

## State v. Seamster

Court of Appeals of Washington, Division Three

September 29, 2011, Filed

No. 29353-0-III

### Reporter

2011 Wash. App. LEXIS 2250

THE STATE OF WASHINGTON, *RESPONDENT*, v. MARCELLUS SEAMSTER, JR., *APPELLANT*.

**NOTICE:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**Subsequent History:** Reported at [State v. Seamster, 2011 Wash. App. LEXIS 2334 \(Wash. Ct. App., Sept. 29, 2011\)](#)

**Prior History:** [\*1] Appeal from Grant Superior Court. Docket No: 09-1-00571-3. Judgment or order under review. Date filed: 08/23/2010. Judge signing: Honorable Evan E Sperline.

**Disposition:** Affirmed.

**Counsel:** *Dennis W. Morgan*, Attorney at Law, Ritzville, WA, for Appellant(s).

*D. Angus Lee*, Grant County Prosecuting Attorney, Ephrata, WA, *Ryan S. Valaas*, Attorney at Law, Ephrata, WA, for Respondent(s).

**Judges:** AUTHOR: Stephen M. Brown, J. WE CONCUR: Kevin M. Korsmo, A.C.J., Dennis J. Sweeney, J.

**Opinion by:** Stephen M. Brown

## Opinion

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¶1 BROWN, J. — Marcellus Seamster Jr. appeals his conviction for third-degree assault of a child. He contends the trial court failed to instruct the jury on the definition of “assault,” thereby relieving the State of its burden of proof and denying him a fair trial. We affirm.

### FACTS

¶2 K.R. was born on November 16, 1996. On November 2, 2009, K.R. lived in Moses Lake, Washington, with her mother, Tawnya Redwine, and Ms. Redwine's boyfriend, Marcellus Seamster Jr. Mr. Seamster was 29 years old at the time. Ms. Redwine and Mr. Seamster had lived together for approximately 10 years. They parented K.R. together. They had discussed how to discipline K.R. They first try grounding, earlier bedtimes, and loss of privileges. Ms. Redwine has authorized [\*2] Mr. Seamster to spank K.R. as a last resort.

¶3 Ms. Redwine and Mr. Seamster first learned that K.R. had a My Space account in September 2009. Access was through her cell phone. K.R. was prohibited from using My Space. On November 2, 2009, Ms. Redwine and Mr. Seamster learned that K.R. was again accessing My Space and that she was engaging in “phone sex.” Report of Proceedings (RP) at 448-49. At trial, K.R. acknowledged that she was using her phone to have explicit conversations on My Space.

¶4 Ms. Redwine and Mr. Seamster agreed that this was the “last straw.” RP at 450. Ms. Redwine authorized Mr. Seamster to spank K.R.; Mr. Seamster had K.R. pull down her pajama pants. He spanked her with a belt. Mr.

Seamster is left-handed. He used his right hand when he spanked her. Prior to spanking her, he wrapped the belt around his hand. He held on to the buckle so that it would not hit her. Mr. Seamster spanked K.R. approximately five times with the belt. K.R. screamed and cried while being spanked.

¶5 K.R. slept on her stomach due to the pain from the spanking. After she saw a doctor, she was prescribed pain pills that she took for one to two weeks. She had trouble sitting down, lying on her back, wearing [\*3] pants, going to the bathroom, and bending over. The day after the spanking, during a physical education class at school, K.R.'s classmates saw bruises on her and she was referred to the assistant principal, Vicki Swisher. Ms. Swisher observed marks on K.R.'s lower left inner thigh and back. There was bruising, blood specks, and a cut. Ms. Swisher contacted the police. The next day, Mr. Seamster was charged with assault of a child third degree and child molestation second degree.

¶6 Defense counsel did not take exception to any of the jury instructions. A jury found Mr. Seamster guilty of third degree assault of a child but acquitted him of child molestation second degree. Mr. Seamster appealed.

#### ANALYSIS

¶7 The issue is whether the instructions properly instructed the jury on Washington law regarding the elements of the crime of third degree assault of a child. Mr. Seamster contends instructional error denied him a fair trial.

¶8 Challenged jury instructions are reviewed de novo. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995). Jury instructions relieving the State of its burden to prove every element of an offense violate a defendant's due process rights. *State v. Randhawa*, 133 Wn.2d 67, 76, 941 P.2d 661 (1997) [\*4] (citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979)).

¶9 [RCW 9A.36.140\(1\)](#) defines the crime of assault of a child in the third degree:

A person eighteen years of age or older is guilty of the crime of assault of a child in the third degree if the child is under the age of thirteen and the person commits the crime of assault in the third degree as defined in [RCW 9A.36.031\(1\)\(d\)](#) or [\(f\)](#) against the child.

¶10 Undisputedly, Mr. Seamster is over the age of 18 and K.R. was under the age of 13 at the time Mr. Seamster spanked her with a belt. Mr. Seamster's concerns surround [RCW 9A.36.031\(1\)\(f\)](#):

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

. . . .

(f) With criminal negligence, causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering.

¶11 Jury Instruction No. 4 provided the elements of assault of a child in the third degree in a form nearly identical to WPIC <sup>1</sup> 35.39. Jury Instruction No. 5 defined assault in the third degree, criminal negligence, and bodily harm. The definition given for assault in [\*5] the third degree is identical to WPIC 35.20. The definition given for bodily harm is identical to WPIC 2.03. The definition given for criminal negligence is nearly identical to WPIC 10.04. These instructions did not require the jury to find that an "assault" occurred; they required the jury to find Mr. Seamster had, with criminal negligence, caused bodily harm accompanied by substantial pain that extended for a period sufficient to cause considerable suffering, which is how the statute defines "assault in the third degree." That is all that [RCW 9A.36.031\(1\)\(f\)](#) requires.

¶12 And Jury Instruction No. 6 instructed the jury regarding the defense of lawful physical discipline of a child. The instruction given was nearly identical to WPIC 17.07. Jury Instruction No. 6 instructed that the State bears the

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<sup>1</sup> 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (3d ed. 2008).

burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. Mr. Seamster unpersuasively argues for more definitional instructions on assault.

¶13 Given all, the trial court did not err in instructing the jury. Therefore, Mr. Seamster received a fair trial.

#### STATEMENT OF ADDITIONAL GROUNDS [\*6] (SAG) ISSUE

¶14 Mr. Seamster filed a statement of additional grounds that reads in its entirety, “The State either mismanaged the case, or committed misconduct, when it failed to provide defense counsel and the defense expert with comparative photographs. The trial court should have dismissed the case insofar as the offense of child assault in the third degree based upon [CrR 8.3\(b\)](#), or, a mistrial was required.”

¶15 Mr. Seamster's SAG is not adequate for review. Mr. Seamster makes no argument in his SAG, solely allegations, and he has not directed us to consider his concerns based on citations to the factual or procedural record.

¶16 Affirmed.

¶17 A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to [RCW 2.06.040](#).

Korsmo, A.C.J., and Sweeney, J., concur.