

NO. 36734-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

RENEE A. FIELD,

Appellant

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable Toni A. Sheldon, Judge
Cause No. 07-1-00129-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence.
02. The trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence to support Field's conviction for assault in the third degree?
02. Whether, as a matter of law, the trial court erred in imposing a sentence that exceeded the statutory maximum for the crime of conviction? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Renee A. Field (Field) was charged by amended information filed in Mason County Superior Court on July 17, 2007, with assault in the third degree (domestic violence), contrary to RCWs 9A.08.020, 9A.36.031(1)(d) and 10.99.0020. [62-63].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or 3.6 hearing. [RP 3]. Trial to a jury commenced on July 12, 2007, the Honorable Toni A. Sheldon presiding.

The jury returned a verdict of guilty of assault in the third degree without domestic violence, Field was sentenced within her standard range and timely notice of this appeal followed. [CP 4-20, 29, 31].

02. Substantive Facts

On November 12, 2006, Dorsey Moody was attempting to discipline his 15-year-old daughter, A.M., in her bedroom by paddling her rear with a wooden sledgehammer/tool handle when he yelled for Field, his live-in girlfriend, who was in the kitchen making soup, to assist him: "I said would you get back here and help me do this." [RP 84-89, 118]. "I'm holding (my daughter) down and her hands are busy trying to ... block me from paddling her on the rear." [RP 89]. Field "held her hands out of the way to assist me and ... I paddled her on the rear [RP 91](,)" swatting her five times. [RP 90]. "All (Field) did was hold her hands out of the way so that I would not hit her hands." [RP 91].

I did not want to hurt her. I only wanted to express that, you know, dad was not happy with you being gone four days.

[RP 91].

I was on my knees on the floor, and I was trying to strike her, you know, not to hurt her but to paddle her, as I had been when I was in junior high, and high school, and school for misbehavior.

[RP 97].

A.M. testified that Field lifted her by her hair onto the bed and then held her hands above her head while her dad spanked her with the wooden sledgehammer/tool handle. [RP 130, 133, 139]. After the incident, A.M. left the house and called the police. [RP 134].

NOTE: The tape recording of the proceedings malfunctioned during the testimony of Field. [RP 232]. As a result, the parties recreated the testimony, agreeing that the recreation accurately represented what had not been recorded, portions of which follow. [RP 251].

Field testified that prior to entering A.M.'s bedroom, she had heard Moody and A.M. arguing but nothing indicating assaultive behavior. [RP 249]. It was her impression that Moody was more concerned than angry while disciplining his daughter. [RP 250]. She acknowledged that she had grabbed A.M.'s hands and held them above her head while Moody spanked A.M. twice on her rear, but denied she had intentionally pulled A.M.'s hair, noting that it could have happened inadvertently or accidentally. [RP 236-239, 248].

D. ARGUMENT

01. THERE IS INSUFFICIENT EVIDENCE TO UPHOLD FIELD'S CRIMINAL CONVICTION FOR ASSAULT IN THE THIRD DEGREE.

The test for determining the sufficiency of the

evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The elements of the crime are: (1) On or about November 12, 2006, (2) in the State of Washington, (3) Field or acting as an accomplice, (4) caused physical harm to another person, (5) acting with criminal negligence, (6) and that the physical injury was caused by a weapon or other instrument or thing likely to produce bodily injury. [CP 50]. As instructed in this case,

A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and the failure to be aware of such substantial risk constitutes a gross deviation

from the standard of care that a reasonable person would exercise in the same situation.

[CP 44]. evince

The circumstances of this case do not evince proof beyond a reasonable doubt that Field, acting as a principal or accomplice, criminally assaulted A.M. Insufficient evidence was presented that either Moody or Field failed to be aware of a substantial risk in a manner constituting a gross deviation from the standard care that a reasonable person would exercise in the same situation. As Moody explained, he was trying not to hurt A.M. by paddling her in the same fashion he had been punished for disobedience in his youth. When he realized he couldn't do this without hurting A.M.'s hands, he yelled for Field to come hold "her hands out of the way so I would not hit her hands." [RP 91].

Nor was there sufficient evidence that Field was an accomplice, i.e., that she acted with knowledge that here actions would promote or facilitate the commission of the crime of assault of A.M. While she did hold A.M.'s hands over her head, this was not done with knowledge that she was assisting in the commission of a crime, but rather to protect A.M.'s hands from being hit while Moody was paddling her. Prior to entering the room, Field had no indication of assaultive behavior on

Moody's part, which was consistent with her observation that he seemed more concerned than angry while disciplining A.M.

The critical issue is not so much what happened, but rather whether Field acted with the required men's rea, which can only be resolved by reviewing her actions within the context of the relevant circumstances and events. Again, there was a paucity of evidence that either she or Moody failed "to be aware of a substantial risk that a wrongful act may occur" or that such failure constituted "a gross deviation from the standard of care that a reasonable person would exercise in the same situation.

02. AS A MATTER OF LAW, THE TRIAL COURT ERRED IN IMPOSING A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM FOR THE CRIME OF CONVICTION.

The Washington Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and "that a defendant cannot agree to punishment in excess of that which the Legislature has established." In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error "involves an agreement to facts

(e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

Since there was “simply no question that Goodwin’s offender score was miscalculated, and his sentence is as a matter of law in excess of what is statutorily permitted for his crimes given a correct offender score,” the court held that Goodwin “cannot agree to a sentence in excess to that statutorily authorized.” In re Goodwin, 146 Wn.2d at 876.

A sentencing court “may not impose a sentence providing for a term of confinement or community supervision, community placement, or custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9:94A.505(5); State v. Hudnall, 116 Wn. App. 190, 195, 64 P.3d 687 (2003); State v. Sloan, 121 Wn. App. 220, 221, 87 P.3d 1214 (2004)(the total punishment, including imprisonment and community custody, may not exceed the statutory maximum). Nothing in the statute grants the sentencing court the authority to speculate that a defendant will earn early release and to impose a sentence beyond the statutory maximum based on that speculation. If the Legislature had so intended, it would have made that provision.

In addition to sentencing Field to 53 months for assault in the third degree, the trial court imposed 9 to 18 months' community custody. [CP 9]. As this sentence exceeds the statutory maximum sentence of five years imprisonment, or a \$10,000 fine, or both, See RCW 9A.36.031; RCW 9A.20.021(1)(c), this court should remand for resentencing within the five-year statutory maximum for assault in the third degree, a class C felony.

For felonies committed on or after July 1, 1984, adult defendants are subject to the provisions of the Sentencing Reform Act of 1981, as amended (SRA). Under the enabling legislation of this sentencing system, RCW 9.94A et seq., the jurisdiction of sentencing courts is limited to the imposition of determinate sentences, i.e., "a sentence that states with exactitude the number of actual years, months, or days of total confinement, of partial confinement, of community supervision, the number of actual hours or days of community restitution work, or dollars or terms of a legal financial obligation." RCW 9.94A.030(18).

Division I of this court, in State v. Sloan, supra, while recognizing that total punishment, including imprisonment and community custody, may not exceed the statutory maximum for a particular offense, Sloan 121 Wn. App. at 221, created a workaround, holding that though Sloan had been sentenced to the statutory maximum of 60 months followed by 36 to

48 months community custody, everything was okay since the judgment and sentence included the qualification that Sloan was “not to be incarcerated for any violations as upon her release she will have served the maximum time allowed.” Sloan, 121 Wn. App. at 222.

This is not the correct remedy, given that the solution proffered in Sloan results in an indeterminate sentence, a sentence failing to state with exactitude the term of confinement or restrictions, which is, most critically, incompatible with the aforementioned limiting jurisdiction of a sentencing court operating under the SRA to impose determinate sentences, and which, in addition, may operate to deny a defendant of his or her protected liberty interest in his or her good time credits, since any early release time earned by a defendant would merely be applied to extend the duration of his or her community custody by the same period. See In re Personal Restraint Johnson, 109 Wn.2d 493, 496-97, 745 P.2d 864 (1987). The second point is linked with the first, and the court lacks jurisdiction in each instance, either because the court is without jurisdiction to impose an indeterminate sentence, the first point, or because the court is without authority to restrict a defendant’s earned early release in this manner, since only the correctional agency having jurisdiction over a defendant has the authority to determine earned early release time, the

second point. In re Personal Restraint of West, 154 Wn.2d 204, 212, 110 P.3d 1122 (2005).

The remedy is simple. As the felony for which Field was sentenced carries a five year maximum sentence, with a community custody range of 9 to 18 months, for which she was sentenced to 53 months plus the community custody range of 9 to 18 months, an indeterminate sentence exceeding the statutory maximum, the matter should be remanded for a determinate sentence with directions that the period of community custody shall not exceed 7 months (53 + 7 = 60).

E. CONCLUSION

Based on the above, Field respectfully requests this court to reverse and dismiss her conviction for assault in the third degree and to remand for resentencing consistent with the arguments presented herein.

DATED this 25th day of March 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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