

No. 49635-6-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TYLER J. McVEY

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
Cause No. 15-1-00783-5

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Insufficient evidence was admitted at trial to support the conviction.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State presented sufficient evidence to prove both charges beyond a reasonable doubt when no physical evidence supported the rape allegation and the minor child's statements were inconsistent as to when and how the alleged touching or touchings occurred?

(Assignments of Error #1)

III. STATEMENT OF THE CASE

A. Procedural History

On June 11, 2015, the State charged Tyler McVey with one count of Rape of a Child in the First Degree and one count of Child Molestation in the First Degree for an incident that occurred on or between March 1, 2015 and April 17, 2015. CP 6. On August 26, 2016, the State filed a First Amended Information to correct a clerical mistake in Count I related to the initials of the minor child. CP 42.

On December 28, 2015, a child hearsay hearing was held to determine the admissibility of statements made by the minor child to her father, Jason Seevers, a forensic interviewer, Sue Villa (Batson), and a medical doctor, Joyce Gilbert, M.D. At the conclusion of the hearing, the court determined that the child hearsay statements were admissible. CP 16-20.

On August 29, 2016, trial was held before the Honorable Carol Murphy and on September 1, 2016, the jury returned guilty verdicts on both counts. CP 126-127. On October 13, 2016, the Court sentenced Mr. McVey to an indeterminate sentence of 160 months to life as well as other conditions of sentence. CP 149-162. On October 25, 2016, Mr. McVey filed his notice of appeal with the Court of Appeals. This appeal follows.

B. Facts

Kecia Johnson and Jason Seevers are the parents of E.S., a five-year-old girl, who was born October 21, 2010. RP 39:13-40:18. In 2012, when E.S. turned two, the parents separated. RP 41:3-9. After their separation, Ms. Johnson and

Mr. Seevers had split custody of E.S., and then Mr. Seevers obtained full custody. RP 41:14-21.

In approximately 2014, Ms. Johnson was in a romantic relationship with the defendant, Tyler McVey, who she met while working at the Manor Care long term care facility. RP 41:25-42:21. During the period of Ms. Johnson's relationship with Mr. McVey, Jason Seevers obtained full custody of E.S., but Ms. Johnson had visitation with her daughter two to three times per week, which would occur at her house. RP 44:4-45:12. During the 2014-2015 period, Ms. Johnson's nanny, Peggy Cluck, and her step-father, Mark Schmidt, lived in her home. RP 45:8-18. At times when E.S. came for visits, Mr. McVey was present. RP 47:10-18.

After Ms. Johnson's nanny moved out of the home, Mr. McVey watched E.S. on three or four occasions. RP 48:6-13. This would occur when Ms. Johnson had to leave for work. *Id.* Mr. Schmidt, who was also living at the house during this time, was not able to watch E.S. by himself because he suffered a stroke that prevented him from being able to care for E.S. RP 49:13-50:14.

After one of E.S.'s visits with Ms. Johnson, Mr. Seevers picked her up and E.S. disclosed that something had happened to her by Mr. McVey. RP 51:8-56:12; RP 100:19-103:14. Mr. Seevers called Ms. Johnson and asked E.S. to tell her what she had just told him. RP 103:16-19. E.S. did not explain anything about the touches, even though Mr. Seevers asked her to describe the touches. RP 103:20-104:14. Even though Mr. Seevers attempted to talk to E.S. more during the drive, she would not speak with him. RP 105:19-21.

When Ms. Johnson confronted Mr. McVey about what she had learned, he stated that the allegation was fabricated because neither Mr. Seevers or E.S. liked him. RP 56:10-15. Mr. Schmidt was present at the time Mr. McVey was with E.S. on the day of the disclosure. RP 52:1-7.

Before Ms. Johnson received the call from Jason Seevers regarding E.S.'s disclosure, she had filed a motion seeking to change visitation with her daughter to return it to a split custody. RP 73:22-74:22.

In March, 2015, Mr. Seevers complained to the court that E.S. was living in unsanitary conditions when she visited her mother. RP 119:10-17. Mr. Seevers made this complaint approximately two and one half weeks before the allegations of April 7, 2015. *Id.* at 18-20. When Ms. Johnson was questioned by law enforcement regarding the allegations, she believed that E.S.'s allegations were the result of the custody battle she was having with Mr. Seevers. RP 66-21-23.

Later, when E.S. was at Mr. Seevers' home, his wife provided E.S. a doll and asked where Mr. McVey had touched her. RP 106:22-107:1. E.S. never verbally disclosed any more details about the touching to Mr. Seevers. RP 107:2-9. The next day, Mr. Seevers took E.S. to the sexual assault clinic for an evaluation. RP 111:9-112:24. Later, Mr. Seevers contacted law enforcement and reported what he had learned. RP 114:21-23.

When E.S. testified, she said that she told her dad that Mr. McVey touched her privates. RP 125:2-3. E.S. also stated that she told her mother and her babysitter about what occurred. RP 125:20-21. E.S. said that the event only

happened one time, RP 126:9-10, and occurred the same day she told her dad. RP 126:22-23.

During cross examination, E.S. stated that she told her mother first and then told her father later in the day about what had occurred. RP 127:8-23. E.S. acknowledged that when this event occurred, her grandfather was home. RP 128:18-20. Later, during cross examination, E.S. stated that the only persons present were Mr. McVey and her babysitter, Peggy. RP 129:11-20; RP 130:5-9.

On April 30, 2015, Sue Villa (Batson) conducted a forensic child interview of E.S. at the Monarch Children's Justice and Advocacy Center in Lacey. RP 172:12-21. At the time, E.S. was 4 ½ years old. RP 173:22-23. During the interview, E.S. said that she was there to talk about Tyler. RP 176:12-23. She reported that Mr. McVey touched her with his hands, that she didn't like it, and that he "screwed" her and it hurt. RP 177:7-14. E.S. stated that his hand went inside her body. RP 177:15-16. E. S. said the event happened more than one time in the dining room, although she was not very specific. RP 177:20-178:8. E.S. also stated that her grandfather was present in the house when the touching occurred. RP 179:7-12.

E.S. was also medically examined by Dr. Joyce Gilbert, M.D. When Dr. Gilbert asked E.S. why she was there at the doctor's office today, she stated, "because Tyler pinched me and it was inappropriate." RP 226:24-227:8. E.S. showed Dr. Gilbert that the pinching occurred in the upper thigh area, that it occurred three times, and that Tyler twisted when he pinched her. RP 227:15-24. E.S. stated that this occurred in both the dining room and in the bedroom. RP

228:8-11. During the process of the physical examination, E.S. grabbed her clitoral hood, pulled it out, twisted it, and said “this is what Tyler does.” RP 237:14-18. At the next part of the examination, during the labial traction, E.S. stated that Tyler puts his fingers into her vaginal opening. RP 238:15-24. E.S.’s physical examination, however, was normal. RP 241:1-4.

The abuse allegations reportedly occurred on April 7, 2015 and the physical examination occurred April 10, 2015. RP 248:18-21. The doctor acknowledged that there was no physical evidence of recent physical trauma as it would take 7-10 days for scar tissue to form and there was no scarring. RP 225:10-14; 250:2-251:3. One of the explanations for a normal examination is because no physical contact occurred. RP 255:19-21.

After the State rested, the defense also rested. Mr. McVey did not testify. RP 258:19-261:23.

IV. ARGUMENT

A. *THIS COURT SHOULD REVERSE THE CONVICTIONS BECAUSE INSUFFICIENT EVIDENCE EXISTS TO SUPPORT THE CONVICTION.*

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). It protects an accused against a conviction except upon proof beyond a reasonable doubt of every element necessary to constitute the crime charged. *State v. Hummel*, 196 Wn.App. 329, 333, 383 P.3d 592 (2016). As it is a question of constitutional law, a challenge to the sufficiency of the evidence is reviewed *de novo*. 100 Wn.App. at 333. As stated in *Hummel*:

This inquiry impinges on the discretion of the fact finder to the extent necessary to guarantee the fundamental protection of due process of law and focuses on whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Where sufficient evidence does not support conviction, such a conviction cannot constitutionally stand.

Id. (citations omitted).

When challenging the sufficiency of evidence, this court must determine:

Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). *See also State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Gallagher*, 112 Wn.App. 601, 612, 51 P.3d 100 (2002) (citations omitted). "A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence." 112 Wn.App. at 613 (citations omitted). Importantly, however, "the existence of a fact cannot rest upon guess, speculation, or conjecture. *State v. Colquitt*, 133 Wn.App 789, 796, 137 P.3d 892 (2006) (citing *State v. Hutton*, 7 Wash.App. 726, 728, 502 P.2d 1037(1972). *See also State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). The courts have not hesitated to reverse convictions where the evidence supporting the conviction requires one to speculate or guess as to the proof of the elements. *See Hummel, supra; Vasquez, supra; State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1990).

In *Alexander*, the Court of Appeals reversed the defendant's conviction because the alleged victim's testimony was so filled with inconsistencies that the

jury could not possibly have found the elements of the charge beyond a reasonable doubt. In that case, the alleged victim directly contradicted herself about whether an incident ever occurred. *Alexander*, 64 Wn.App at 589. Her testimony also was contradicted by her mother's testimony as it related to the time frames she was even in contact with the alleged abuser. *Id.*

In *Weisberg*, Division II of the Court of Appeals reversed a jury's conviction when the state produced insufficient evidence of forcible compulsion in a rape case. There, testimony failed to establish that the defendant either suggested or threatened harm to the alleged victim if she did not comply with his request to engage in sexual intercourse. Based upon the evidence, which the court presumed to be true, the court found that the evidence was insufficient to support a finding of guilt.

Similarly, the Washington State Supreme Court reversed the defendant's conviction in *Vasquez* when the proof of the element of intent to injure in a fraud case was based on nothing more than "rank speculation". *Vasquez*, 178 Wn.2d at 16. *See also State v. Hutton*, 7 Wn.App 726, 502 P.2d 1037 (1972)(reversing defendant's convictions where no expert testimony presented to support identity of the controlled substance).

Importantly, when the evidence presented is consistent with both an inculpatory hypothesis and exculpatory hypothesis, then such evidence is insufficient to support a conviction. *See State v. Bridge*, 91 Wn.App. 98, 966 P.2d 418 (1998). There, the court reversed a conviction based upon fingerprint

evidence because such evidence was insufficient to establish the defendant's guilt beyond a reasonable doubt. *Bridge*, 91 Wn.App. at 100.

Here, Mr. McVey's conviction is based on nothing more than speculation and conjecture. E.S.'s testimony is inconsistent with respect to when, where and what occurred, as well as to who she first reported the alleged touching. Further, the forensic medical evidence is inconsistent with penetrating trauma as the physical exam occurred only three days after the alleged penetration occurred. Based upon E.S.'s testimony, the physical examination is inconsistent with any penetrating trauma. Given that Dr. Gilbert didn't note any evidence of recent trauma, insufficient evidence exists to support either conviction. As such, both convictions should be reversed.

V. CONCLUSION

Based on the foregoing evidence, and lack of evidence, Mr. McVey requests that the Court reverse his convictions in this matter.

DATED this 15th day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that on the day below set forth, I caused a true and correct copy of this opening brief of appellant to be served on the following in the manner indicated below:

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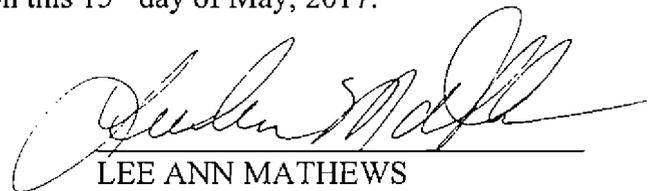
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