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COURT OF APPEALS
BENJAMIN

No. 39588-6-II

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STATE OF WASHINGTON

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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

KAREN JARVIS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-04771-9

REPLY BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

(1) The court should consider the alleged error regarding the failure to give defendant's proposed instruction number six.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Whether the court should entertain the alleged error for failing to give defendant's proposed instruction number six when justice requires that this error be reviewed and her constitutional right to a fair trial is at issue? (Assignments of Error 1).

III. STATEMENT OF THE CASE

The defense adopts by reference the statement of facts presented in its opening brief.

IV. ARGUMENT

A. THE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THIS SET OF FACTS.

As mentioned in the opening brief

"...statutes are to be construed to affect their purposes and to avoid an unlikely or strained consequence." See State v. Mierz, 127 Wn.2d 460, 479, 901 P.2d 286 (1995), (**citing** Ski Acres Inc. v. Kittitas County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992)). As such, the due process clause forbids criminal statutes that permit a standardless sweep, allowing police, judges, juries, and prosecutors to pursue their own personal predilections.

While the State suggests Ms. Jarvis did not communicate to the student to get him to move, in fact, the evidence suggests that she did. It was only as a last resort that she, without any help from her assistant, dragged the student to safety to protect him, as well as the safety of the other students should it be a real situation.

The State argues that the statute here is not unconstitutionally vague as applied to Ms. Jarvis because "...common sense dictates that a school drill is not an excuse for grabbing a student- especially a student with Down-syndrome and dragging them across the classroom by his ankle. While acceptable in true emergencies, such drastic conduct is unacceptable and completely unnecessary during a drill." Respondent's brief at 10. It is precisely this argument that the vagueness clause is designed to prevent. Specifically, it is designed to prevent prosecutors from pursuing their own personal predilections. See, City of Spokane v. Douglass 115 Wn.2d 171, 795 P.2d 693 (1990),

Ironically, the State chastises the appellant for citing to "other unrelated statutes and inapplicable case law." Respondent's brief at 11. However, as the appellant noted in her opening brief and as the State concurs, the Supreme Court has directed individuals to look at other statutes and court rulings that are available to guide one's conduct. See City of Spokane v. Douglass,

supra at 180. That is exactly what one is supposed to do in analyzing this type of situation.

Additionally, the State opines as to what Ms. Jarvis should have done under the circumstances without any training or knowledge to back its opinion. Again, it is simply its own opinion as to what should have happened as opposed to a trained expert. There is no testimony supporting the suggestion. It is not inconceivable that another prosecutor in another office would have a different opinion as to what is proper under this situation. It is this predicament that the Constitution prevents from occurring and why the statute is vague as applied in this setting.

B. THE COURT SHOULD HEAR THE ARGUMENT AS IT RELATES TO THE FAILURE TO GIVE DEFENDANT'S PROPOSED INSTRUCTION NUMBER 6.

Citing to In re Lord, 152 Wn.2d 182, 94 P.3d 952 (2004) and State v. Halstein, 122 Wn.2d 109, 118, 857 P.2d 270 (1993), the State suggests that the court should not hear this argument. However, as those cases indicate and the Washington Supreme Court has decided, this is not a hard and fast rule and there are many exceptions to it. See Peoples National Bank of Washington v. Peterson

82 Wn.2d 822, 514 P.2d 159 (1973). As stated therein, this situation typically applies where the argument has not been presented to the trial court. Obviously, this argument was presented in the context of the entire request to have this issue addressed at the trial court level.

Moreover, there are exceptions to this guideline which include matters going to jurisdiction, right to maintain the action, illegality, invasion of fundamental constitutional rights, lack of claim for relief and also exceptions based upon the fundamental justice of the case. 82 Wn.2d at 830. Here, the court's failure to give the proposed instructions impacted the Constitutional rights of the defendant, as well as the fundamental justice of the case. See State v. Buzzell, 148 Wn.2d 592, 200 P.3d. 287 (2009) (constitutional error in failing to instruct is harmless if defendant able to argue theory of the case under instructions given). The argument was presented to the trial court, and it is being briefed fully in this court as well. The State has had ample opportunity to respond and

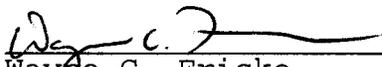
address the issue, but has chosen not to. The Court should hear this argument.

V. CONCLUSION

Based on the points and authorities herein, as well as the files and records of this case, Ms. Jarvis respectfully requests that the court reverse her conviction.

RESPECTFULLY SUBMITTED this 23 day of April, 2010.

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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

BY _____

Lee Ann Mathews, hereby certifies under DEPUTY
penalty of perjury under the laws of the State of
Washington, that on the day set out below, I
delivered true and correct copies of appellant's
reply brief of appellant to which this certificate
is attached, by United States Mail or ABC-Legal
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Signed at Tacoma, Washington this 23rd day
of April, 2010.



Lee Ann Mathews