

FILED  
Court of Appeals  
Division II  
State of Washington  
6/6/2019 9:14 AM

No. 51592-0-II

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

---

STATE OF WASHINGTON,

Respondent,

v.

DICKY SWING  
Appellant.

---

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

The Honorable Christine Schaller, Judge  
Cause No. 17-1-01320-34

---

BRIEF OF RESPONDENT

---

Joseph J.A. Jackson  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT..... 7

    1. Sufficient evidence supported Swing’s conviction  
    for child molestation in the first degree ..... 7

    2. The State concedes that Condition (15) of the  
    community custody conditions ordered in the  
    judgment and sentence does not comply with  
    recent caselaw, however, the State agrees that  
    this Court should stay consideration of the issue  
    pending the State Supreme Court’s decision in  
    State v. Wallmuller ..... 11

D. CONCLUSION..... 13

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	8
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980) .....	7
<u>State v. Riles</u> , 135 Wn.2d 326, 957 P.2d 655 (1998) .....	13
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 p.2d 1068 (1992).....	7
<u>State v. Sanchez Valencia</u> , 169 Wn.2d 782, 239 P.3d 1059 (2010) .....	13

### **Decisions Of The Court Of Appeals**

<u>In re Welfare of Adams</u> , 124 Wn.App. 517, 519, 601 P.2d 995 (1979).....	9
<u>State v. Galisia</u> , 63 Wn. App. 833, 838, 822 P.2d 303 (1992).....	7
<u>State v. Harstad</u> , 153 Wn.App. 10, 21, 218 P.3d 624 (2009).....	8, 9, 10
<u>State v. Howe</u> , 151 Wn.App. 338, 346, 212 P.3d 565 (2009).....	9
<u>State v. Irwin</u> , 191 Wn.App. 644, 655, 364 P.3d 830 (2015).....	11, 12
<u>State v. Jackson</u> , 145 Wn.App. 814, 819, 187 P.3d 321 (2008).....	9

State v. Johnson,  
4 Wn.App.2d 352, 421 P.3d 969 (2018)..... 12

State v. Powell,  
62 Wn.App. 914, 917, 816 P.2d 86 (1991),  
*review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992) ..... 9, 10

State v. Wallmuller,  
4 Wn.App. 698, 704, 423 P.3d 282 (2018),  
*review granted*, 192 Wn.2d 1009, 432 P.3d 794 (2019)..... 11, 12, 13

State v. Walton,  
64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)..... 8

**Statutes and Rules**

RCW 9A.44.010(2)..... 8

RCW 9A.44.083 ..... 8

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported Swing's conviction for child molestation in the first degree, where the evidence presented at trial, when viewed favorably to the State, indicated that Swing rubbed a nine-year old girl's chest, working his way down her stomach to her leg, while kissing her on the cheek and then on the neck.

2. Whether this Court should stay its consideration of a community custody condition that is the State concedes is unconstitutionally vague because the State Supreme Court is currently reviewing a similar condition.

B. STATEMENT OF THE CASE.

The appellant, Dicky G. Swing, was charged in Thurston County Superior Court with two counts of child molestation in the first degree. CP 27. Swing was convicted at trial on count one and acquitted on count two. CP 127-128. He was then sentenced to an indeterminate term of confinement of 60 months to life. CP 153-154.

During trial, child victim L.J.L. indicated that Swing was her friend and was at her father's apartment. 1 RP 267-268.<sup>1</sup> She was in the kitchen of her dad's apartment, playing a game on a tablet, while her dad was in the living room. 1 RP 269. Her uncle Carlos, her sister, her brother, and Swing were also present. 1 RP 269. While she was playing "the shark game" on her tablet in the kitchen, her father and uncle were in the living room, and her sister was upstairs. 1 RP 270. Swing came into the kitchen and stood behind her. 1 RP 271. While she played her game, Swing "went more to the side," and "started kissing [her] cheek." 1 RP 272. He then started kissing her neck and touching her. 1 RP 272.

After Swing started kissing her neck, L.J.L. stated, he touched her on her stomach, legs and her boobs. 1 RP 273. She said that she was scared and wanted to tell her dad, but he wasn't in there. 1 RP 274. She described the touching, stating, "he kind of slid down my - - his hands kind of slid down my body." 1 RP 274-275. During this time, his hands moved to the left and right. 1 RP 275. She said that Swing came back a second time, and

---

<sup>1</sup> The verbatim report of proceedings included several volumes. The jury trial and sentencing were contained in three volumes dated February 23, 26, 27, 28, March 1, 2, 27, 2018, reported by Official Court Reporter Aurora Shackell, which were numbered sequentially and will be referred to collectively as 1 RP. Several other preliminary hearings in this matter were also transcribed but are not herein cited to.

indicated, "he kept kissing me on the neck and then started, like, touching my parts on my body." 1 RP 276. She said that he again touched her boobs, her belly and her legs. 1 RP 277. While touching her chest, she described the motions stating, "sometimes it would go to his side. Sometimes it would go straight. Sometimes it would go other sides." 1 RP 278. At some point during the incident, L.J.L. recalled that Swing moved her hair from her face to over her right ear. 1 RP 278-279.

L.J.L. said that the incident, "probably" stopped because her uncle was coming in, and Swing then went into the backyard with her uncle. 1 RP 280. L.J.L. then went upstairs and told her sister what had happened. 1 RP 280-281. She then decided to tell her father, who went and got Swing and asked her to say it again in front of Swing. 1 RP 281-282.

L.J.L. testified that Swing had touched her before that day and had touched her on the legs and boob and then said "sorry." 1 RP 285-286. Swing left, and law enforcement was contacted. 1 RP 290. L.J.L. told the officer about the incident. 1 RP 291.

Prior to jury selection, the trial court held a hearing pursuant to RCW 9A.44.120 and found that L.J.L.'s pretrial statements made to her father and Officer Lever had sufficient indicia of reliability to

be admitted at trial. 1 RP 119-120. During trial, L.J.L.'s father, Richard, testified that he had known Swing for "two and a half, three years." 1 RP 164. Richard indicated that Swing was a friend of the family and had previous interactions with L.J.L. 1 RP 165. Richard indicated that Swing had babysat his youngest son but had not babysat the girls. 1 RP 167, 213. Richard said that Swing "was somebody that L.J.L. was comfortable with," and "they had a good relationship." 1 RP 167.

On the day of the disclosure, Richard, his brother Carl, Swing, and Richard's two daughters were in Richard's apartment. 1 RP 169. While Richard and his brother were in the living room packing boxes, L.J.L. was at the kitchen table playing a game on her tablet. 1 RP 180-181. Richard walked into the kitchen and saw Swing behind L.J.L., standing above her with arm around the chair. 1 RP 181. L.J.L. later spoke with Richard and appeared withdrawn and sad. 1 RP 186.

Richard testified that L.J.L. told him that "Dicky had been kissing her on her and on her neck and then groping her, you know, putting his hand, you know around her breasts and then moving down to her - - her vagina." 1 RP 188. He then rephrased the disclosure, testifying, "She said, 'Daddy it's like Dicky, you know

started - - was kissing me and was kissing me on my neck and then started putting his hand, you know, across my chest and then moved his hand down to' - - I think she actually said that he did touch her vagina." 1 RP 189. While describing what happened, L.J.L. demonstrated "circular motions on each breast and then moving from the left breast down to her stomach, to her lower abdomen, and then down towards her vagina and then rubbing the vagina." 1 RP 189. Richard also indicated that L.J.L. told him that Swing had tried to rub her "down there" a couple weeks prior on the couch. 1 RP 191.

Following the disclosure, Richard went downstairs and confronted Swing, who denied that the conduct had occurred. 1 RP 191-192. Richard then spoke with L.J.L. again and told her that Swing had denied it, and she responded, "No, no. Like, it did happen. Like, he's lying." 1 RP 193. Richard then had Swing come back in and talked to L.J.L. again about what had happened. 1 RP 194. He indicated that he brought L.J.L. down to talk to Swing and she repeated what she had said in front of Swing. 1 RP 198. With Swing standing there, L.J.L. said, "you kissed me on my neck, and you started rubbing me," when Swing denied it, L.J.L., said "Yes, you did. Yes you did." 1 RP 198-199; 199.

Officer Eric Lever of the City of Lacey Police Department responded to the residence. 1 RP 235, 236. Officer Lever spoke with L.J.L. and noted that she was not happy and “came across as a real shy child.” 1 RP 239-240. When Officer Lever asked her what happened, L.J.L. told him that Swing started kissing her neck and she thought it was because he loved her. 1 RP 240-241. While Officer Lever spoke to her about the incident, L.J.L. was crying and looking down. 1 RP 240.

L.J.L. told Officer Lever that while she was playing a game on her tablet, Swing kissed her on the cheek and then her neck, and that he rubbed her breast area. 1 RP 241-242. While describing this, L.J.L. “was using both of her hands, and they were close to where her...chest area is, and she was making circular motions.” 1 RP 241-242. L.J.L. told Officer Lever that Swing demonstrated the circular motion moving her hands down toward her mid-region toward her groin area. 1 RP 242. L.J.L. also described a previous incident saying that “it happened before on the couch.” 1 RP 243.

Swing testified that he used his index finger to move L.J.L.’s hair out of her face, but denied kissing her cheek, kissing her neck, touching or rubbing her chest, touching or rubbing her legs or touching her vaginal area. 1 RP 383. When Richard went back

upstairs to talk to his daughters again, he told Swing, "if I get the same story," "it would be in [his] best interests to leave," and Swing left the residence. 1 RP 206-207. Richard then called the police. 1 RP 207.

This appeal follows Swing's conviction and sentence.

### C. ARGUMENT

1. Sufficient evidence supported Swing's conviction for child molestation in the first degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility

determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

The crime of child molestation in the first degree requires that the state prove that the defendant had sexual contact with a child, the child was less than twelve years old and not married to the defendant, and that the act occurred in the State of Washington. RCW 9A.44.083. Here the child was nine, the defendant was fifty, the child had never been married to Swing, and the apartment where the act occurred was in the State of Washington. 1 RP 168, 237, 247, 264, 284. The only element that Swing makes argument regarding is sexual contact with the child.

Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). In determined whether the element of sexual contact has been proven, a reviewing court must look to the “totality of the facts and circumstances presented.” State v. Harstad, 153 Wn.App. 10, 21,

218 P.3d 624 (2009). “Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference that the touching was for the purpose of sexual gratification.” State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992). In those cases where the touching is through clothing, Washington courts have required some additional evidence of sexual gratification. Id. at 917.

Sexual contact may be made through clothing. In re Welfare of Adams, 124 Wn.App. 517, 519, 601 P.2d 995 (1979); State v. Howe, 151 Wn.App. 338, 346, 212 P.3d 565 (2009). Contact is intimate within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. Id. at 521, State v. Jackson, 145 Wn.App. 814, 819, 187 P.3d 321 (2008). The breast area is a sexual or intimate part of a person. Jackson, 145 Wn.App. at 819. In Harstad, Division I of this Court concluded that rubbing an intimate area above clothing was “sufficient additional proof to establish a sexual purpose.” 153 Wn.App. at 22.

In Powell, the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. 62 Wn.App. at 916. The Court described the touching as “fleeting” and indicated that the evidence of the defendant’s purpose was “equivocal.” Id. at 917-918. Reviewing the facts of this case is a light most favorable to the State, the totality of the circumstances do not support a conclusion that Swing’s purpose was equivocal or susceptible to an innocent explanation. Even when the touching of intimate parts is over clothing, a sexual contact has occurred when the touching is not susceptible of innocent explanation. State v. Harstad, 153 Wn.App. at 22.

L.J.L. stated that Swing used a rubbing motion on her chest, downward over her stomach and to her leg while kissing her on the cheek and neck. 1 RP 273-275. Swing argues that he had a “caretaking” function which would support an innocent explanation; however, his own testimony at trial did not suggest any innocent explanation for the touching, rather he denied that the touching ever occurred. Brief of Appellant at 8; 1 RP 383. Moreover, while there was some testimony from Swing and L.J.L. regarding Swing’s relationship with the children, 1RP 298-299, 367, Richard clearly

testified that Swing did not have a caretaking function of L.J.L. 1 RP 167, 213. Even if this Court accepted that Swing had an arguable caretaking function, there is still no innocent explanation for rubbing a nine-year old's chest, working down toward her leg, while kissing her neck.

Taking the evidence in a light most favorable to the State, there was sufficient evidence presented to support Swing's conviction for child molestation in the first degree. The touch described by L.J.L. was neither fleeting nor inadvertent and even Swing did not offer an innocent explanation for an accidental touching. The record is not susceptible to innocent explanation.

2. The State concedes that Condition (15) of the community custody conditions ordered in the judgment and sentence does not comply with recent caselaw, however, the State agrees that this Court should stay consideration of the issue pending the State Supreme Court's decision in State v. Wallmuller.

Condition (15) of Appendix H of the judgment and sentence in this case states that Swing shall, "Not frequent or loiter in areas where children congregate" while on community custody. CP 175. Almost identical language has been found to be unconstitutionally vague. State v. Irwin, 191 Wn.App. 644, 655, 364 P.3d 830 (2015) (Without some clarifying language or an illustrative list of prohibited

locations, the condition does not give ordinary people sufficient notice to understand what conduct is proscribed).

Division III of this Court addressed a similar community custody condition in State v. Johnson, 4 Wn.App.2d 352, 421 P.3d 969 (2018). The Court specifically found that a condition to “avoid places where children congregate,” which included an illustrative list, provided “sufficient notice to allow for compliance,” and “comports with constitutional protections.” Id. at 356, 361. This Division of this Court disagreed in State v. Wallmuller, 4 Wn.App. 698, 704, 423 P.3d 282 (2018), *review granted*, 192 Wn.2d 1009, 432 P.3d 794 (2019). In Wallmuller, this Court held that the phrase, “places where children congregate” is inherently vague and favorably indicated that a condition stating, “The defendant shall not loiter in nor frequent parks, video arcades, campgrounds, and shopping malls would not be unconstitutionally vague.” Id. at 703-704.

The condition at issue here did not include an illustrative list, therefore, the State concedes that it does not comply with Irwin, Johnson, or Wallmuller. As noted above, however, the State Supreme Court accepted review of the issue in Walmuller. Oral argument occurred in that matter on May 14, 2019. Supreme Court

Docket, Spring 2019, [www.courts.wa.gov/appellate\\_trial\\_courts/supreme/calendar/?fa=atc\\_supreme\\_calendar.display&year=2019&file=docspr19#A5](http://www.courts.wa.gov/appellate_trial_courts/supreme/calendar/?fa=atc_supreme_calendar.display&year=2019&file=docspr19#A5). As this issue has been recurring since the decision of State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), *abrogated by*, State v. Sanchez Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), the State agrees with Swing's suggestion that staying the decision on this issue would be appropriate until the Supreme Court rules on the issue and hopefully provides guidance as to acceptable language.

#### D. CONCLUSION.

Sufficient evidence supports the jury's finding that Swing committed child molestation in the first degree. Condition (15) of the conditions of community custody is unconstitutionally vague, but this Court should stay consideration of the issue until such time as the State Supreme Court decides the issue, which may be instructive for this Court and the parties. The State respectfully requests that this Court affirm Swing's conviction, stay consideration of the community custody issue, and ultimately remand that issue with direction to comply with whatever direction may be provided by the State Supreme Court in State v. Walmuller.

Respectfully submitted this 6 day of June, 2019.

JON TUNHEIM  
Thurston County Prosecuting Attorney



---

Joseph J.A. Jackson, WSBA# 37306  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT on the date below as follows:

ELECTRONICALLY FILED AT DIVISION II

TO: DEREK M. BYRNE, CLERK  
COURT OF APPEALS, DIV II  
950 BROADWAY, SUITE 300  
TACOMA WA 98402-4454

**VIA E-MAIL**

TO: LISE ELLNER  
PO BOX 2711  
VASHON WA 98070

LISEELLNERLAW@COMCAST.NET

SPENCER BABBITT  
P O BOX 2711  
VASHON WA 98070

BABBITTS@SEATTLEU.EDU

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6<sup>th</sup> day of JUNE, 2019, at Olympia, Washington.

  
CYNTHIA WRIGHT, PARALEGAL

**THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE**

**June 06, 2019 - 9:14 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51592-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Dicky Swing, Appellant  
**Superior Court Case Number:** 17-1-01320-3

**The following documents have been uploaded:**

- 515920\_Briefs\_20190606091405D2762369\_6020.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was SWING BRIEF OF RESPONDENT.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- babbitts@seattleu.edu
- valerie.liseellner@gmail.com

**Comments:**

---

Sender Name: Cynthia Wright - Email: wrightc@co.thurston.wa.us

**Filing on Behalf of:** Joseph James Anthony Jackson - Email: jacksoj@co.thurston.wa.us (Alternate Email: PAOAppeals@co.thurston.wa.us)

Address:  
2000 Lakedrige Dr SW  
Olympia, WA, 98502  
Phone: (360) 786-5540

**Note: The Filing Id is 20190606091405D2762369**