

FILED
January 24, 2013
Court of Appeals
Division III
State of Washington

No. 311295

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CODY BRIAN BEEKS, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

OPENING BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Spokane, WA 99228
509.939.3038

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I. ASSIGNMENT OF ERROR

- A. The Evidence Was Insufficient To Sustain A Conviction For Fourth-Degree Assault.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Was the evidence sufficient to sustain a conviction for fourth-degree assault where the facts did not support the element of unlawful touching?

II. STATEMENT OF FACTS

Cody Beeks and his girlfriend, Cassie Robinson, hired fifteen-year-old M.R.A. to babysit their son for the evening of August 28, 2011. RP 19,22. They were close family friends and she regularly babysat for them. RP 22,23.

As a regular routine, M.R.A. would arrive in the evening to babysit, and spend the night on the couch with a blanket. RP 23, 31. Ms. Robinson would usually wake her and tell them they were home. RP 28. Her mother would pick her up, generally around 7 a.m. the next morning. RP 23-24.

That night, she was sleeping on the couch when they arrived home about 3 a.m. RP 27. M.R.A. heard Ms. Robinson go into the bathroom, and heard Mr. Beeks go into the kitchen and fix himself something to eat. RP 29.

She later testified that as she lay dozing on the couch, Mr. Beeks put his hand on her mid-thigh. RP 32. She testified he then lifted the blanket and touched her leg again and ran his hand up “near my butt.” RP 32. She said she kept her eyes closed and rolled over. RP 33. She said he then placed his hand on her chest, but did not touch her breasts. RP 33,51. She did not see him, hear him breathing, or smell his breath; she estimated he was about a foot away. RP42. She stirred and he sat back and then moved to the other side of the couch and played with his telephone. RP 34. A couple of minutes later, he got up and went into the bedroom. RP 35. Very upset, M.R.A. called her mother to come and get her around 4 a.m. RP 37. Her parents called the police to report the incident. RP 38.

Mr. Beeks’ statement to the investigating officer and trial testimony differed from M.R.A. Mr. Beeks testified he and Ms. Robinson arrived home sometime after 3 a.m. Ms. Robinson had had too much to drink and went directly into the bathroom and to bed. Mr. Beeks got a bottle of water from the kitchen and took it to her. He also prepared a bowl of soup for himself. RP 70-71;93. He sat on the couch and text messaged a friend. RP 71;93. Within a few minutes, he leaned over, gently shook M.R.A. with his hand

on her hip a couple of times and said, "...we're home." RP 71-72;94-95;99. The he then went to bed.

At the end of the State's case in chief, the court denied the defense motion to dismiss both charges against Mr. Beeks: child molestation in the third degree, and fourth degree assault with sexual motivation. RP 84-85; 89.

During deliberations, the jury sent one question to the court: "May we have clarification of Instruction No. 9 especially with regard to the phrase, 'unduly sensitive.'" RP 165. With agreement from counsel, the court sent back a note: "The court cannot clarify this instruction any further." RP 166.

The jury returned a verdict of *not guilty* of child molestation in the third degree; *guilty* of assault in the fourth degree; *not guilty* of the crime of assault in the fourth degree with sexual motivation. RP 169; CP 84-86. Mr. Beeks was sentenced to 364 days of jail, with 274 days suspended for two years and a fine of \$5,000 suspended. CP 87. This appeal follows. CP 91.

III. ARGUMENT

The Evidence Was Insufficient To Sustain A Conviction For Fourth-Degree Assault.

Due process requires the State to prove each element of the charged offense beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333,337, 96 P.3d 974 (2004). When a conviction is based on insufficient evidence, a criminal defendant's right to due process is violated. U.S. Const. amend. XIV; Const.art.1,§3; *State v. Baeza*, 100 Wn.2d 487,488, 670 P.2d 646 (1983).

In a challenge to the sufficiency of the evidence, the reviewing court views the evidence in a light most favorable to the prosecution and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences are drawn in the State's favor and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). If the reviewing court finds insufficient evidence as to an element, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Dismissal is the proper remedy following a reversal for insufficient evidence. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

To convict Mr. Beeks of fourth-degree assault, the State was required to prove that he assaulted M.R.A. The term assault is not

statutorily defined, so Washington courts apply the common law definition: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006)(internal citations omitted). In this case, the definition of assault that applies is an unlawful touching with criminal intent. Under Washington law, a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive.’ ” *State v. Thomas*, 98 Wn.App. 422, 424, 989 P.2d 612 (1999) (quoting *State v. Garcia*, 20 Wn.App. 401, 403, 579 P.2d 1034 (1978).

Jury Instruction 9, taken directly from WPIC 35.50, was given at trial as follows:

“An assault is an intentional touching of another person that is harmful or offensive regardless of whether any physical injury is done to the person. A touching is offensive if it would offend an ordinary person who is not unduly sensitive.”

CP 78.

The definition of “offensive”, adapted from § 19 of the Restatement (Second) of Torts states, “A bodily contact is offensive if it offends a reasonable sense of personal dignity.” “Comment (a) to §19 states:

In order that a contact be offensive to a reasonable sense of personal dignity, it must be one which would offend the ordinary person and as such one not unduly sensitive as to his personal dignity. It must, therefore, be a contact which is unwarranted by the social usages prevalent at the time and place at which it is inflicted.”
Washington Practice Series, Comments WPIC 35.50.

Mr. Beeks makes two arguments: First, the act of touching M.R.A. was not done with criminal intent; and second, the gentle shake was not a contact that would be offensive to an ordinary person who is not unduly sensitive

The jury in this case found Mr. Beeks’ credible: the act of touching M.R.A. to wake her was not a sexual touch. There was no criminal intent. The question then is limited to whether the contact would be offensive to a reasonable sense of personal dignity, unwarranted by ‘the social usages prevalent at the time and place at which it is inflicted.’

The evidence presented by the State was insufficient for the jury to conclude Mr. Beeks’ did anything more nefarious than gently

shake M.R.A. to wake her and alert her they were home.

According to M.R.A.'s testimony and the testimony of Mr. Beeks, on previous occasions Ms. Robinson usually woke M.R.A. to notify her they were home. RP 28; 94. A physical touch to wake her was not 'unwarranted by the social usages prevalent at the time and place' nor something that a reasonable person in that situation would find offensive.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Beeks respectfully asks this Court to reverse his conviction and dismiss for insufficient evidence.

Respectfully submitted this 24th day of January.

s/Marie J. Trombley
WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
Fax: 253-268-0477
marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant CODY BEEKS, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid on January 24, 2013 to: Cody Brian Beeks, PO Box 442, Lyle, WA 98635; and by email per agreement between the parties to: Jessica M. Foltz, Klickitat County Prosecutor's Office, jessicaf@co.klickitat.wa.us

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s/Marie J. Trombley
WSBA 41410
PO Box 829
Graham, WA 98338
509-939-3038
Fax: 253-268-0477
marietrombley@comcast.net