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COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 28 PM 4:40

No. 71010-9

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

STATE OF WASHINGTON,

Respondent,

v.

DONTRELL J.S.,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State did not prove beyond a reasonable doubt that Dontrell committed two assaults with sexual motivation within the two-month charging period.

B. ASSIGNMENTS OF ERROR

1. In the absence of substantial evidence, the court erred in finding Dontrell touched B.S. on the breasts between January 3 and February 28, 2013.

2. In the absence of substantial evidence, the court erred in finding Dontrell touch E.B. on her breasts between January 3 and February 28, 2013.

3. In the absence of substantial evidence, the court erred in finding Dontrell assaulted E.B. and B.S. for the purpose of sexual gratification between January 3 and February 28, 2013.

4. The court erred in adjudicating Dontrell guilty of two counts of fourth degree assault with sexual motivation.

5. The court erred in denying Dontrell's motion for arrest of judgment.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

It is a fundamental principle of criminal procedure that the State must prove beyond a reasonable doubt the elements of the crime as charged in the information. Did the State fail to meet its burden where it did not prove beyond a reasonable doubt that Dontrell committed any assault with sexual motivation during the two-month charging period?

D. STATEMENT OF THE CASE

B.S. is 14 years old and a freshman at Auburn Riverside High School. RP 9-10. Last year, she was an eighth-grader at Mount Baker Middle School in Auburn. RP 10. She used to be friends with 14-year-old Dontrell, who was also an eighth-grader at Mount Baker Middle School. RP 11.

B.S. testified that sometime during the eighth-grade school year, Dontrell “would touch my butt. He would come behind me and slap my butt and call it Slap Ass Friday at school.” RP 12. She said he slapped her butt “a couple times.” RP 13. He would laugh when he did this. RP 13. He would also call her “Big [B.] and Juicy.” RP 14. She said she did not give him permission to slap her on the butt and it made her uncomfortable. RP 12.

“Slap Ass Friday” was an activity that some of the students at Mount Baker participated in. RP 19, 31-34. On Fridays, some of the students, both boys and girls, would hit each other on the butt. RP 19, 31-34. B.S. said she herself did not participate in “Slap Ass Friday.” RP 19.

B.S. could not say when Dontrell slapped her on the butt but she said it happened “[t]owards the end” of the school year. RP 13. It happened in January 2013, but not in February. RP 13.

Also, one time Dontrell “did stick a pencil behind” B.S., in her lower back. RP 14. This likewise made her feel uncomfortable. RP 14.

Finally, B.S. said that Dontrell “would come up to me and like slap my boob.” RP 15. She did not give him permission to do that, either. RP 15. She did not say when it happened, however.

B.S. said she also saw Dontrell do “sexual harassment” to her friend E.B., one time. RP 15. She did not specify what the “sexual harassment” was.

A.C. was a friend of both B.S. and E.B. at Mount Baker Middle School. RP 28, 37. She said one time when she and B.S. were walking to class, Dontrell “kept saying how big our butts were” and “how he

would like to have sex with it.” RP 28-29. She said she also saw Dontrell touch E.B. on her butt. RP 29. E.B. would tell him to stop. RP 29-30. She said this happened sometime at “the end of the school year,” after Christmas break. RP 34.

A.C. said she also saw Dontrell touch E.B. “[i]n her breasts.” RP 35. Dontrell “would grab at her breast and slap her breast.” RP 36. A.C. did not say when she saw Dontrell touch E.B.’s breasts.

One day, A.C. and E.B. took B.S. to see the counselor because B.S. was upset and crying about her breakup with her boyfriend. RP 37. Dontrell was not B.S.’s boyfriend. RP 37. While the girls were there, Dontrell walked in and this reminded E.B. of the things he had done. RP 37. She told the teacher about it. RP 37. The vice principal, Denise Wheeler, received a referral from B.S., A.C., and E.B., on February 27, 2013, regarding Dontrell. RP 43. She talked to Dontrell but he denied touching the girls in an inappropriate way. RP 46. Nonetheless, he was suspended from school for a short period of time. RP 23.

Dontrell was charged with two counts of fourth degree assault with sexual motivation for allegedly touching B.S. and E.B. CP 1-2. The information alleged the incidents occurred “during a period of time

intervening between January 3, 2013 through February 28, 2013.” CP 1-2.

At the adjudication hearing, Dontrell again denied touching B.S. or E.B. in a sexual way. RP 60.

At the end of the hearing, the court found the State had proved the elements of the crimes as charged and that the incidents had occurred within the charging period. RP 83; CP 5-6. The court found that if the allegations had involved only “slapping on the butt, given the Slap Ass Friday game at school, it would be a closer case.” RP 83. That is, because many of the children at school were playing the “Slap Ass Friday” game, the court could not find that the testimony regarding touching on the butt was sufficient to prove the touching was done with sexual motivation. RP 83-84. But “[t]ouching on the breast [wa]s an entirely different matter.” RP 83. The court found the testimony regarding the touching on the breasts was sufficient to prove assault in the fourth degree with sexual motivation, but refused to “mak[e] any finding” that touching on the butt would constitute the crime charged. RP 84.

Prior to the disposition hearing, defense counsel moved for arrest of judgment under CrR 7.4, arguing the evidence was insufficient

to prove the touching of the breasts occurred during the two-month charging period. RP 88; CP 7-11. The court denied the motion, finding the testimony was sufficient to prove that the touching of the breasts occurred in January and February, 2013. RP 90.

E. ARGUMENT

THE STATE DID NOT PROVE BEYOND A
REASONABLE DOUBT THAT DONTRELL
COMMITTED FOURTH DEGREE ASSAULT WITH
SEXUAL MOTIVATION DURING THE CHARGING
PERIOD

It is a fundamental principle of criminal procedure that an accused is presumed innocent of a criminal charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could

have found 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 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

In reviewing the sufficiency of the evidence to support a juvenile's adjudication following a fact-finding hearing, this Court must necessarily examine the juvenile court's written findings of fact.¹ State v. McDaniels, 39 Wn. App. 236, 239, 692 P.2d 894 (1984) (citing JuCR 7.11(c)). The appellate court reviews solely whether the trial court's findings of fact are supported by substantial evidence and, if so, whether the findings support the trial court's conclusions of law. State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. Id.

¹ The court's written findings of fact are attached as an appendix.

Here, Dontrell was charged with committing fourth degree assault with sexual motivation against B.S. and E.B. “during a period of time intervening between January 3, 2013 through February 28, 2013.” CP 1-2. A person commits fourth degree assault if he “assaults another.” RCW 9A.36.041. “Assault” is further defined by the common law as: (1) an intentional touching, with unlawful force, that is harmful or offensive; (2) an attempt, with unlawful force, to inflict bodily injury upon another; or (3) an attempt to create in another apprehension and fear of bodily injury, and which in fact creates such reasonable apprehension and fear. State v. Smith, 159 Wn.2d 778, 781-82, 154 P.3d 873 (2007).

“Sexual motivation” means “that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification.” RCW 13.40.135; RCW 9.94A.030(47).

Here, the juvenile court specifically refused to find that the allegations regarding the touching on the butt were sufficient to prove fourth degree assault with sexual motivation. RP 83-84. Therefore, the issue is whether the State proved beyond a reasonable doubt that Dontrell touched B.S. and E.B. on the breasts during the charging period.

The evidence is insufficient to sustain the State's burden of proof. In regard to B.S., she testified that Dontrell "would come up to me and like slap my boob" but she did not say when that occurred. RP 15. Although she said Dontrell slapped her on the butt sometime in January 2013, she did not say when he allegedly touched her breasts. RP 13.

The evidence is similarly insufficient in regard to E.B. A.C. said she saw Dontrell "grab at [E.B.'s] breast and slap at her breast," but she did not say when that happened. RP 36. Although she said she saw Dontrell touch E.B. on the butt sometime "at the end of the school year," after Christmas break, she did not say when she saw him touch her breasts. RP 34.

Even if it is reasonable to conclude the touching occurred before February 27, 2013, when the vice principal Ms. Wheeler was informed of the allegations, RP 43, that does sufficiently narrow down the timeframe. The State did not prove beyond a reasonable doubt that the touching did *not* occur prior to January 3, 2013.

Thus, because the State did not prove the elements of the crimes as charged beyond a reasonable doubt, the adjudications must be reversed and the charges dismissed.

F. CONCLUSION

Because the State did not prove the elements of the crimes as charged in the information beyond a reasonable doubt, the adjudication must be reversed and the charges dismissed.

Respectfully submitted this 28th day of February, 2014.


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Washington Appellate Project - 91052
Attorneys for Appellant

APPENDIX

The Honorable Judge Barbara Mack
Hearing Date: October 11, 2013 at 10:00 am
Hearing Location: Courtroom 2

FILED
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DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

vs.

DONTRELL J. S. [REDACTED]
B.D. 02/21/99

Respondent.

No. 13-8-06186-6

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

THE ABOVE-ENTITLED CAUSE having come on for fact finding on September 16, 2013, before the Honorable Judge Barbara Mack in the above-entitled court; the State of Washington having been represented by James F. Johnson; the respondent appearing in person and having been represented by Brad Hampton; the court having heard sworn testimony and arguments of counsel, now makes and enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. At various times between January 3, 2013, and February 28, 2013, the respondent slapped B. [REDACTED] Si [REDACTED] on the butt and grabbed and slapped her breast. The respondent did these things at Mt. Baker Middle School. Mt. Baker Middle School is located in King County, Washington.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
PURSUANT TO CrR 6.1(d) and JuCR 7.11(d) - 1

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55

- 1 2. Ms. S [REDACTED] told the respondent to stop touching her butt and breast because his touching
2 made her feel uncomfortable.
- 3 3. Ms. S [REDACTED] was friends with the respondent before he began slapping her on the breast
4 and butt.
- 5 4. The respondent called Ms. S [REDACTED] "Big Booty B [REDACTED]" and whispered sexual things to her
6 in class.
- 7 5. Students at Mt. Baker played a game called "Slap Ass Friday" but Ms. S [REDACTED] did not
8 participate because it made her uncomfortable.
- 9 6. Ms. S [REDACTED] saw the respondent touch E [REDACTED] B [REDACTED] on her breast and butt between
10 January 3, 2013, and February 28, 2013, at Mt. Baker Middle School.
- 11 7. A [REDACTED] C [REDACTED] was walking with Ms. S [REDACTED] when the respondent commented that
12 their butts were big and "juicy" and that he would like to have sex with their butts.
- 13 8. Ms. C [REDACTED] saw the respondent touch Ms. S [REDACTED] and Ms. B [REDACTED] on the butt.
- 14 9. Ms. C [REDACTED] like Ms. S [REDACTED], saw the respondent touch Ms. B [REDACTED] on her breast.
- 15 10. Ms. C [REDACTED] saw the respondent touch Ms. S [REDACTED] and Ms. B [REDACTED] in the center hallway
16 of Mt. Baker Middle School.
- 17 11. Denise Wheeler was the vice principal at Mt. Baker when a referral came in that the
18 respondent touched B [REDACTED] S [REDACTED] and E [REDACTED] B [REDACTED] in a sexual way.
- 19 12. Mrs. Wheeler spoke with Ms. S [REDACTED], Ms. B [REDACTED] and Ms. C [REDACTED] about the allegation
20 of the respondents sexual touching.
- 21 13. When speaking with Mrs. Wheeler, Ms. S [REDACTED] was upset, afraid, mad, and worried about
22 repercussions and retaliation. Ms. B [REDACTED] was upset, angry, worried about repercussions,
23
24

1 and indignant that someone would do that to her at school. Ms. C [REDACTED] was upset with
2 the situation and defensive of her friends.

3 14. The respondent knew about the game "Slap Ass Friday" but said he did not play it.

4 15. The respondent testified that he never touched any of these girls; he only hugged them as
5 friends. However, he said that Ms. S [REDACTED] and Ms. B [REDACTED] told him to stop touching them.

6 16. The respondent testified he never touched Ms. S [REDACTED] or Ms. B [REDACTED]. However, it makes
7 no sense that the girls would tell him to stop touching him if he never touched them in the
8 first place.

9 17. The court did not find the statement by the respondent that he never touched either of Ms.
10 S [REDACTED] or Ms. B [REDACTED] to be credible.

11 18. The respondent's touching of both girls was intentional and was offensive to them both.

12 19. At least one of the purposes for which the respondent touched both Ms. S [REDACTED] and Ms.
13 B [REDACTED] was for his sexual gratification.

14 20. The testimony of Ms. S [REDACTED], Ms. C [REDACTED] and Ms. W [REDACTED] was credible.

15 CONCLUSIONS OF LAW

16 I.

17 The above-entitled Court has jurisdiction of the subject matter and of the Respondent in
18 the above-entitled cause.

19 II.

20 The state has proved beyond a reasonable doubt the following elements of Assault in the
21 Fourth Degree with a Sexual Motivation, in violation of RCW 9A.36.041 and 13.40.135:

22 (1) During a period of time between January 3, 2013 and February 28, 2013, the
23 respondent intentionally assaulted both E.B. (DOB 9/19/97) and B.S. (DOB 5/28/99);

24 (2) The respondent committed the intentional assaults with a sexual motivation; and

1 (3) That these acts occurred in the King County, Washington.

2 In making these findings, the Court relied upon the testimony of witnesses.

3 III.

4 The Respondent is guilty of two counts of Assault in the Fourth Degree with Sexual
5 Motivation as charged in the original Information.

6 IV.

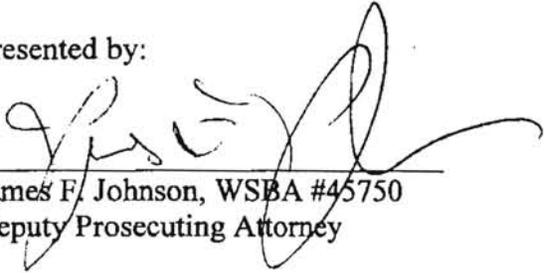
7 Judgment should be entered in accordance with Conclusion of Law III.

8 In addition to these written findings and conclusions, the Court hereby incorporates its
9 oral findings and conclusions as reflected in the record.

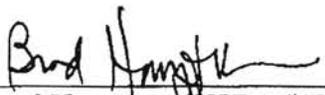
10 DONE IN OPEN COURT this 20 day of December, 2013.

11 
12 _____
13 JUDGE BARBARA A. MACK

14 Presented by:

15 
16 _____
17 James F. Johnson, WSBA #45750
18 Deputy Prosecuting Attorney

19 Approved as to form: *and objects to findings.*

20 
21 _____
22 Brad Hampton, WSBA #12664
23 Attorney for Respondent
24

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 71010-9-I
v.)	
)	
DONTRELL J. S.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] DONTRELL J. S. 2019 E 57 TH ST TACOMA, WA 98404	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2014.

X _____ 

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