

No. 47615-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**N.M.**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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By:   
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I. **STATEMENT OF THE CASE**

On April 14, 2015, the Defendant, Nazref McGill (Nazref), was convicted by means of a fact finding in Lewis County Juvenile Court. The charge was one count of Custodial Assault. The primary witness for the State was David Neil Baldwin-McGraw (David). RP 18. The facts of the offense outlined below were all taken from David's testimony.

On the date and time of the offense, David was a counselor's assistant at Green Hill School. RP 18 & 20. As part of his duties, David escorted inmates incarcerated in Green Hill School to various places in the compound. RP 19. Nazref was an inmate at Green Hill School on February 7, 2015. RP 19 & 20. David identified Nazref in open court. RP 19.

David further testified that on the day in question he was working in the Spruce Unit, D-Wing. RP 20. He was gathering the inmates for a line-up to walk them down to dinner. RP 20. Nazref had an injured ankle, and was on crutches. RP 20. David walked the inmates to the kitchen area; Nazref was walking at the end of the line due to his injury. RP 22. David walked with Nazref, giving him directives to use his crutches as they went. RP 20.

When they arrived at the kitchen, Nazref turned to David and said, "If you disrespect me like that again, I'm going to 'flex and flash' on you." RP 22. According to David, the term "flex and flash" means that the inmate will fight and take a swing at an individual. RP 22. Nazref would not listen to the directives David gave him. RP 24.

Nazref became aggressive and got louder. RP 24. He threatened David several times. RP 24. Nazref's attitude increased in aggressiveness. RP 25. Nazref started to draw attention by his loudness. RP 25. Staff members Scott and Kendall came to assist. RP 26. Security Officers Scott and Kendall made the decision to return Nazref to his living unit, until Nazref could calm down. RP 26. Nazref threw his crutches away from him, out into the open area of the kitchen. RP 26 & 43. Nazref was very angry. RP 27. Nazref broke out of the line and ran/sprinted (faster than a jog) toward David. RP 27. Nazref stopped a couple of inches from David's face. RP 28. David brought his hands up in a defensive position. RP 29. David thought there was a possibility that he would be hit. RP 29. Nazref brought both of his hands under David's hands, and pushed David's hands out of the way. RP 30. Nazref's hands made contact with David's hands. RP 30.

The manner in which Nazref ran at David created in David an apprehension that he would be hit by Nazref. RP 39.

Nazref was grabbed from behind by Staff Member John Kendall before he could hit David. RP 30.

David further testified that he was a staff member at Green Hill School, and on duty when this incident occurred. RP 31. Green Hill School is a juvenile detention facility, located in Lewis County. RP 30 & 31.

Staff Member Jonathan Kendall was a security officer for Green Hill School. RP 41. He observed Nazref's actions. RP 43. Kendall intervened because he saw Nazref "go after" David. RP 43. It appeared to Kendall that Nazref was going to "Hit, push" or "attack" RP 43. So Kendall grabbed Nazref to contain and prevent Nazref from "going after" David. RP 43 & 44.

All of this testimony was before the court.

## II. ARGUMENT

### A. THE APPELLANT'S CONDUCT CONSTITUTED AN ASSAULT.

An assault is an act with unlawful force done with intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent

fear of bodily injury. WPIC 35.50. David thought there was a possibility he was going to be hit by Nazref, so he brought his hands up in a defensive position. RP 28, 29. If he didn't think he would be hit, he would not have brought his hands up. David actually testified that the manner in which Nazref ran at him created an apprehension that he would be hit by Nazref. RP 39.

The reaction is the same as if one person were to quickly raise his hand against another. The person on the receiving end flinches, because he thinks he is going to be hit. Being hit is painful. That's why it's a natural human reaction is to flinch. Had Kendall not grabbed Nazref and prevented him from attacking David, David would have been struck.

Bodily injury is defined as mere "physical pain." WPIC 2.03. By running at David and striking David's arms out of their defensive posture, Nazref created in David an apprehension that he would be subject to being struck, which would have caused physical pain. There is no other reason an angry inmate runs at corrections staff.

**B. THERE IS MORE THAN ENOUGH EVIDENCE TO MEET THE ELEMENTS OF CUSTODIAL ASSAULT.**

A person commits the crime of custodial assault when:

- (a) He assaults a full or part-time staff member, of any juvenile corrections institution, who was performing official duties at the time of the assault. RCW 9A.36.100.

The only difference between custodial assault and assault in the fourth degree is the victim of the assault. For Custodial Assault, the victim must be a full or part-time staff member of a juvenile corrections institution. Nazref was an inmate of Green Hill School, a juvenile corrections facility. RP 30 & 31. David was a full-time staff member of Green Hill School. RP 18 & 20. David was on shift and performing his job duties at the time he was assaulted by Nazref. RP 20. The elements of the crime have been met, and the Defendant's conviction should be upheld.

**C. THE STATE CONCEDES THE \$200 COURT APPOINTED ATTORNEY FEE AND THE \$100 CRIME VICTIM PENALTY ASSESSMENT.**

No colloquy was conducted by the Court with the Appellant regarding the Appellant's ability to pay. Moreover, the Appellant is correct in his assessment of RCW 7.68.035. Lewis County Juvenile Court is no longer ordering the \$100 victim penalty assessment or the court appointed attorney fee. The State concedes this issue.

**IV. CONCLUSION**

There is more than enough testimony supporting the elements of Custodial Assault. The Court should affirm the conviction. The Court should remand for entry of an order modifying the Order on Adjudication and Disposition such that the \$100 crime victim's penalty assessment and the attorney fee are eliminated.

RESPECTFULLY submitted this 11<sup>th</sup> day of January, 2015.

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by:

  
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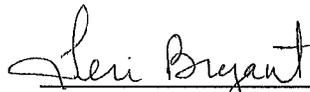
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DECLARATION OF SERVICE

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Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On January 11, 2016, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Marla L. Zink, Washington Appellate Project, attorney for appellant, at the following email address: [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

DATED this 11<sup>th</sup> day of January, 2016, at Chehalis, Washington.



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Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

**January 11, 2016 - 11:26 AM**

## Transmittal Letter

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