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65972-3

NO. 65972-3-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

S.P.,

Appellant.

REC'D  
JAN 10 2011  
King County Prosecutor  
Appellate Unit

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

The Honorable Leroy McCullough, Judge

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
Issues Pertaining to Assignments of Error .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	4
THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE ASSAULT CONVICTION.....	4
D. <u>CONCLUSION</u> .....	9

## TABLE OF AUTHORITIES

Page

### WASHINGTON CASES

<u>Bering v. Share</u> , 106 Wn.2d 212, 721 P.2d 918 (1986) .....	8
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	5
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998) .....	9
<u>State v. Parker</u> , 81 Wn. App. 731, 915 P.2d 1174 (1996) .....	5

### FEDERAL CASES

<u>In re Winship</u> , 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) .....	4
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979) .....	5

### RULES, STATUTES AND OTHER

11 Washington Pattern Jury Instructions, WPIC 35.50 (West 2008) .....	5
RCW 9A.08.010(1)(a) .....	5
RCW 9A.36.041 .....	2
RCW 9A.36.041(1) .....	5

A. ASSIGNMENTS OF ERROR

1. There is insufficient evidence to support appellant's conviction for assault in the fourth degree.

2. The trial court erred when it entered that portion of finding of fact 5 that indicates S.P. "seemed angry" prior to the charged incident.<sup>1</sup>

3. The trial court erred when it entered conclusion of law II.

Issues Pertaining to Assignments of Error

1. Appellant was charged with assault for touching his mother while trying to grab a set of car keys. An essential element of assault is an intentional touching. Where appellant was reaching for the keys and pulled his hand back as soon as he touched his mother's hand, did the State offer sufficient evidence to sustain appellant's conviction?

2. Findings of fact must be supported by substantial evidence in the record or they will be deemed erroneous. Where there was no evidence that S.P. appeared angry prior to the incident, did the court err in finding that he "seemed angry"?

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<sup>1</sup> The court's findings and conclusions are attached to

3. The court's mistaken belief that S.P. was angry prior to the incident played a role in the guilty finding. Did the court's factual error contribute to its mistaken conclusion there was an intentional touching?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged juvenile appellant S.P. with one count of assault in the fourth degree, in violation of RCW 9A.36.041. CP 1.

The only witness at trial was S.P.'s mother, Sadie Dunham. RP 7. According to Ms. Dunham, on the morning of February 23, 2010, she was at work, which is about two blocks from her home. RP 7-8. S.P. stopped by her work, indicated he was locked out of their home, and asked if he could use her key. S.P. did not seem like his usual self and Dunham wondered if he was high. She told him she would take him home and let him in. RP 8.

When they arrived home in Dunham's car, S.P. again asked for the keys. Since Dunham had the only existing house key, she told him she would unlock the house for him. RP 9. The engine was still running and the car was still in drive when S.P. grabbed for the keys in the ignition. RP 9, 14. Dunham saw what was happening

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this brief as an appendix.

and got to the keys first. As she was in the process of removing them from the ignition, S.P. – still attempting to grab the keys – grabbed his mother’s hand for a “quick split-second.” RP 9-10, 14-17. As soon as he realized she already had the keys, however, he lifted his hand off of hers. RP 10, 14-16. Dunham felt it was disrespectful and offensive for her son to touch her. RP 10, 13-14.

Both Dunham and S.P. exited the car. RP 9, 11, 15. Dunham decided to teach S.P. a lesson and told him she was going to call the police. RP 11. S.P. encouraged her to do so, yelled at her, and then left the area. RP 11-12, 14. Dunham was angry and emotionally hurt. RP 14. She called police and reported what happened. Later, S.P. apologized for being rude and attempting to take her keys. RP 12. Dunham was not injured by the brief touch, did not experience any discomfort, and was never worried about her physical safety. RP 10, 14-15.

Defense counsel argued that the State had failed to prove an intentional touching because, according to Dunham, S.P. was attempting to reach for the keys and only grabbed her hand for a fleeting moment because she was quick and managed to get her hand on the keys first. Counsel argued the fact S.P. immediately removed his hand from hers upon recognition she had the keys in

her possession demonstrated he did not intend the touching. RP 20-23.

The Honorable Leroy McCullough found S.P. guilty. RP 23-24. In concluding there had been an intentional touching, Judge McCullough found that S.P. was “angry and irritated” when he asked for the house key and was told he could not have it. RP 23.

A similar finding is found in the court’s written findings and conclusions. Finding 3 indicates that when S.P. went to his mother’s work, he already “seemed angry and irritated.” CP 16.

Judge McCullough imposed local sanctions, and S.P. timely filed his Notice of Appeal. CP 10-15.

C, ARGUMENT

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN THE ASSAULT CONVICTION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt

beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The State charged S.P. with assault in the fourth degree. "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(1). An assault:

is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if the touching would offend an ordinary person who is not unduly sensitive.

11 Washington Pattern Jury Instructions, WPIC 35.50, at 547 (West 2008); see also State v. Parker, 81 Wn. App. 731, 736-37, 915 P.2d 1174 (1996) (discussing elements).

In S.P.'s case, the State failed to offer evidence from which a reasonable trier of fact could conclude that he intended to grab his mother's hand. The State can prove intent only if it demonstrates that a defendant "acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). There was insufficient evidence of criminal intent below.

As Dunham described the incident, S.P. simply intended to grab the keys, turn the car off, and remove the keys from the ignition. She thwarted his effort by quickly grabbing the keys. RP 9-10, 14. His hand then grabbed her hand for what she described as a “quick split-second.” RP 9-10, 14-17. Importantly, the moment he realized she already had the keys, he lifted his hand off of hers. RP 10, 14-16. This evidence demonstrates that S.P.’s only intent was to grab the keys and not his mother’s hand.

In reaching a contrary conclusion, Judge McCullough was apparently swayed by his mistaken belief that Dunham had testified S.P. was angry before reaching for the keys. In both his oral and written decisions, Judge McCullough found that S.P. “seemed angry and irritated” prior to this time. RP 23, CP 16 (finding 3). This misconception is likely the product of the prosecutor’s closing argument:

This is a case about choices and ultimately about responsibility. Ms. Dunham just testified, she testified that on February 23, 2010 her son came to her office, he appeared high so she made a choice, she refused to hand over her keys. Instead she drove him in order to let him into their home. When she tried to speak with him about his behavior, he made another choice, he became angry. Instead of reacting calmly, he chose to try to pull the keys out of the ignition and to

pull the keys out of her hand. . . .

RP 18-19 (emphasis added).

But Ms. Dunham never testified that her son was angry prior to reaching for the keys, even when specifically questioned on this point:

Q: Okay. What was his demeanor at this point [when he arrived at your work looking for a key]? Did he seem angry –

A: Irritated and rushy, upset with himself that he left his key again.

Q: Okay. So you then offered to take him home; was that your testimony?

A: I told him –

Q: Okay.

A: -- to wait outside and I'd take him home.

Q: Okay. And then what happened.

A: And then we pulled up to the house and he wanted me to actually give him my key so he could go inside and do some schoolwork and I told him I'd let him in the house and not give my key.

Q: Okay. And why didn't you give him your key?

A: Because it was the only key I had and he had lost his key and I needed to get back in when I got off work.

Q: Okay. And had his demeanor changed at all or was it the same as when he first came?

A: It was the same.

RP 8-9 (emphasis added). According to Dunham, S.P. then went for the keys. RP 9.

Thus, while the evidence establishes that S.P. was irritated, S.P. was the source of his own irritation because he forgot his key. There was no testimony that S.P. was angry, much less angry with his mother. Moreover, his demeanor remained the same right up to the time he reached for the keys. Therefore, the court's oral and written finding that S.P. "seemed angry" prior to his attempt to grab the keys – an emotion consistent with assault – is erroneous. See, e.g., Bering v. Share, 106 Wn.2d 212, 222, 721 P.2d 918 (1986)(in the absence of substantial evidence, i.e., evidence of a sufficient quantity to persuade a fair-minded rational person of the truth of the premise, a finding of fact will be deemed erroneous).

In the end, the evidence revealed that S.P.'s only intent was to reach for and grab the keys from the ignition. His mother simply got in the way, and he immediately withdrew his hand. Because the State failed to offer any evidence from which a reasonable trier of fact could have concluded that S.P. intentionally touched his mother,

his conviction cannot stand. It must be reversed and dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

D. CONCLUSION

This Court should reverse based on insufficient evidence.

DATED this 10<sup>th</sup> day of January, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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Attorneys for Appellant

## **APPENDIX**

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KING COUNTY  
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

SHAQUILLE V. POLK

Respondent,

No. 10-8-01939-3

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d)

THE ABOVE-ENTITLED CAUSE having come on for trial from August 9, 2010 before the undersigned judge in the above-entitled court; the State of Washington having been represented by Rule 9 Prosecuting Attorney, Patricia Sully; the defendant appearing in person and having been represented by his attorney, Amy Bowles; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

I

The following events took place within King County, Washington:

1. The Respondent, Shaquille Polk, is the son of Sadie Dunham.
2. On the day of February 23, 2010, the respondent went to Ms. Dunham's place of work.
3. At this time, he seemed angry and irritated.
4. Ms. Dunham drove the respondent to their shared home.

FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d) - 1

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ORIGINAL

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- 1 5. When they arrived, the respondent wanted the house key.
- 2 6. An effort was made to grab the key.
- 3 7. In the process, the respondent did grab Ms. Dunham's hand.
- 4 8. This did not cause pain, but it did startle Ms. Dunham.
- 5 9. Ms. Dunham, the sole witness in this account, is credible.

6 ~~10. Ms. Dunham testified that she did not believe her son~~  
~~was intended to grab her hand. She believes her~~  
~~son was grabbing for the keys.~~ *WA*

7 And having made those Findings of Fact, the Court also now enters the following:

8 CONCLUSIONS OF LAW

9 I.

10 The above-entitled court has jurisdiction of the subject matter and of the Respondent  
 11 Kiahnu Dorsey in the above-entitled cause.

12 II.

13 The following elements of the crime(s) charged have been proven by the State beyond a  
 14 reasonable doubt: that the Respondent did unlawfully and intentionally touch his mother, Ms.  
 15 Sadie Dunham. He took deliberate action, and in doing so did touch his mother in an offensive  
 16 way. The Respondent therefore did assault Mr. Dorsey in King County of the State of  
 17 Washington. *Ms. Dunham*

18 III.

19 The defendant is guilty of the crime(s) of Assault in the Fourth Degree-DV as charged  
 20 in the Information.

21 IV.

22 Judgment should be entered in accordance with Conclusion of Law III.

23 DONE IN OPEN COURT this 13<sup>th</sup> day of August, 2010.

*[Signature]*  
 JUDGE *Malenough*

Presented by:

*[Signature]* Rule 9  
 ID #  
 9117511

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 Daniel T. Satterberg, Acting Prosecuting Attorney  
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FINDINGS OF FACT AND CONCLUSIONS OF LAW  
 PURSUANT TO CrR 6.1(d) - 2

ORIGINAL

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*Amy M. Bawles*  
Attorney for Defendant *Bawles*  
*33541*

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FINDINGS OF FACT AND CONCLUSIONS OF LAW  
PURSUANT TO CrR 6.1(d) - 3

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65972-3-1
	)	
S.P.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10<sup>TH</sup> DAY OF JANUARY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] S.P.  
11213 SE 233<sup>RD</sup> PL  
KENT, WA 98031

**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF JANUARY, 2011.

x *Patrick Mayovsky*

RECEIVED  
JAN 10 2011  
B