

FILED

APR 17 2008

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 36803-0-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESSIE HOVIG,

Appellant.

FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2008 APR 14 PM 4:54

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon L. Godfrey

FILED
COURT OF APPEALS
DIVISION II
03 APR 21 AM 9:19
STATE OF WASHINGTON
DEPUTY

APPELLANT'S OPENING BRIEF

Vanessa M. Lee
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
(206) 587-2711

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously failed to file written findings of fact indicating the factual basis for each necessary element of the crime, as required under CrR 6.1.

2. The State presented insufficient evidence to convict Jessie Hovig of assault of a child in the second degree.

3. The exceptional sentence imposed by the trial court was clearly excessive.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. CrR 6.1 requires the trial court enter written findings of fact and conclusions of law following a bench trial. The findings must specifically state that each element has been met, and indicate the factual basis for each element. Here, the court failed to indicate the factual basis for the recklessness element of second degree assault of a child. Does the failure to enter complete findings of fact require remand? (Assignment of Error 1)

2. To convict Mr. Hovig of assault of a child in the second degree, the State was required to prove that Mr. Hovig recklessly inflicted substantial bodily harm on a child under thirteen years of age. The State presented no evidence supporting a finding of

recklessness. Did the trial court err in finding that Mr. Hovig acted recklessly? (Assignment of Error 2)

3. Where the injury was minimal was an exceptional sentence of 60 months, based solely on the aggravating factor of the victim's particular vulnerability, clearly excessive? (Assignment of Error 3)

C. STATEMENT OF THE CASE

On April 23, 2007, Jessie Hovig was alone with his four month old son, M.H., in the hotel room where they lived with M.H.'s mother and grandmother. RP 18. Mr. Hovig was playing a game with M.H., lying on his back on the bed, holding the baby above him, growling like a dog and pretending to bite his face. RP 45. Mr. Hovig accidentally bit M.H.'s right cheek hard enough to leave a red mark. RP 45, 50. Mr. Hovig put makeup on M.H.'s face to cover the mark, but then wiped it off. RP 46, 51. He then called M.H.'s mother and told her he had left a mark on M.H.'s face that "looked like a hickey." RP 46, 49. After about 30 minutes he noticed that tooth marks and a small bruise had appeared on M.H.'s cheek, and the marks continued to look worse after that. RP 51. When Ms. Forbes and her sister returned to the hotel room, he

showed them the mark on M.H.'s right cheek. RP 46, 49. He had not noticed a mark on the left cheek. RP 49.

Asked about scratch marks on M.H.'s back and stomach, he believed he had accidentally scratched M.H. while catching him when he almost fell off the bed during a diaper change. RP 46. Mr. Hovig testified he never intended to hurt his son and felt "ashamed." RP 47, 51.

Mr. Hovig's statements at trial about the source of the bite and scratch marks were consistent with his statements to Aberdeen Police Department Detective George Kelley on April 25, 2007. RP 11, 13-14.

M.H.'s mother, Hope Forbes, testified that she was shopping with her mother and sister when Mr. Hovig called her and said he had left a "hickey" on M.H.'s face but that M.H. was not crying, and that he had tried covering it up with Ms. Forbes' makeup "so [she] wouldn't yell at him." RP 20. When Ms. Forbes returned to the hotel, M.H. was asleep. RP 21. Ms. Forbes put him in the car, wiped off the makeup, and saw the bite mark. RP 22. Ms. Forbes' sister, April Destiny Forbes-Demaske, testified that she saw teeth marks and a pinch mark on the right cheek and a pinch mark on the left, but that Mr. Hovig only showed her the left cheek, saying "it's

nothing big.” RP 37. She took a picture of the right cheek and called the police. RP 39.

Dr. William Steven Hutton, who examined M.H., testified the right cheek presented bruises in the pattern of adult teeth, but the skin was not broken. RP 53-54. The bruise on the left cheek was not in any pattern. RP 55.

After a bench trial before the Honorable Gordon L. Godfrey, Mr. Hovig was convicted of assault of a child in the second degree, with a special finding of a particularly vulnerable victim. CP 24. Judge Godfrey imposed an exceptional sentence of 60 months and 18 to 36 months community custody. CP 11-18.

D. ARGUMENT

1. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED UNDER CrR 6.1.

The trial court rendered its decision and entered its oral ruling finding Mr. Hovig guilty on September 12, 2007. RP 63. Mr. Hovig was sentenced and the Judgment and Sentence was entered on September 24, 2007. RP 65, CP 11-18. Written findings of fact and conclusions of law as required by CrR 6.1 were entered on October 22, 2007, but failed to state every essential element of the crime of assault of a child in the second degree.

CrR 6.1(d) requires:

In a case tried without a jury, the court *shall* enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated.

(Emphasis added.) The term “shall” indicates a *mandatory* duty on the trial court. State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (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); citing State v. Alvarez, 128 Wn.2d 1, 19, 904 P.2d 754 (1995).

Here, the trial court entered a conclusion of law stating “the defendant recklessly inflicted substantial bodily harm on [M.H.]” but entered no finding indicating the factual basis for that conclusion.

In a similar juvenile case, the trial court entered findings of fact and conclusions of law, but failed to make findings as to whether the juvenile respondent had the criminal intent for assault and robbery. State v. Jones, 34 Wn. App. 848, 850, 664 P.2d 12 (1983). Without such findings, the Court of Appeals could not consider the merits of Jones’ appeal, and therefore vacated and remanded.¹ Id. at 851.

¹ In that case, the Court of Appeals allowed the trial court to receive additional evidence on remand. Subsequent caselaw, however, has established that no additional evidence may be taken on remand, as the findings and

The error is not harmless because, as discussed in the next section, the State failed to prove beyond a reasonable doubt that Mr. Hovig acted recklessly. Therefore this Court must vacate and remand Mr. Hovig's matter for the entry of the CrR 6.1 findings of fact as to recklessness, or reverse and dismiss Mr. Hovig's conviction.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. HOVIG'S CONVICTION FOR SECOND DEGREE ASSAULT OF A CHILD.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d

conclusions are based solely on the evidence initially taken. Head, 136 Wn.2d at 625.

560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).²

b. The evidence was insufficient to prove recklessness beyond a reasonable doubt. To convict Mr. Hovig of second degree assault of a child, the State was required to prove that he intentionally assaulted a child under the age of thirteen and thereby recklessly inflicted substantial bodily harm. RCW 9A.36.130(1)(a); RCW 9A.36.021(1)(a). There is no dispute that M.H. was under thirteen years old and that Mr. Hovig inflicted substantial bodily harm on him. Mr. Hovig disputes the trial court's finding that he did so recklessly.

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.

RCW 9A.08.010(c).

Mr. Hovig testified that he bit M.H. while playing with him, but did not try to hurt him. RP 47. Asked what he was thinking, he

² When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Id.

replied, "Obviously I wasn't really thinking nothing. I didn't think anything would happen." Id. Mr. Hovig's testimony as to the cause of the injury and his state of mind at the time is completely uncontroverted. There were no other witnesses to the incident and no evidence, other than Mr. Hovig's own statements, which might provide insight into his state of mind. The prosecutor argued that the teeth marks themselves proved the recklessness of the act, but failed to explain how a visual inspection of the injury or the pediatrician's testimony could possibly indicate Mr. Hovig's state of mind. RP 60.

In any event, it is unclear whether the court agreed with the prosecutor, since Judge Godfrey did not address recklessness at all in his oral ruling. Apparently the court convicted Mr. Hovig of second degree rather than third degree assault solely because of the extent of the injury.

There is no question in my mind that this caused a substantial bodily harm as defined by the cases cited by the prosecuting attorney. Therefore, it qualifies as substantial bodily harm and so, therefore, qualifies as assault in the second degree. If I am incorrect in that, then it will obviously go down to assault in the third degree if a higher court felt I was wrong[.]

RP 63.

This ruling suggests that the court believed that the State could meet its burden by proving either substantial bodily harm or recklessness. But the statute is clear:

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[.]

RCW 9A.36.021(1). Proof of substantial bodily harm alone is insufficient; the State must also prove recklessness, which it failed to do. Although Mr. Hovig's behavior may have been inappropriate, it was not reckless. The State presented no evidence that Mr. Hovig knew of a substantial risk that he would actually hurt his son through his game, much less that he disregarded that risk. The trial court's finding of recklessness was error and the conviction must be reversed.

c. The evidence was insufficient to prove substantial bodily harm beyond a reasonable doubt. RCW 9A.36.021 requires proof of substantial bodily harm for a conviction of assault in the second degree. Before 1986, the statute instead used the standard of "great bodily harm" and "grievous bodily harm," which meant "any serious hurt or injury or a hurt or injury that is seriously painful or

hard to bear." State v. Huddleston, 80 Wn. App. 916, 922, 912

P.2d 1068 (1996). "Substantial bodily harm" is now defined 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.

RCW 9A.04.110(4)(b).

Noticeably missing from the new definition of injury is the mention of mere pain. In fact, the historical notes indicate that the Legislature did not believe substantial pain, standing alone, was enough to convict a person for assault in the second degree.³

Accordingly, to satisfy the current statutory requirement, M.H.'s injuries must consist of substantial disfigurements, loss or impairment of the function of a bodily part or organ, or a substantial fracture of a bodily part. RCW 9A.04.110(4)(b). However, he sustained only bruises.

Under the former statute, "grievous bodily harm" included:

a hurt or injury calculated to interfere with the health or comfort of the person injured ... By 'grievous' is

³ The historical and statutory notes concerning the 1988 amendments are found at RCW 9A.04.110(4)(b) and state:

Laws 1988, ch. 158, sec 1, rewrote the definition of "substantial bodily harm"; *deleted the definition of "substantial pain"*; and redesignated the subsequent definitions accordingly.

meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature.

State v. Salinas, 87 Wn. 2d 112, 121, 549 P.2d 712 (1976).

But even under the former statute, the Supreme Court of Washington held that where grievous bodily harm is not sustained by substantial evidence, a conviction of an assault in the second degree must be reversed as a matter of law. State v. Miles, 77 Wn. 2d 593, 601, 464 P.2d 273 (1973). The Miles Court found evidence of a cut and swollen lip caused by a blow by the appellant with his fist or a pistol was insufficient to establish “grievous bodily harm” needed for a conviction of assault in the second degree under the former statute. Id. at 601.

The degree of injury in the instant case is even less than that found in Miles. According to M.H.’s mother, the child was sleeping soundly when she returned to the hotel, a minimum of thirty minutes after the incident. RP 20. No witness testified that M.H. appeared to be in any pain or discomfort at any time. Dr. Hutton testified that he saw a “bluish purple” bruise on M.H.’s right cheek, clearly showing adult-sized teeth marks, but the skin had not been broken or penetrated. RP 53-54. He described another bruise, with no discernable pattern, on the left cheek. RP 55.

Based on the appearance of the bruises, he expected the child would have been in pain for a period of minutes, but it was “consistent” with the injury for the child to have been asleep half an hour later. RP 55.

A single case in the Court of Appeals, Division One, has held that “the presence of bruise marks indicates temporary but substantial disfigurement.” State v. Ashcraft, 71 Wn. App. 444, 455, 859 P.2d 60 (1993). However, no other published opinion has followed Division One’s radical departure from the Miles holding. Neither this Court nor the Supreme Court has held that such minor transitory injuries can rise to the level of “substantial bodily harm.”

Although “pain” was included in the definition of the former statute’s “grievous bodily harm,” mere pain is not part of the definition of “substantial bodily injury” under the new statute. Thus, the evidence unerringly points to the fact that M.H.’s injuries were not “substantial” within the meaning of the statute and therefore do not satisfy the requirement of second degree assault.

d. Reversal is required. Since the State failed to prove that Mr. Hovig recklessly inflicted substantial bodily harm, the judgment may not stand. See e.g. State v. Spruell, 57 Wn.App. 383, 389, 788 P.2d 21 (1990) (reversing a possession conviction where the

State produced evidence of fleeting, but not actual possession).

The State presented evidence only sufficient to prove assault in the fourth degree.⁴ The conviction should therefore be reversed and the matter remanded for entry of a conviction for the lesser-included offense, fourth degree assault.

3. THE SENTENCE IMPOSED WAS CLEARLY EXCESSIVE.

Mr. Hovig had an offender score of 0. CP 12. The seriousness level of the crime was IX, resulting in a standard range of 31 to 41 months and a statutory maximum of 10 years. Id. The prosecutor, recommending 53 months, offered no particular argument for the exceptional sentence other than noting M.H.'s extreme youth and stating at sentencing that he found the offense "totally outrageous" with "no explanation... whatsoever." CP 10, RP 65-66.

The trial court accepted the State's invitation to impose an exceptional sentence, but exceeded the term recommended by the State by seven months, stating, "You are lucky that you didn't take a chunk of meat out of that kid's face... [T]o say that's infuriating is just a gross understatement." RP 67.

⁴ 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. RCW 9A.36.041.

In crafting the determinate sentencing scheme of the SRA, the Legislature's intent was to make the criminal justice system accountable to the public by "developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences." RCW 9.94A.010. The Legislature declared the purposes of the act, in part, to be to

- (1) Ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
- (3) Be commensurate with the punishment imposed on others committing similar offenses.

....

RCW 9.94A.010.

A judge abuses his discretion in imposing an exceptional sentence where the sentence imposed is "clearly excessive." Former RCW 9.94A.585(4); State v. Batista, 116 Wn.2d 777, 792, 808 P.2d 1141 (1991). Further, where some of the trial court's justifications for imposing an exceptional sentence are improper, the sentence should be reversed unless a reviewing court is confident that the principal justifications on which the trial court relied are proper and that the trial court, on remand, would impose

the same sentence absent the improper justifications. Farmer, 116 Wn.2d at 432.

In State v. Ritchie, 126 Wn.2d 388, 894 P.2d 1208 (1995), the Washington Supreme Court decided that a judge who has elected to depart from the standard range is not required to give reasons correlating the length of the exceptional to the aggravating factor providing the “substantial and compelling reasons” for the departure. 126 Wn.2d at 392. The Court noted, however, that where the sentence length has in no way been linked to the aggravating factors cited by the court, the sentence may be reviewed for an abuse of discretion if it is “clearly excessive.” Id., see also, Farmer, 116 Wn.2d at 432.

The Ritchie decision has been criticized because it precludes review of the length of an exceptional sentence by rendering judges’ sentencing decisions standardless. Ritchie, 126 Wn.2d at 405-17 (Madsen and Guy, JJ., dissenting); see also Boerner, §§9.2, 9.4 at 9-2 – 9.5; 9.10 – 9.11 (discussing the purpose of substantive appellate review of exceptional sentences and the requirement that reasons for deviating from the standard range be stated). The Ritchie holding is also arguably unconstitutional because it denies a defendant his appeal of right

by making judges' "discretionary" sentencing decisions unreviewable. Const. Art. I, § 22.

Here, Mr. Hovig, who had no offender score, disputed that he possessed the intent required for assault, but readily admitted that he had hurt his son and repeatedly expressed his remorse and shame. RP 45, 46, 47, 51, 66. The assault left only bruises, which would have faded within days. RP 54. At sentencing, defense counsel informed the trial court that the Department of Social and Human Services had initiated a dependency action and that Mr. Hovig's lengthy incarceration would, in all likelihood, result in the termination of his parental rights to M.H. RP 66. Despite all these facts, the court did not even attempt to tie the sentence length to the aggravating factor, or explain the reasons for the seven month departure from the already lengthy sentence recommended by the State. Accordingly, this Court should find the 60-month sentence was clearly excessive, contrary to the purposes of proportionality enunciated in the SRA.

E. CONCLUSION

Because the State presented insufficient evidence to convict Mr. Hovig of second degree assault of a child, he respectfully requests this Court reverse the conviction and enter a conviction for

assault in the fourth degree or dismiss the charge. In the alternative, he respectfully requests vacation and remand for entry of findings of fact as to recklessness, and remand for resentencing.

Respectfully submitted this 14th day of April, 2008.

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

VANESSA M. LEE (WSBA# 37611)
Washington Appellate Project (91052)
Attorneys for Appellant

