 P.2d 432 (1994)	15
<u>State v. Banks</u> , 149 Wn.2d 38, 65 P.3d 1198 (2003)	15,16,17
<u>State v. Brown</u> , 29 Wn. App. 11, 627 P.2d 132 (1981)	25
<u>State v. Dolan</u> , 118 Wn. App. 323, 73 P.3d 1011 (2003)	23,24
<u>State v. Finch</u> , 137 Wn.2d 792, 975 P.2d 967 (1999)	21
<u>State v. Ford</u> , 33 Wn. App. 788, 658 P.2d 36 (1983)	26,27,28
<u>State v. Gamble</u> , 154 Wn.2d 457, 114 P.3d 646 (2005)	13
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	19
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	17,18
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998)	27
<u>State v. Hill</u> , 123 Wn.2d 641, 870 P.2d 313 (1994)	21
<u>State v. Jones</u> , 34 Wn. App. 848, 664 P.2d 12 (1983)	16
<u>State v. Kees</u> , 48 Wn. App. 76, 737 P.2d 1038 (1987)	26
<u>State v. Russell</u> , 68 Wn.2d 748, 415 P.2d 503 (1966)	16
<u>State v. Shipp</u> , 93 Wn.2d 510, 610 P.2d 1322 (1980)	12

Federal Cases

Crawford v. Washington, 541 U.S. 36 (2004) 9,11

Jackson v. Virginia, 443 U.S. 307 (1979) 19,24,28

United States v. Esquivel-Ortega, 484 F.3d 1221 (9th Cir. 2007) 19

United States v. Vasquez-Chan, 978 F.2d 546 (9th Cir. 1992) 19

*Statutes, Constitutional Provisions, Rules, Treatises
and Other Authority*

CrR 3.5 3,10,27

JuCR 1.4 3

JuCR 7.11 15

RCW 9A.04.030 25,26

RCW 9A.04.110 12,20,22,23,24

RCW 9A.08.010 12,13

RCW 9A.36.021 11,12,24

RCW 9A.36.031 13,14,22,24

RCW 9A.36.041 24

U.S. Const. amend. 14 20,24,28

A. ASSIGNMENTS OF ERROR

1. Appellant Kuhyar Sajjadi [K.M.S.] assigns error the entry of the Disposition Order. CP 11-17.

2. Appellant assigns error to Finding of Fact III:

That all relevant events occurred in Pierce County.

CP 7-10, App. A.¹

3. Appellant assigns error to Finding of Fact V:

The respondent thereby inflicted substantial bodily harm in that he caused bleeding from Halter's nose, caused, [sic] swelling of Halter's face and nose, caused impairment of Halter's breathing, and caused Halter considerable pain that lasted a substantial period of time. Halter missed some school because of his injuries.

CP 7-10, App. A.

4. Appellant assigns error to the trial court's failure to make any findings of fact on the issue of whether he acted recklessly.

5. Appellant assigns error to Conclusion of Law I:

That the Court has jurisdiction of the parties and subject matter.

CP 7-10, App. A.

6. Appellant assigns error to Conclusion of Law II:

¹ A copy of the Findings of Fact and Conclusions of Law is attached in Appendix A.

That KUHYPAR SAJJADI is guilty beyond a reasonable doubt of the crime of ASSAULT IN THE SECOND DEGREE in that, on 12/15/05, he did intentionally assault Jason Halter and thereby recklessly inflicted substantial bodily harm

CP 7-10, App. A.

7. There is insufficient evidence to support a conviction for assault in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it failed to make findings regarding whether Kuhyar Sajjadi acted recklessly?

2. Is there sufficient evidence to support a conviction for assault in the second degree – i.e. is there sufficient evidence either that Kuhyar Sajjadi acted recklessly or that he inflicted substantial bodily harm?

3. Is there substantial evidence to support factual findings that Kuhyar Sajjadi caused impairment of Jason Halter's breathing?

4. Is there substantial evidence in the record to support the factual finding that Kuhyar Sajjadi inflicted substantial bodily harm to Jason Halter?

5. Is there substantial evidence in the record to support the

finding that Jason Halter missed some school because of his injuries?

6. Was there any evidence that the alleged assault took place either in Pierce County or in the State of Washington?

C. STATEMENT OF THE CASE

1. Procedural History

By information filed in juvenile court in Pierce County on April 25, 2006, the State charged Kuhyar “Matt” Sajjadi (DOB:10/7/91) with assault in the second degree, alleging that fourteen year old Kuhyar did “intentionally assault Jason Halter, and thereby recklessly inflict[ed] substantial bodily harm.” CP 1. The charges stemmed from a December 2005 fight at Kuhyar’s and Jason’s school.

The case was tried to the bench on December 13, 2006, the Hon. James R. Orlando presiding. Judge Orlando held a brief CrR 3.5² hearing prior to taking substantive evidence, RP 14-23, and ruled that Kuhyar’s statements were admissible at trial. RP 24-25. At the conclusion of the trial, Judge Orlando orally found Kuhyar guilty. RP 155-60. The oral findings did not include detailed findings about Kuhyar’s mental state – i.e., whether he recklessly caused substantial bodily injury.

² CrR 3.5 is applicable to juvenile proceedings pursuant to JuCR 1.4(b).

Written Findings of Fact and Conclusions of Law were entered on January 23, 2007, CP 7-10, App. A, the same day the disposition order was entered. CP 11-17. As with the oral ruling, Judge Orlando's written findings do not reflect any finding about Kuhyar's mental state, other than the fact that he "did intentionally assault Jason Halter by hitting him repeatedly in the head." FF IV. Although Judge Orlando included in the Conclusion of Law section the conclusion that Kuhyar "recklessly inflicted substantial bodily harm," CL II, in the section of the findings related to causing injury, Judge Orlando made no findings on recklessness, stating only:

The respondent thereby inflicted substantial bodily harm in that he caused bleeding from Halter's nose, caused, [sic] swelling of Halter's face and nose, caused impairment of Halter's breathing, and caused Halter considerable pain that lasted a substantial period of time. Halter missed some school because of his injuries.

FF V.

When sentencing Kuhyar, Judge Orlando noted that he believed that this case should have been settled before trial and that "[i]n my mind, in many circumstances this kind of case possibly would have resolved in a finding of guilt to a lesser offense than the assault second degree that was charged." RP 171. Judge Orlando thereupon ignored the probation

counselor's recommendation of a downward manifest injustice disposition, and sent Kuhyar to JRA for 15 to 36 weeks. RP 171; CP 11-17.

This appeal timely followed. The disposition was not stayed pending appeal.

2. General Substantive Facts

On December 15, 2005, Kuhyar "Matt" Sajjadi and Jason Halter, both fourteen years old at the time, were in choir class watching a movie at the Lakeridge school.³ Kuhyar was much smaller than Jason, being shorter and weighing only half of what Jason weighed. RP 109.

One of their classmates, Brad Paasch, was "flicking" pennies at the other students, including Jason. RP 35, 63, 130.⁴ Either Kuhyar called Jason a "bitch" or Jason called Kuhyar a "bitch." RP 63-64, 130.

Jason, who had already been in one fight earlier that same day, RP 78-83, testified that after the exchange of words, Kuhyar came over to him and "pushed my chair over with me in it." RP 65. Kuhyar admitted

³ The school was apparently at the time a "middle school," although later it became a "junior high." RP 34.

⁴ Although Brad Paasch testified that Kuhyar joined him in the "flicking" of the pennies, RP 36, he told the police that it was he alone who was doing the flicking, never mentioning that Kuhyar was involved. RP 40-41; Ex. 1. Kuhyar testified that Brad was the one flicking the pennies. RP 130.

pushing Jason, but testified that “he just kind of stumbled in his chair.”

RP 131. Kuhyar testified that Jason got up and “clinched his fists and walked over to me and he got in my face.” RP 131. Jason was “biting down on his teeth, his jaw and he was glaring at me like he was going to fight me.” RP 131. Kuhyar feared that Jason was “about to hit me, so I hit him first before he hit me.” RP 131.

Jason denied that he was going to hit Kuhyar. He said he got out of his chair, propped his backpack up against it and stood there, when Kuhyar said “Did you want some of this?” and hit him in the face. RP 66.

The child who was flicking the pennies, Brad Paasch, testified that after words were exchanged between Jason and Kuhyar, “Matt went over there and pushed him. And then Jason got up, got up in his face and stuff, and started hitting him.” RP 35. Brad told the police in January 2005 that it was “Matt” who started hitting Jason. Ex. 1. On the day of the incident, he apparently told Kuhyar’s father, Mayhar “Mike” Sajjadi, that Kuhyar “didn’t start it. It wasn’t his fault.” RP 124.⁵

Kuhyar testified he hit Jason one time on the side of his face, not on the nose. Jason put his head down, shook his body, started to walk

⁵ This statement was admitted only for impeachment purposes. RP 124.

backwards, stumbled and fell. The teacher then came into the classroom, turned on the lights, picked Jason up and took him to the nurse's office.

RP 132.

Jason testified that Kuhyar hit him on the right side of the face, mainly on the cheek, but "just a little bit on my nose." RP 68. He testified: "It was just like in my cheeks. He was just trying to get me in the face . . . I don't recall direct single punch to my nose, no." RP 112. He was stunned and bent over and Jason hit him "hard" in the face a few more times. He tripped over his backpack and fell down. His face was "kind of throbbing and stuff." RP 69. He said:

I am like blinked, and my eyes were all watery and stuff, my face was throbbing and throbbing, and people were like gasping and stuff. And I got up and went like this [gesturing rubbing his nose], and there was blood.

RP 69. His nose hurt, and then the lights came on. He stood there and "didn't really know what to do" and until a teacher took him to the office. He put an ice pack to his nose and the "office lady" called his mother. RP 70.

His nose kept hurting, and he told his parents that he thought it was broken, but they said that "it would hurt more." RP 71. His nose was "pretty swollen." RP 71. His cheeks were also "kind of swollen, not as

much as my nose, though.” RP 112. The inside of his bottom lip was bleeding, but he did not “really” get a black eye. RP 112. Jason had “really bad” pain and the throbbing made it difficult for him to “focus” at school. RP 74.

Jason already had an appointment with a doctor for a pre-existing adenoid problem, which was causing difficulties with his breathing. RP 71, 113. The doctor performed an operation which fixed his nose, and also “took out the things that were blocking [Jason’s] air passage” which were unrelated to the broken nose. RP 73.⁶ Jason had to wear a cast for a few days and missed one day of school after the surgery. RP 73.⁷

Exhibit 4 contained the records from the doctor who treated Jason’s nose. The records reveal that Jason had a closed nasal fracture in addition to his adenoid problem. The adenoids were “obstructing greater than 70% of the choana.” Ex. 4. During the operation, the doctor “repositioned” the broken nose and removed the adenoids. Ex. 4.

Ex. 4 was admitted without objection. RP 53. In closing argument, defense counsel objected to portions of the exhibit under

⁶ The medical reports showed that adenoids “were obstructing greater than 70% of the choana.” Ex. 4.

⁷ Jason did not miss any school after being hit in the face. RP 73.

Crawford v. Washington, 541 U.S. 36 (2004). RP 153-54. Judge Orlando stated that he would “rule as if I sustained that Crawford objection, which would then exclude the testimony as to a fracture . . . So I will decide this case with the absence of basically the facts alleged in Exhibit 4, the medical testimony or medical records of the physician’s office that treated Jason.” RP 156-57.

3. Facts Related to Jurisdiction

The information alleged that the charged acts took place “in the State of Washington.” CP 1. The trial court found that “all relevant events occurred in Pierce County.” FF III, CP 8.

The State presented the testimony of four witnesses, while the defense presented two witnesses.

Pierce County Sheriff’s Department Deputy Ken Solbrack testified that he did a follow up investigation at the Lakeridge Middle School in January 2006 where he took statements from Brad Paasch and Kuhyar Sajjadi. RP 14-15. Deputy Solbrack offered no testimony as to the location of the school. The statement from Brad Paasch noted that his address was “19514 67th St e.” Ex. 1. Kuhyar Sajjadi’s statement reflected that he resided at “7509 W. Tapps Hwy E” with his parents. Ex.

2. The advisement of rights form, which was admitted for the CrR 3.5 hearing only, RP 17, but not at trial, stated that the location of the advisement of rights was “5909 Myers Rd. E.,” without any city listed. Pre-Trial Ex. 2.

Brad Paasch testified that the incident took place at Lakeridge Middle School and clarified “it was junior high, but now it’s middle.” RP 34. Jason Halter also testified that the incident took place at Lakeridge Junior High. RP 55.

Kuhyar Sajjadi testified that he lived with his parents at 7590 West Tapps Highway East in Bonney Lake, Washington, RP 129, the same address (without the state) which his father gave. RP 120. Kuhyar said that he had been going to “Lakeridge Middle School,” where he was in 8th grade. RP 130. Mike Sajjadi testified that he got a call about the incident and went to “Lakeridge School.” No other information was given as to the location of the school. RP 121.

Finally, Leticia Mans, the custodian of records for Dr. Julie Gustafson, who treated Jason Halter’s injuries, testified. She gave no information about her address. RP 50-54. Dr. Gustafson’s records, though, listed an office address in Puyallup, Washington. Jason Halter’s

residential address was in Bonney Lake, Washington. Ex. 4. It is not clear, based upon the trial court's later rulings under Crawford, what portions of these records actually contained admissible evidence.

D. ARGUMENT

1. Kuhyar Sajjadi's Actions Were Not Reckless

Fourteen year old Kuhyar Sajjadi got into a school fight with Jason Halter, a much larger classmate. Kuhyar hit Jason in the face and unfortunately caused harm to Jason's cheek and nose. No one, including the other boy, testified that Kuhyar intended to hurt Jason's nose so badly. Indeed, as Jason himself testified, Kuhyar did not hit Jason squarely on the nose, but more on the side of his cheek, perhaps brushing the nose area.

Given the trial court's rejection of Kuhyar's self-defense claim, FF VI, FF VII, FF VIII, CL III and CL IV, and given the undisputed fact that Kuhyar intentionally punched Jason in the face, the only real question remaining under the second degree assault statute, RCW 9A.36.021, was whether the State proved beyond a reasonable doubt that Kuhyar acted *recklessly* when he caused substantial bodily harm.⁸ This element would

⁸ RCW 9A.36.021 defines assault in the second degree in part as follows:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(continued...)

not be met if Kuhyar intentionally hit Jason, but only *accidentally* caused substantial bodily harm.⁹

Recklessness is defined in RCW 9A.08.010, which establishes a hierarchy of mental states for crimes of increasing culpability. State v. Shipp, 93 Wn.2d 510, 515, 610 P.2d 1322 (1980). Under this scheme, recklessness is a “higher” mental state than criminal negligence:

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(I) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts

⁸(...continued)

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm. . . .

RCW 9A.04.110(4)(a)(b) defines “substantial bodily harm” as:

bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.

⁹ The second degree assault statute contains two mental state elements. First, the State must prove the defendant “*intentionally* assaults another.” Second, the State must prove that the defendant “thereby *recklessly* inflicts substantial bodily harm.” RCW 9A.36.021(1)(a) (emphasis added).

exist which facts are described by a statute defining an offense.

(c) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

RCW 9A.08.010.

Thus, to prove recklessness, one must identify with specificity what “wrongful act,” caused by the defendant’s actions, was disregarded. For assault in the second degree, the State has to prove the defendant “knows of and disregards a substantial risk that a wrongful act [infliction of substantial bodily harm] may occur.” See State v. Gamble, 154 Wn.2d 457, 467-68, 114 P.3d 646 (2005).

The importance of the element of recklessness to assault in the second degree can be seen by way of contrast to the Class C felony of assault in the third degree, under RCW 9A.36.031(1)(f), a crime based

upon criminal negligence.¹⁰ The two crimes – assault in the second degree and assault in the third degree – differ not only because second degree requires more severe injuries (“substantial bodily harm” as opposed to “bodily harm”), but also because of differences in the *mens rea* required. A person who acts with criminal negligence is not guilty of second degree assault, although he or she may be guilty of assault in the third degree.

In this case, there are two issues raised by the key mental state of recklessness: (1) inadequate findings by the trial court; and (2) insufficiency of the evidence.

a. **The Trial Court’s Findings Are Inadequate**

Although the trial court made a legal conclusion that Kuhyar “recklessly inflicted substantial bodily harm,” CL II, the court made absolutely no factual findings on this key mental state, either orally or in the written findings. Finding of Fact V noticeably lacks any finding about

¹⁰ RCW 9A.36.031 provides in part:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

....

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

recklessness:

The respondent thereby inflicted substantial bodily harm in that he caused bleeding from Halter's nose, caused, [sic] swelling of Halter's face and nose, caused impairment of Halter's breathing, and caused Halter considerable pain that lasted a substantial period of time. Halter missed some school because of his injuries.

FF. V, CP 7-10.

JuCR 7.11 provides in part:

(c) Decision on the Record. The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

(d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

The findings required under this rule must reflect findings and conclusions on each element of the charged offense, which are necessary to ensure adequate appellate review. State v. BJS, 72 Wn. App. 368, 372, 864 P.2d 432 (1994). "The findings must specifically state that an element has been met." State v. Banks, 149 Wn.2d 38, 43, 65 P.3d 1198

(2003). See also State v. Alvarez, 128 Wn.2d 1, 17, 904 P.2d 754 (1995) (findings that fail to address each element are insufficient).

Just a conclusory statement that someone is guilty is not sufficient because such a statement does not reveal "an understanding of the conflicting contentions and evidence, and a resolution of the material issues of fact that penetrates beneath the generality of ultimate conclusions." State v. Jones, 34 Wn. App. 848, 664 P.2d 12 (1983). "In a criminal cause, the findings should at least treat with the elements of the crime separately, indicating the factual basis for each of these ultimate conclusions." State v. Russell, 68 Wn.2d 748, 750, 415 P.2d 503 (1966).

Here, the findings are completely inadequate. Neither the trial court's oral decision nor its written findings address the key element of whether Kuhyar – a fourteen year old child in a school fight – knew of and disregarded a substantial risk that Jason's nose would be injured so much when he hit him in the cheek area of his face, and that this disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. The findings are clearly insufficient.

Insufficiency of findings of fact and conclusions of law from a

bench trial is subject to a harmless error analysis. Banks, 149 Wn.2d at 43. The test is whether "there is a reasonable probability that the outcome of the trial would have been different had the error not occurred. . . . A reasonable probability exists when confidence in the outcome of the trial is undermined." Banks, 149 Wn.2d at 44 (internal quotations and citations omitted).

This test is met. There was no evidence admitted in this case that a fourteen year old child in a school fight would know that he could cause such damage to another child's nose by hitting him in the cheek. There was no evidence in the record that Kuhyar knew of such a risk and went ahead and hit Jason in the cheek, disregarding the risk of injury. Given this lack of evidence, and given the trial judge's own statement at disposition that "in many circumstances this kind of case possibly would have resolved in a finding of guilty to a lesser offense than assault second degree," RP 171, there is a reasonable probability that had the judge made any findings of recklessness, that he would have found that the State had not met its burden of proof on that issue.

In terms of remedy, the Court has the option of remanding for additional findings. State v. Alvarez, supra; State v. Head, 136 Wn.2d

619, 964 P.2d 1187 (1998). The other option is reversal and dismissal:

where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same. For example, a defendant might be able to show prejudice resulting from the lack of written findings and conclusions where there is strong indication that findings ultimately entered have been "tailored" to meet issues raised on appeal.

State v. Head, 136 Wn.2d at 624-25.

In this case, because of Kuhyar's argument in the next section that there is insufficient evidence to sustain a conviction, it would be unfair to remand the case back for additional findings. The State had the burden of proof. The State also, as the prevailing party, had the burden of drafting adequate findings. Here, the failure of the entry of adequate findings on each element of the offense should be held against the State, rather than Kuhyar Sajjadi. Reversal and dismissal should result. Alternatively, the Court should remand for additional findings.

b. There Is Insufficient Evidence of Recklessness

The trial court's lack of any factual findings on a key element of the case reflects the complete lack of any evidence that the State met its burden of proof on that element. While perhaps young Kuhyar should not have hit Jason, there was a complete lack of evidence that Kuhyar ever

knew of and disregarded a risk that hitting Jason would cause such damage to his nose. Because of this lack of evidence, reversal and dismissal is appropriate.

The relevant test for sufficiency of evidence under U.S. Const. amend. 14 is "whether, 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." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (Wash. Sup. Ct.'s emphasis), quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979).

As the Ninth Circuit once held:

When there is an innocent explanation for a defendant's conduct as well as one that suggests that the defendant was engaged in wrongdoing, the government must produce evidence that would allow a rational jury to conclude beyond a reasonable doubt that the latter explanation is the correct one.

United States v. Vasquez-Chan, 978 F.2d 546, 549 (9th Cir. 1992).

Accord United States v. Esquivel-Ortega, 484 F.3d 1221 (9th Cir. 2007).

In this case, the evidence was that a fourteen year old child hit another, larger, child in the cheek a few times during a middle school confrontation. There was no indication that Kuhyar had any prior experience with the sensitivities of noses or that he knew of and

disregarded the risks that significant injuries could be inflicted by blows to the cheek. Perhaps it would be different if Kuhyar had intentionally hit Jason on the nose, with evidence that he knew of the special sensitivities of noses (especially those of adolescents), but there was no such testimony. Given this record, it cannot be said that Kuhyar acted recklessly.

There is an alternative innocent explanation – that breaking the nose was an accident and was not the result of recklessness. There is insufficient evidence to sustain a conviction under the Due Process Clause of U.S. Const. amend. 14. The conviction for assault in the second degree should be reversed and the case dismissed.¹¹

2. There Was Insufficient Evidence to Support a Finding that Kuhyar Sajjadi Inflicted Substantial Bodily Harm

While causing a fracture of a nose bone would qualify as “substantial bodily harm” under RCW 9A.04.110(4)(b), the trial court did not base a conviction on that prong of the statute, ruling that it would not consider any of the evidence contained in Exhibit 4, the doctor’s records. RP 156-57. Rather, the trial court’s findings regarding “substantial bodily

¹¹ Conclusion of Law II was accordingly entered in error.

harm” make no mention of a broken nose, stating only:

The respondent thereby inflicted substantial bodily harm in that he caused bleeding from Halter’s nose, caused, [sic] swelling of Halter’s face and nose, caused impairment of Halter’s breathing, and caused Halter considerable pain that lasted a substantial period of time. Halter missed some school because of his injuries.

FF. V, CP 7-10.

This finding is erroneous as is the parallel conclusion in Conclusion of Law II.

“Factual findings are erroneous where not supported by substantial evidence in the record. [Citation omitted] Substantial evidence exists where there is a ‘sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.’” State v. Finch, 137 Wn.2d 792, 856, 975 P.2d 967 (1999), *quoting* State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

First, there was no evidence offered that Kuhyar did anything to cause an “impairment to Halter’s breathing.” The impairment to his breathing was based upon a pre-existing adenoid condition, which Jason’s own testimony highlighted. *See* RP 73.¹² This portion of FF V is not

¹² The testimony was as follows:

(continued...)

supported by the evidence.

As for causing bleeding from the nose and considerable pain that lasted a substantial period of time, none of those problems constitute “substantial bodily harm” under RCW 9A.04.110, which requires temporary but substantial disfigurement; temporary but substantial loss or impairment of function of a bodily part or organ; or a fracture of any bodily part. Bleeding and pain, without any further testimony, do not qualify under the statute (although they might qualify as “bodily harm” “accompanied by substantial pain that extends for a period sufficient to cause considerable suffering” under the third degree assault statute. RCW 9A.36.031(1)(f).).

The trial court also found that Jason “missed some school because

¹²(...continued)

Q [By Ms. Sholin] Did she do some additional surgery at the same time?

A [By Jason Halter] Yes.

Q And what was that for?

A She took out the things that were blocking my air passage. I don't remember what they are called.

Q Was that something that related to this injury with the broken nose?

A No.

RP 73.

of his injuries.” FF V. This finding is erroneous and not based on the evidence. Jason specifically testified that he did not miss school because of the injuries, although he missed one day of school after the surgery (which he apparently would have had to undergo in any case because of the adenoids.). See RP 73 (Q: “Did you miss any days of school either after you were hit in the face or as recovery from the surgery?” A: “I think – I think I missed one day. I didn’t go right after the surgery, but then I just started going again.” Q: “Okay. Did you miss any days of school after being hit in the face?” A: “No.”). This aspect of FF V is not supported by the evidence.

The only aspect of Finding of Fact V that might support a conclusion of substantial bodily harm is the finding that Kuhyar’s blows caused “swelling of Halter’s face and nose.” The question, though, is whether swelling constituted a “temporary but substantial disfigurement” under RCW 9A.04.110(f)(b).

Under some circumstances, the presence of bruise marks can constitute temporary but substantial disfigurement. See State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993) (bruise marks on three year old child caused by shoe with rigid sole). However, bruising and swelling are

not always indicative of substantial disfigurement and do not always constitute assault in the second degree. See State v. Dolan, 118 Wn. App. 323, 330-32, 73 P.3d 1011 (2003) (improper to give instruction to the jury that bruising and swelling can constitute substantial bodily harm). Otherwise, almost any simple assault that resulted in a swelling or a bruise would be automatically ratcheted up to a Class B felony, thereby eliminating any reasoned distinction between assault in the fourth degree under RCW 9A.36.041, assault in the third degree under RCW 9A.36.031 and assault in the second degree under RCW 9A.36.021.

Ex. 4 contains photos of Jason, but they fail to show much of anything that would constitute “*substantial* disfigurement,” as opposed to just some lesser degree of puffiness.¹³ Notably, the trial court made no factual finding that the swelling of Jason’s face and nose did in fact constitute “substantial disfigurement” under RCW 9A.04.110(4)(b).

In the absence of that finding, and in the absence of any evidence that there really was “*substantial* disfigurement,” there is insufficient evidence to sustain a conviction under the Due Process Clause of U.S. Const. amend. 14 and Jackson v. Virginia, *supra*. Finding of Fact V and

¹³ It is not clear from the judge’s oral ruling whether his belated exclusion of Ex. 4 included the exclusion of the photographs. RP 156-57.

Conclusion of Law II were erroneously entered. The conviction should be reversed and the charge dismissed with prejudice.

3. **The State Failed to Prove that the Alleged Assault Occurred Within Pierce County or the State of Washington**

The trial court found that “all relevant events occurred in Pierce County,” FF III, CP 8, and that therefore the court had “jurisdiction of the parties and subject matter.” CL I, CP 9. These findings and conclusions are not supported by the record. Because there was no evidence that the alleged assault even occurred within the State of Washington, the conviction should be reversed and the charge dismissed.

"To convict any defendant in a Washington court of a crime, the State must prove it has subject matter jurisdiction over that crime. RCW 9A.04.030." State v. Brown, 29 Wn. App. 11, 13, 627 P.2d 132 (1981).¹⁴

¹⁴ RCW 9A.04.030 provides:

The following persons are liable to punishment:

(1) A person who commits in the state any crime, in whole or in part.

(2) A person who commits out of the state any act which, if committed within it, would be theft and is afterward found in the state with any of the stolen property.

(3) A person who being out of the state, counsels, causes, procures, aids, or abets another to commit a crime in this state.

(continued...)

See also State v. Kees, 48 Wn. App. 76, 80, 737 P.2d 1038 (1987) (“At common law, state jurisdiction over crimes is limited by the requirements that the prohibited conduct or result take place in the state and that each crime have only one situs.”).

In State v. Ford, 33 Wn. App. 788, 658 P.2d 36 (1983), the Court of Appeals reversed a malicious mischief conviction based on the failure of the State to prove jurisdiction. Mr. Ford was convicted for kicking a hole in the wall of his bedroom at the Raging River Ranch, a group home for boys. No one mentioned the location of the ranch, although there was evidence that a present resident of Issaquah was a former resident of the home, and that an employee of the ranch lived in Edmonds. However,

¹⁴(...continued)

(4) A person who, being out of the state, abducts or kidnaps by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends, or conveys such person into this state.

(5) A person who commits an act without the state which affects persons or property within the state, which, if committed within the state, would be a crime.

(6) A person who, being out of the state, makes a statement, declaration, verification, or certificate under RCW 9A.72.085 which, if made within the state, would be perjury.

(7) A person who commits an act onboard a conveyance within the state of Washington, including the airspace over the state of Washington, that subsequently lands, docks, or stops within the state which, if committed within the state, would be a crime.

there was no evidence that the incident occurred within the State of Washington:

Jurisdiction has not been shown. There is nothing in the record from which to infer jurisdiction and no basis on which to take judicial notice of the location of the Raging River Ranch. We therefore reverse and dismiss.

33 Wn. App. at 791.

Similarly, in State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), the Supreme Court reversed a conviction where the State had assumed the burden of proving that the charged crime of insurance fraud occurred in Snohomish County. The only two references in the record to Snohomish County “were made by the Snohomish County Sheriff, who testified that he received a call reporting the car stolen "off Logan Road" without specification as to the Logan Road location, and by the sheriff's deputy who testified he located the stripped car hulk on a rural road in Snohomish County. That was the extent of the evidence regarding Snohomish County.” 135 Wn.2d at 100 The Court concluded that this evidence was insufficient to prove that the crime occurred in Snohomish County and reversed the conviction for insufficiency of the evidence. 135 Wn.2d at 106.

In the instant case, there was no testimony as the location of the

Lakeridge Middle School. While a Pierce County Sheriff's deputy went to the school and took statements, and the record contains evidence that both Kuhyar Sajjadi and Jason Halter resided in Bonney Lake, there was no substantive evidence, admitted at trial, as to the location of the school.¹⁵

This case is no different than State v. Ford, *supra*, and the Raging River Ranch. Accordingly, the trial judge erred when finding in FF III that "all relevant events occurred in Pierce County" and when concluding that he had "jurisdiction of the parties and subject matter. CL I. CP 7-10. Absent these erroneous findings and conclusions, and absent any evidence in the record that the Lakeridge Middle School was in Pierce County or the State of Washington, the conviction should be reversed and the case dismissed. There was insufficient evidence of jurisdiction and thus insufficient evidence to sustain a conviction under the Due Process Clause of U.S. Const. amend. 14 and Jackson v. Virginia, *supra*.

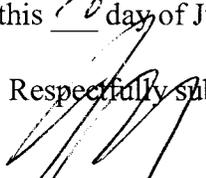
¹⁵ Pretrial Ex. 2, the advisement of rights form, does state that the "location" was "5909 Myers Rd. E." without giving a city, county or state. Even if this address is any type of evidence that the assault took place in Washington State, the exhibit was not admitted at trial and was only used in the pretrial CrR 3.5 hearing. RP 17. The exhibit was not re-marked for trial purposes, as was Pretrial Ex. 1, Kuhyar's statement, which was then admitted at trial as Ex. 2. RP 26.

E. CONCLUSION

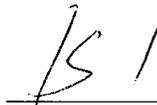
For the foregoing reasons, the Court should reverse the conviction and order dismissal with prejudice or, in the alternative, remand for additional findings.

Dated this 28 day of June 2007

Respectfully submitted,

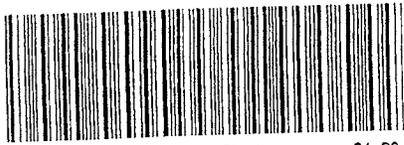


NEIL M. FOX, WSBA NO. 15277

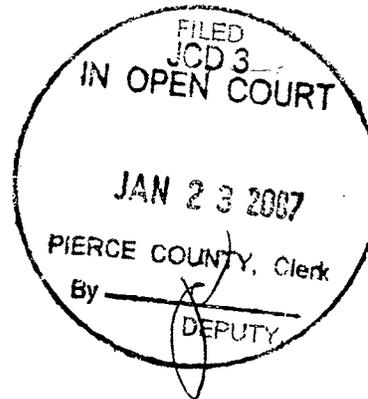


ANN M. CAREY, WSBA NO. 17101
Attorneys for Appellant

APPENDIX A



06-8-00789-9 26843381 FNFL 01-23-07



IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
JUVENILE COURT

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-8-00789-9

vs.

KUHYAR SAJJADI

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

D.O.B.: 10/07/91

JUVIS#: 890220-06R001961

Respondent.

THIS MATTER having come on before the Honorable James Orlando, Judge of the above entitled court, for trial on December 13, 2006, upon an information charging the respondent with ASSAULT IN THE SECOND DEGREE; the respondent having been present and represented by KENT W UNDERWOOD and the State being represented by Deputy Prosecuting Attorney SUE L. SHOLIN, and the court having observed the demeanor and heard the testimony of the witnesses, having considered the admitted exhibits, and having considered the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

That KUHYAR SAJJADI, age 15, is a juvenile, being born on 10/07/91.

Office of the Prosecuting Attorney
Juvenile Division
5501 Sixth Avenue
Tacoma, Washington 98406-2697
Telephone: (253) 798-3400

II.

That on April 25, 2006, an information was filed charging the respondent with
ASSAULT IN THE SECOND DEGREE.

III.

That all relevant events occurred in Pierce County.

IV.

On or about December 15, 2006, the respondent did intentionally assault Jason Halter
by hitting him repeatedly in the head.

V.

The respondent thereby inflicted substantial bodily harm in that he caused bleeding
from Halter's nose, caused, swelling of Halter's face and nose, caused impairment of
Halter's breathing, and caused Halter considerable pain that lasted a substantial period of
time. Halter missed some school because of his injuries.

VI.

The respondent initiated the physical conflict by pushing Halter over as Halter sat in
a chair in class.

VII.

There is no credible evidence that Halter initiated the physical confrontation and even
the respondent did not testify that he feared, either subjectively or objectively, any physical
attack or harm from Halter.

VIII.

1
3 The respondent's actions in assaulting Halter far exceeded any threat he may have
4 perceived from Halter and the assault was an unreasonable response to any remarks Halter
5 may have made.

6 From the foregoing Findings of Fact, the Court makes the following Conclusions of
7 Law.

8 CONCLUSIONS OF LAW

9 I.

10 That the Court has jurisdiction of the parties and subject matter.

11 II.

12 That KUHYAR SAJJADI is guilty beyond a reasonable doubt of the crime of
13 ASSAULT IN THE SECOND DEGREE in that, on 12/15/05 he did intentionally assault
14 Jason Halter and thereby recklessly inflicted substantial bodily harm.

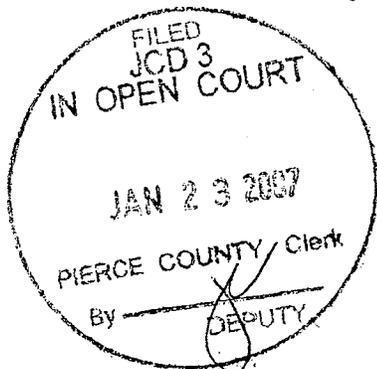
15 III.

16 That the State has disproved self-defense beyond a reasonable doubt.

17 IV.

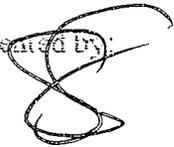
18 That the respondent was the first aggressor and he thereafter failed to withdraw from
19 the conflict sufficiently to reverse the roles of himself and Halter.
20
21
22

23 DONE IN OPEN COURT this 27 day of Jan, 2007.



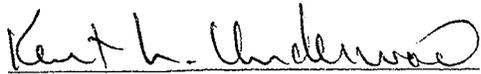
JUDGE [Signature] JAMES R. ORLANDO

Presented by:



Deputy Prosecuting Attorney
WSB# 21333

Approved as to Form only;



Attorney for Respondent
WSB# 27250

sls

STATUTORY APPENDIX

JuCR 7.11 provides:

(a) Burden of Proof. The court shall hold an adjudicatory hearing on the allegations in the information. The prosecution must prove the allegations in the information beyond a reasonable doubt.

(b) Evidence. The Rules of Evidence shall apply to the hearing, except to the extent modified by RCW 13.40.140(7) and (8). All parties to the hearing shall have the rights enumerated in RCW 13.40.140(7).

(c) Decision on the Record. The juvenile shall be found guilty or not guilty. The court shall state its findings of fact and enter its decision on the record. The findings shall include the evidence relied upon by the court in reaching its decision.

(d) Written Findings and Conclusions on Appeal. The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

RCW 9A.04.030 provides:

(1) A person who commits in the state any crime, in whole or in part.

(2) A person who commits out of the state any act which, if committed within it, would be theft and is

afterward found in the state with any of the stolen property.

(3) A person who being out of the state, counsels, causes, procures, aids, or abets another to commit a crime in this state.

(4) A person who, being out of the state, abducts or kidnaps by force or fraud, any person, contrary to the laws of the place where the act is committed, and brings, sends, or conveys such person into this state.

(5) A person who commits an act without the state which affects persons or property within the state, which, if committed within the state, would be a crime.

(6) A person who, being out of the state, makes a statement, declaration, verification, or certificate under RCW 9A.72.085 which, if made within the state, would be perjury.

(7) A person who commits an act onboard a conveyance within the state of Washington, including the airspace over the state of Washington, that subsequently lands, docks, or stops within the state which, if committed within the state, would be a crime.

RCW 9A.04.110(4) provides:

(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;

(b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;

©) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.

RCW 9A.08.010 provides:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.

(b) KNOWLEDGE. A person knows or acts knowingly or with knowledge when:

(I) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

©) RECKLESSNESS. A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation.

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he fails to be aware of a substantial risk that a wrongful act may occur and his failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable man would exercise in the same situation.

(2) Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

(3) Culpability as Determinant of Grade of Offense. When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly, or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

(4) Requirement of Wilfulness Satisfied by Acting Knowingly. A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.

RCW 9A.36.021 provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

©) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another; or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.

(2) (a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

RCW 9A.36.031 provides:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

(a) With intent to prevent or resist the execution of any lawful process or mandate of any court officer or the lawful apprehension or detention of himself or another person, assaults another; or

(b) Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, 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; or

©) Assaults a school bus driver, the immediate supervisor of a driver, a mechanic, or a security officer, employed by a school district transportation service or a private company under contract for transportation services with a school district, while the person is performing his or her official duties at the time of the assault; or

(d) With criminal negligence, causes bodily harm to another person by means of a weapon or other instrument or thing likely to produce bodily harm; or

(e) Assaults a fire fighter or other employee of a fire department, county fire marshal's office, county fire prevention bureau, or fire protection district who was performing his or her official duties at the time of the assault; or

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering; or

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault; or

(h) Assaults a peace officer with a projectile stun gun; or

(I) Assaults a nurse, physician, or health care provider who was performing his or her nursing or health care duties at the time of the assault. For purposes of this subsection: "Nurse" means a person licensed under chapter 18.79 RCW; "physician" means a person licensed under chapter 18.57 or 18.71 RCW; and "health care provider" means a person certified under chapter 18.71 or 18.73 RCW who performs emergency medical services or a person regulated under Title 18 RCW and employed by, or

contracting with, a hospital licensed under chapter 70.41 RCW.

(2) Assault in the third degree is a class C felony.

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.

U.S. Const. amend. 14, § 1 provides in part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KUHYAR MATTHEW SAJJADI,

Appellant.

COA NO. 35899-9-II

CERTIFICATION OF SERVICE

I, Lauren Jones, certify and declare that on June 28, 2007, I mailed copies of the attached
Opening Brief of Appellant, with proper first-class postage attached, to:

Sue Sholin
Pierce County Prosecuting Attorney's Office
Juvenile Division
5501 6th Ave.
Tacoma WA 98406

Anne Carey
Carey & Lillevik
2003 Western Ave. Suite 203
Seattle WA 98121

Kuhyar Sajjadi
7509 W. Tapps Highway East
Bonney Lake WA 98391

FILED
COURT OF APPEALS
DIVISION II
07 JUN 29 PM 1:34
STATE OF WASHINGTON
BY 

I certify and declare under penalty of perjury under the laws of the State of Washington
that the foregoing is true and correct.

6.28.07 Seattle WA
DATE AND PLACE


LAUREN JONES