

FILED
Feb 17, 2016
Court of Appeals
Division III
State of Washington

S. Ct. No.
COA No. 32862-7-III

92818-5

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CYNTHIA LOU MICHEL,

Petitioner.

FILED
FEB 26 2016
WASHINGTON STATE
SUPREME COURT

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUE PRESENTED FOR REVIEW.....1

 1. Was the State’s evidence insufficient to support
 the convictions for fourth degree assault and first
 degree child molestation?.....1

D. STATEMENT OF THE CASE.....1

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....4

F. CONCLUSION.....8

Table of Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068,
25 L. Ed.2d 368 (1970).....8

State v. Carver, 113 Wn.2d 591, 781 P.2d 1308 (1989).....5

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010).....4

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....4, 6

State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972).....5

State v. Jarvis, 160 Wn. App. 111, 246 P.3d 1280,
review denied, 171 Wn.2d 1029 (2011).....7

State v. Tyler, 138 Wn. App. 120, 155 P.3d 1002 (2007).....7

Statute

RCW 9A.44.010(2).....6

Rules

RAP 13.4(b)(1).....4, 8
RAP 13.4(b)(2).....4, 8
RAP 13.4(b)(3).....4, 8

A. IDENTITY OF PETITIONER

Petitioner Cynthia Lou Michel asks this Court to accept review of the Court of Appeals' decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished decision of the Court of Appeals, filed on December 17, 2015. A copy of the decision is in the Appendix at pages A-1 through A-8.

C. ISSUE PRESENTED FOR REVIEW

1. Was the State's evidence insufficient to support the convictions for fourth degree assault and first degree child molestation?

D. STATEMENT OF THE CASE

Cynthia Lou Michel was charged by information with count 1: first degree child molestation of DM and count 2: first degree child molestation of HM. (CP 1). The case proceeded to jury trial. During the trial, the information was amended to charge fourth degree assault of DM in count 1, while count 2 remained the same with an aggravator of abuse of a position of trust. (8/22/14 RP 194).

Ms. Michel, the paternal grandmother of DM and HM, had

taken care of them for the past 12 years of their lives. (8/22/14 RP 299-300). DM, born 12/17/2000, testified she had been touched by her in a way she did not like. (8/21/14 RP 133-34). As DM was hitting puberty, Ms. Michel touched her breasts. (*Id.* at 134-35). She was around 11 years old. (*Id.* at 136). DM felt uncomfortable. (*Id.* at 135).

HM, born 5/16/2002, said Ms. Michel touched her where she did not like. (8/21/14 RP 93). More than once, her grandmother touched her private parts, *i.e.*, vagina, with her hand, rubbing both on top of her clothes and underneath. (*Id.* at 94). Ms. Michel rubbed outside HM's vagina. (*Id.* at 95). It happened in the living room and the bedroom. (*Id.* at 96, 102). HM told her to stop and said I love you, but not like that. (*Id.* at 96). She said DM knew what was going on. (*Id.*).

HM did not remember the last time it happened. (8/21/14 RP 98). She did not remember how old she was when Ms. Michel touched her private parts. (*Id.* at 108). HM also saw Ms. Michel rub DM's breasts underneath her pajamas. (*Id.* at 98-99). DM was going through puberty and had told her grandmother. (*Id.* at 101).

HM was recalled by the State in its case in chief. Realizing it had not presented any evidence as to when Ms. Michel had

allegedly touched HM's vagina, the State then elicited testimony from HM that she had thought real hard about when it happened and was able to recall the incidents took place when she was 10 or 11. (8/22/14 RP 261-63).

Ms. Michel, born 11/24/51, testified she never hurt DM and HM and never touched them sexually. (8/22/14 RP 302). She did not touch DM's breasts, but DM did show her the inverted nipple on her left breast because she was concerned and frightened by it. (*Id.* at 304). Ms. Michel never touched HM's vagina for sexual purposes. (*Id.* at 313).

Dr. Phillip Esplin, a psychologist, testified that derogatory comments about Ms. Michel were made concerning her relationship with her son and her being a victim of sexual abuse by her father. (8/22/14 RP 291). Dr. Esplin said this could lead to negative stereotyping of the accused. (*Id.* at 292).

No exceptions were taken by the defense to the court's instructions to the jury. (8/22/14 RP 321). Ms. Michel was found guilty as charged. (8/25/14 RP 384-89). The court imposed a standard range sentence of 51 months for first degree child molestation and 180 days for the fourth degree assault

misdemeanor. (10/28/14 RP 116). Imposition of sentence was stayed pending her appeal.

The convictions were affirmed by the Court of Appeals in an unpublished decision filed December 17, 2015. Her motion for reconsideration was denied on January 21, 2016.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This case should be accepted for review under RAP 13.4(b)(1) and (2) because the decision of the Court of Appeals conflicts with decisions of the Supreme Court and the Court of Appeals. Moreover, a significant question of constitutional law is involved, thus warranting review under RAP 13.4(b)(3).

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 25, 225 P.3d 237 (2010).

Despite Ms. Michel's recognition of these well-established principles, the Court of Appeals opinion viewed Ms. Michel's challenge as urging the court to reweigh the evidence and make

credibility determinations. But she did not ask the court to do what it cannot. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989). Very few cases prevail on a claim of insufficiency of the evidence, but this is that case.

The State's evidence did not prove beyond a reasonable doubt the elements of the crimes. Questions of credibility are determined by the trier of fact, but the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). With the dearth of State's evidence, the jury had to resort to speculation and conjecture to find the elements of the crimes beyond a reasonable doubt.

Particularly telling is the State's decision to amend the first degree child molestation charge involving the touching of DM's breasts to a fourth degree assault. The State realized it did not have enough evidence to prove the molestation charge. By the same token, the State did not have enough evidence to prove the molestation charge involving HM. Indeed, she could not remember when the alleged molestation occurred. (8/21/14 RP 98, 108, 116).

The testimony of DM and HM was unspecific as to time and circumstance of the alleged offensive or sexual touching. The State had not established the requisite time frame for the first

degree child molestation charge as to HM in her initial testimony. (8/22/14 RP 196). But for a defense motion that alerted the prosecution of this deficiency before it had rested, the State would not have proved that essential element of the crime for lack of evidence. Only upon recalling HM the next day did she testify about a time frame. As the record shows, HM then testified as to when the touching took place, but only after some prompting by the deputy prosecutor who had told her “to think as hard as possible to remember.” (8/21/14 RP 166; 8/24/14 RP 196, 267-68). Even viewed in a light most favorable to the State, the evidence fell far short of proving beyond a reasonable doubt the date element for proving first degree child molestation. *Green, supra*.

Moreover, HM testified there was nothing sexual about the touching. (8/21/14 RP 115, 118). This is not proof of the “sexual contact” element of the crime as any touching was not done of the the purpose of gratifying sexual desire of either party. RCW 9A.44.010(2). Nor can there be an inference to the contrary as there is no evidence supporting it. The State also failed to prove this essential element of the offense beyond a reasonable doubt. *Green, supra*. Yet, the Court of Appeals found it did.

As for the fourth degree assault of DM, the State had to

prove an intentional touching of another person that is harmful or offensive, regardless of whether physical injury results. *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007). In the Court of Appeals opinion, the evidence cited to support guilt on this charge could just as well have established some degree of child molestation using the same flawed reasoning as its rationale for affirming the first degree child molestation conviction of HM. Indeed, the original charge involving DM was also first degree child molestation. (CP 1). The State realized it could not prove that charge and amended it to fourth degree assault. But the State still failed to prove an offensive touching and failed to prove intent. *State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280, *review denied*, 171 Wn.2d 1029 (2011).


After trial, the untoward and baiting comments by the deputy prosecutor to the able trial judge concerning the sentence he imposed and his permitting Ms. Michel to stay out of jail pending appeal speaks volumes as to the propriety of the convictions. (See 10/28/14 RP 116-18, 130-32). They were obtained through the very nature of the charges, not the evidence. The Court of Appeals decision upholding the convictions conflicts with longstanding jurisprudence governing sufficiency challenges and relieves the

State of its constitutional burden to prove every element of the offenses. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). This court should accept review under RAP 13.4(b)(1), (b)2, and (b)(3).

F. CONCLUSION

Based on the foregoing facts and authorities, Ms. Michel respectfully urges this Court to grant her petition for review and reverse the convictions.

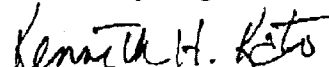
DATED this 17th day of February, 2016.



Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on February 17, 2016, I served a copy of the petition for review by USPS on Cynthia Michel, 936 S. Division, # 15, Moses Lake, WA 98837-2143; and by email, as agreed by counsel, on Katharine Mathews at kburns@grantcountywa.gov.



APPENDIX

FILED
Dec. 17, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,)	
)	No. 32862-7-III
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
CYNTHIA LOU MICHEL,)	
)	
Appellant.)	

LAWRENCE-BERREY, J. — Cynthia Michel appeals her convictions for fourth degree assault and aggravated first degree child molestation. She contends insufficient evidence supports these convictions. We affirm.

FACTS

Ms. Michel is the paternal grandmother of D.M., born December 17, 2000, and H.M., born May 16, 2002. Because D.M. and H.M.'s mother trusted Ms. Michel, the sisters have regularly and frequently visited Ms. Michel throughout their lives. However, the girls' maternal grandmother, Laurie Reese, did not trust Ms. Michel. In the past, Ms. Reese and Ms. Michel engaged in heated discussions over the ways in which Ms. Michel touched the girls. Specifically, Ms. Reese observed Ms. Michel inappropriately rubbing

the girls' bottoms, kissing them on the lips, and making the girls kiss her. Ms. Reese told Ms. Michel "a grandmother is not supposed to kiss their grandchildren like that." Report of Proceedings (RP) at 70. D.M. and H.M. first disclosed Ms. Michel's unwanted behavior to Ms. Reese.

According to D.M., Ms. Michel touched her bare breast and nipple while they were in Ms. Michel's bedroom. Despite the fact that the then 11-year-old D.M. did not ask Ms. Michel to touch her or for help, Ms. Michel told D.M. to lift her top, come over, and let her feel. D.M. stated Ms. Michel "kind of like felt around and she said that I was growing breasts. And it wasn't hard, it was kind of softly. But it was uncomfortable." RP at 135. D.M. contrasted how she felt during this incident to others before where she asked for Ms. Michel to help her with her bra, stating she was not uncomfortable previously because she had asked for help. H.M., around 10 years old at the time, witnessed Ms. Michel's actions. She said when D.M. asked Ms. Michel to stop, she stopped.

H.M. also experienced unwanted touching. According to her, Ms. Michel used her hand to rub the outside of H.M.'s vagina, both on top of H.M.'s clothing and underneath her underwear. This happened in the living room and Ms. Michel's bedroom; H.M. said she was sitting on Ms. Michel's lap when the touching occurred. When H.M. told Ms.

Michel to stop, Ms. Michel “would guilt trip [H.M.] and say, what, you don’t love me?” RP at 96. H.M. responded, “Yes, grandma, I love you, I just don’t like that.” *Id.*

Both D.M. and H.M. also related incidents of unwanted kissing where Ms. Michel would stick her tongue in their mouths. Each time it happened, D.M. pulled back and said “ew.” RP at 136. When D.M. asked her to stop, Ms. Michel asked “what, you don’t love me?”; D.M. replied “yes, grandma, I love you, but I mean I don’t want to do this thing with you, it’s gross.” RP at 137. H.M. echoed D.M.’s complaints. Each of the three times it happened, H.M. told Ms. Michel to stop as the kissing made her feel uncomfortable. Ms. Michel also asked H.M. whether H.M. loved her anymore.

The State charged Ms. Michel with two counts of first degree child molestation but at the close of its case in chief amended the information to one count of fourth degree assault against D.M. and one count of first degree child molestation against H.M. with an aggravator of abuse of a position of trust. At trial, Ms. Michel denied sexually touching either D.M. or H.M. Ms. Michel’s expert, Dr. Phillip Esplin, a psychologist, testified the girls’ father had told H.M. Ms. Michel abused him; according to Dr. Esplin, this could lead to negative stereotyping of the accused, which could in turn adversely affect the child’s motivation to make the statements and the reliability of the statements. The jury found Ms. Michel guilty as charged. Ms. Michel appealed.

ANALYSIS

Ms. Michel contends her convictions must be reversed because there was insufficient evidence of any actual touching of D.M.'s breast or H.M.'s vagina. Evidence is sufficient to support a guilty finding if ““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.”” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). An evidence sufficiency challenge “admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We defer to the jury’s assessment of conflicting testimony, witness credibility, and evidence weight. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

A. FOURTH DEGREE ASSAULT

“Assault is an intentional touching or striking of another person that is harmful or offensive, regardless of whether it results in physical injury.” *State v. Tyler*, 138 Wn. App. 120, 130, 155 P.3d 1002 (2007). Ms. Michel argues the jury impermissibly based the existence of facts, namely that she touched the girls inappropriately, on guess, speculation, or conjecture. *See State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

Ms. Michel ignores the evidence establishing she touched D.M.'s breast and inappropriately kissed D.M. Both D.M. and H.M. testified Ms. Michel touched D.M.'s breast. The fact that Dr. Esplin's testimony provided an explanation as to why the girls were not credible does not negate the girls' testimony. At that point, there were two competing versions of what happened to the girls; the jury obviously believed the testimony of D.M. and H.M. We do not review witness credibility or reassess the weight of evidence. The testimony of D.M. shows two offensive "touchings": the touching of her bare breast/nipple and kissing involving tongue. D.M. found these touches offensive, and an ordinary person not unduly sensitive would too. *See* 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (3d ed.) (2008). The testimony also shows sufficient evidence of intent. Ms. Michel asked D.M. to come to her so she could feel D.M.'s breast; D.M. expressed her discomfort with the kissing and asked D.M. if she loved her when D.M. asked her to stop. It is thus reasonable to infer Ms. Michel intended to make physical contact with D.M. on both occasions. *See State v. Jarvis*, 160 Wn. App. 111, 119, 246 P.3d 1280 (2011) (the intent required for assault is the intent to make physical contact with the victim).

B. FIRST DEGREE CHILD MOLESTATION

"A person is guilty of child molestation in the first degree when the person has . . . sexual contact with another who is less than twelve years old and not married to the

perpetrator and the perpetrator is at least thirty-six months older than the victim.”

RCW 9A.44.083(1). Only the sexual contact element is at issue here as Ms. Michel again contends the jury impermissibly speculated as to whether she touched H.M.’s vagina.¹

“Sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2).

“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.”

State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (internal quotation marks omitted). While proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification, the fact finder can consider circumstantial evidence surrounding the touching if the adult has a caretaking function. *State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224 (1989).

Again, the jury believed H.M.’s testimony over that of Ms. Michel and Dr. Esplin. H.M.’s testimony provides sufficient evidence for Ms. Michel’s conviction. H.M. testified Ms. Michel used her hand to rub H.M.’s vagina both over and underneath her

¹ Because Ms. Michel does not argue sufficiency of the evidence for the aggravating circumstance that she abused a position of trust, the State’s argument on this point is not addressed.

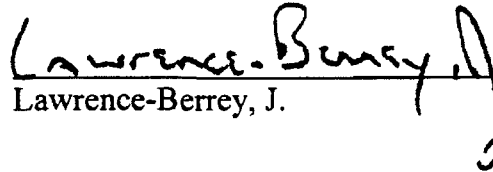
clothes. This happened in both the living room and Ms. Michel's bedroom. When H.M. asked Ms. Michel to stop, Ms. Michel would ask "what, you don't love me?" RP at 96. A person of common intelligence could fairly be expected to know touching a 10-year-old's vagina was intimate and thus improper. Given the rooms where the touching occurred, how Ms. Michel actually went about touching H.M., and Ms. Michel's response to H.M.'s request to stop the touching, a rational person could infer, beyond a reasonable doubt, the sexual contact was done for the purpose of sexual gratification.

A similar analysis follows for the unwanted kissing. According to H.M., Ms. Michel kissed her using her tongue three times. When H.M. told her to stop because she did not like it, Ms. Michel again responded with "you don't love me anymore?" RP at 104. Given the circumstances—including H.M.'s objection to the kissing, Ms. Michel's response to H.M.'s request she stop kissing her with her tongue, and Ms. Reese's observations and discussions with Ms. Michel about how she kissed the girls—a jury could reasonably infer kissing with tongues constitutes contact with intimate parts for purposes of sexual gratification. *See State v. Allen*, 57 Wn. App. 134, 787 P.2d 566 (1990) (evidence of kissing sufficient to prove sexual contact under indecent liberties statute).

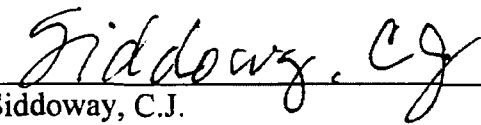
No. 32862-7-III
State v. Michel

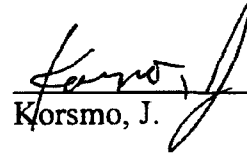
Affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.


Lawrence-Berrey, J.

WE CONCUR:


Siddoway, C.J.


Korsmo, J.