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Division III
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No. 37106-9-III

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

STATE OF WASHINGTON, Respondent

v.

JUAN ACEVEDO-GIRON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY
THE HONORABLE JUDGE GAYLE M. HARTHCOCK

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR 1

II. STATEMENT OF FACTS 1

III. ARGUMENT..... 4

A. The Child Molestation Conviction In Count 4 Must Be Dismissed
Because The State Did Not Prove Sexual Contact Beyond A Reasonable
Doubt..... 4

B. The Child Molestation Conviction In Count 5 Must Be Dismissed
Because The State Did Not Prove The Essential Elements Of The Crime. 6

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Washington Cases

Matter of Welfare of Adams, 24 Wn. App. 517, 601 P.2d 995 (1979) 7
State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) 8, 9
State v. Carter, 5 Wn. App. 802, 490 P.2d 1346 (1976) 6
State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 4
State v. Harstad, 153 Wn. App. 10, 218 P.3d 624 (2009)..... 7, 9
State v. Jackson, 145 Wn. App. 814, 187 P.3d 321 (2008) 7
State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982) 8, 9
State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015)..... 4
State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991) 7, 8, 9
State v. Rich, 184 Wn.2d 897, 365 P.3d 746 (2016)..... 4
State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005) 6
State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006) 5
State v. Zamora, 6 Wn. App. 130, 491 P.2d 1342 (1971) 6

Constitutional Provisions

U.S. Const. Amend. VI 4
U.S. Const. Amend. XIV 4
Wash. Const. art. I, § 22 4
Wash. Const. art. I, § 3 4

Washington Statutes

RCW 9.94A.535(3)(g) 2
RCW 9A.44.010(2) 5, 6
RCW 9A.44.083(1) 5

I. ASSIGNMENT OF ERROR

- A. The evidence was insufficient to sustain a conviction for child molestation in the first degree as charged in Count 4.

LEGAL ISSUE: Was the evidence insufficient to sustain a conviction for child molestation in the first degree as charged in Count 4?

- B. The evidence was insufficient to sustain a conviction for child molestation in the first degree as charged in Count 5.

LEGAL ISSUE: Was the evidence insufficient to sustain a conviction for child molestation in the first degree as charged in Count 5?

II. STATEMENT OF FACTS

Yakima County prosecutors charged Juan Acevedo Giron by Fourth Amended Information: Count 1: Attempted indecent liberties for an alleged event on February 9, 2017; Count 2: Second degree assault-sexual motivation for an alleged event of February 9, 2017; Count 3: Felony harassment of another- threat to kill - sexual motivation for an alleged event February 9, 2017; Count 4: First degree child molestation for an alleged event August 17, 2012; Count 5: First degree child molestation for an alleged event between October 1, 2013 and December 31, 2013;

Count 6: First degree rape of a child for an event alleged between October 1, 2013 and December 31, 2013.

Each charge included an aggravating factor of an ongoing pattern of sexual abuse of the same victim under the age of eighteen manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g).

Mr. Acevedo was in an on and off relationship with N.C¹, the mother of D.S. RP 289; 291. When N.C. was in the hospital, eight-year-old D.S. and her siblings stayed with Mr. Acevedo at his sister's home. RP 239. She reported that she woke up in the night as Mr. Acevedo carried her downstairs. RP 239. He asked if she wanted to sleep next to her brothers (on the floor) or next to her sister. She opted to sleep next to her sister and Mr. Acevedo slept on her other side. RP 239.

She testified he told her to "choose a spot" for him and he would only touch that spot. She said "he was trying to touch my private area. I told him no." RP 239. She asked if she picked a spot would he do it again, to which he said no. She said, "I said okay. I told him – he told me, you can grab the back of me. So, I did. He tried kissing on me. I said, no." RP 240.

¹ This brief will use the initials of the mother of D.S., a minor child.

At a different point while N.C. was in jail, D.S. and her siblings stayed with Mr. Acevedo at his sister's home. RP 241. Although she could not remember how old she was or what grade she was in at the time, D.S. testified she asked Mr. Acevedo if she could have a package of breath mints. He agreed and she climbed up on a shelf to get them. RP 240. When she was on the shelf, she felt him grab her "butt". She turned around quickly. RP 240. He told her to get something for him from the car. RP 240. She climbed down and retrieved the item for him. RP 240-41.

D.S. reported these alleged incidents to a school counselor and the police. RP 243, 319. The prosecutor's office declined to pursue charges at that time. RP 323-24, 327.

After a jury trial, Mr. Acevedo was found guilty of two counts of child molestation first degree, and one count of felony harassment with sexual motivation. CP 178-79. The jury found the charged aggravators, but the court did not impose an exceptional sentence. CP 179-80. The court declared a mistrial on the remaining three counts. CP 180. Mr. Acevedo makes this timely appeal. CP 192.

III. ARGUMENT

A. The Child Molestation Conviction In Count 4 Must Be Dismissed Because The State Did Not Prove Sexual Contact Beyond A Reasonable Doubt.

To convict Mr. Acevedo of child molestation in the first degree, the State had to prove beyond a reasonable doubt he had contact with an intimate part of D.S.'s body for the purpose of sexual gratification. D.S. never testified such contact occurred. Mr. Acevedo's conviction should be dismissed with prejudice.

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015); U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 3, 22. A conviction may only be affirmed if, after the viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Whether the State presented sufficient evidence to support a conviction is a question of constitutional law reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

To convict Mr. Acevedo of child molestation in the first degree, the State had to prove beyond a reasonable doubt that (1) on August 17, 2012, Mr. Acevedo had sexual contact with D.S. (2) D.S. was less than twelve years old at the time and not married to the defendant and (3) that D.S. was at least thirty-six months younger than the defendant, and (4) this act occurred in the State of Washington. RCW 9A.44.083(1); CP 92.

‘Sexual contact’ means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party or a third party.” RCW 9A.44.010(2). The State was therefore, required to prove that Mr. Acevedo touched D.S.’s sexual or intimate parts for the purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

Here, D.S. was specifically asked, “Can you tell us where he touched you?” RP 240. She testified he *tried* putting his hand down the front of her pants, and she told him “no”. He told her to “pick a spot.” RP 240. She asked if she picked a spot, would he do it again. “He said no. He said he wouldn’t. I said okay. I told him – he told me, you can grab the back of me. So, I did.” RP 240.

To support a determination of the existence of a fact, the evidence must be substantial; it must be substantial enough it would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence

is directed. *State v. Zamora*, 6 Wn. App. 130, 132, 491 P.2d 1342 (1971). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn. App. 802, 490 P.2d 1346 (1976). Whether there is substantial evidence is a question of law for this Court. *Zamora*, 6 Wn. App. at 132-33.

D.S.'s testimony is void of any description of what actually occurred that amounted to completed sexual contact. The evidence here is not substantial; rather, it rests on guess, speculation and conjecture. Because the State failed to present sufficient evidence for the jury to convict Mr. Acevedo of first degree molestation, this Court must reverse the conviction. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

B. The Child Molestation Conviction In Count 5 Must Be Dismissed Because The State Did Not Prove The Essential Elements Of The Crime.

The child molestation statute requires (1) "*touching of the sexual or other intimate parts* of a person (2) *done for the purpose of gratifying the sexual desire of either party or a third party.*" RCW 9A.44.010(2)(italics added). Which anatomical areas, besides genitalia and breast, are "intimate" is a question for the trier of fact. *State v.*

Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008); *Matter of Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979).

A reviewing Court looks to the totality of the facts and the circumstances presented to determine whether the sexual contact element has been satisfied. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Where an unrelated adult with no caretaking function has touched the intimate parts of a child, there is an inference the touching was for the purpose of sexual gratification. However, in the circumstance where “the evidence shows touching through clothing or touching of intimate parts of the body other than the primary erogenous areas...*some additional evidence of sexual gratification*” is required. *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991) (italics added).

Here, the facts underlying the second charge of child molestation was D.S.’s testimony that Mr. Acevedo grabbed her “butt” after she climbed up on a shelf. It can be reasonably concluded that she was clothed because she climbed down from the shelf and went outside. Assuming the buttocks is an intimate area, under *Powell*, some additional evidence of sexual gratification must be shown.

For example, in *Harstad*, the defendant argued the State did not prove the victims’ upper inner thighs were intimate parts or that his touching was done for the purpose of sexual gratification. *Id.* at 21. The

Court found the circumstances supported the conviction. The touching occurred at night when everyone slept, the defendant touched and rubbed the child's inner thighs, and while he moved his hand he was breathing heavily. The evidence was sufficient to conclude he touched an intimate part of her body. A reasonable jury could infer the touching was incidental to another activity intended to promote sexual gratification. *Id.* at 22.

The additional evidence necessary to find the activity was intended to promote sexual gratification was found in *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (defendant rubbed zipper area of child's pants for 5 to 10 minutes) and *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982) (unrelated male wiped child's genitals and evidence was sufficient to show it was for purpose of sexual gratification because he then had her perform fellatio on him).

By contrast, in *Powell*, the defendant hugged a child around the chest, and touched her groin over her underwear while helping her off his lap, and touched her thighs helping her out of the car. *Powell*, 62 Wn. App. at 916. The Court concluded the fleeting touches were outside the child's clothing, and susceptible to an innocent explanation, and evidence of the defendant's purpose was equivocal. *Id.* at 917-18.

Here, the evidence shows that a clothed D.S. felt Mr. Acevedo grab her butt. By her report, she turned quickly, and he told her to get a

pipe out of his car. The over the clothing touch was clearly fleeting. In contrast to *Harstad*, *Camarillo*, and *Johnson*, there was no further evidence by which a rational trier of fact could infer it was done for the purpose of sexual gratification beyond a reasonable doubt.

This matter must be decided as the Court ruled in *Powell*, and the conviction reversed and dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Acevedo respectfully asks this Court to reverse and dismiss the child molestation convictions, and remand to the trial court for a correct judgment and sentence.

Respectfully submitted this 17th day of April 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on April 17, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Yakima County Prosecuting Attorney at appeals@co.yakima.wa.us and to Juan Acevedo-Giron, Yakima County Department of Corrections/#17J-03621, 111 N Front Street, Yakima, WA 98901.



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