

NO. 92818-5
Court of Appeals No. 32862-7-III

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CYNTHIA LOU MICHEL, PETITIONER

STATE'S RESPONSE TO PETITION FOR DISCRETIONARY REVIEW

GARTH DANO
Grant County Prosecuting Attorney

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I. IDENTITY OF RESPONDING PARTY.

The responding party is the State of Washington, by and through the Grant County Prosecuting Attorney's Office.

II. STATEMENT OF RELIEF SOUGHT

The State asks this Court to find there are no grounds for discretionary review and deny this Petition for discretionary review pursuant to RAP 13.4(b).

III. FACTS RELEVANT TO THE PETITION.

The Court of Appeals affirmed petitioner Cynthia Lou Michel's convictions for one count of first degree child molestation with an aggravator of abuse of position of trust and one count of fourth degree assault in an unpublished opinion filed December 17, 2015. The sole issue on appeal was whether sufficient evidence supported each of Michel's convictions.

The jury found Michel guilty of fourth degree assault on D.M. (count 1) and first degree child molestation of H.M., with an aggravator of abuse of a position of trust (count 2). CP 142-44. The convictions were based on the following evidence.

Michel is the paternal grandmother of D.M., born December 17, 2000 and H.M., born May 16, 2002. RP 81-82. Both D.M. and H.M. loved Michel. RP 83. They typically spent one weekend with Michel each

month during the school year. RP 82. There had been frequent, regular visits in her care since both sisters were in diapers. RP 85–86. Their mother trusted Michel “absolutely.” RP 85.

The girls’ maternal grandmother, L.R., did not. RP 72. She is the person to whom the girls first disclosed Ms. Michel’s unwanted behavior in January 2013. RP 66–67. 75. L.R. testified that “in the past” she and Michel had engaged in heated discussions over the way in which Michel touched the girls, going back to when they were in diapers. RP 70. L.R. had objected to “things like rubbing them on the behind, kissing them on the lips, making them kiss her” and told Michel “a grandmother is not supposed to kiss their grandchildren like that.” *Id.* She did not believe Michel’s behavior was “[t]ime, age appropriate.” RP 72. When defense counsel asked whether she would have reported any illegal behavior, L.R. responded, “I had turned Cindy in before.” RP 78–79.

H.M. testified she twice witnessed Michel touching D.M.’s breasts and that both times when DM told her to stop, Michel stopped. RP 102. Both incidents occurred in Michel’s bedroom. RP 100. Michel did not say anything while she was rubbing D.M. RP 103. One incident happened when D.M. was going through puberty. RP 96. She was about eleven years old. RP 136. Excited that her breasts were growing, D.M. told her grandmother. RP 101. H.M. testified Michel responded by telling D.M. to

come to her “and then she just slipped her hand under her shirt.” RP 102. D.M. testified about the event, saying Michel touched her nipple under her clothing and “kind of like felt around . . . it wasn’t hard, it was kind of softly. But it was uncomfortable.” RP 135–136. D.M. also testified that a couple of times she had asked Michel to help with her brassiere, but had not been uncomfortable because “I was asking for help, you know, I wasn’t trying to be gross.” RP 139–40.

D.M. thought some of Michel’s kisses were “gross.” RP 137. She testified Michel would ask the girls “for a kiss and then she would out of nowhere stick her tongue in [their] mouths.” RP 136. D.M. testified that each of the several times it happened she pulled back and said “ew.” RP 136. Michel would respond: “what. don’t you love me?” to which D.M. would reply “yes, grandma, I love you, but I mean I don’t want to do this thing with you, it’s gross.” RP 137.

H.M. told the jury that three times Michel had kissed her on the lips and put her tongue in H.M.’s mouth. RP 103. Like D.M., H.M. told Michel to stop and that she did not like kissing with tongues. *Id.* As with D.M., Michel met H.M.’s protest with “you don’t love me anymore?” RP 120.

H.M. also testified that Michel rubbed the outside of H.M.’s vagina with her hand, both on top of her clothing and underneath her underwear.

RP 94–95. She said, “It just happened out of nowhere, like, I would be sitting on her lap in her chair and she just would do it.” RP 94. H.M. testified she knew it was on purpose “[b]ecause she would do it often.” RP 116. Ms. Michel did not “say anything at all” as she touched H.M.’s vagina. RP 116. The touching occurred both in Michel’s bedroom and in her living room. RP 96. H.M. testified: “I’d tell her to stop. And then if she didn’t, I’d tell her to do it—I’d tell her to stop again, and then I’d just get up and leave.” *Id.* H.M. testified that when she told Michel to stop, Michel responded, as she had with objections to tongue-kissing, “what, you don’t love me?” RP 96. H.M. characterized her grandmother’s response as a guilt tripping. *Id.* On cross-examination, defense counsel asked H.M. whether the rubbing was “sexual”, to which H.M. replied: “No.” RP 115. He also confirmed her “vagina was touched only in the living room, except for that one time [in the bedroom].” RP 115–16. H.M. did not remember how many times Michel had rubbed her vagina in the living room. RP 116. H.M. said she knew the touching was on purpose “because she would do it often.” *Id.*

IV. GROUNDS FOR RELIEF AND ARGUMENT

A petition for review will be accepted by this Court only if (1) the decision of the Court of Appeals in is conflict with a decision of the Supreme Court; or (2) the decision of the Court of Appeals is in conflict

with another decision of the Court of Appeals, or (3) a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

Michel asserts the decision of the Court of Appeals conflicts with decisions of this Court and with other decisions of the Court of Appeals, and that her case involves a significant question of constitutional law. It does neither.

A. The decision of the Court of Appeals is not in conflict with a decision of the Supreme Court or with another decision of the Court of Appeals.

Michel argues, without elaboration, that the Court of Appeals incorrectly interpreted her appeal as a request to reweigh trial evidence and make credibility determinations. Petition at 5. She does not support this bare assertion with any language from the opinion demonstrating Division Three deviated from its usual sufficiency analysis, or from the analysis of other divisions of the Court of Appeals and in this Court.

Michael's Petition is effectively a motion for reconsideration. Vigorously reasserting her sufficiency challenge, she concludes "[t]he 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.” *Id.* at 7–8. She argues the dearth of the State’s evidence forced the jury to resort to speculation and conjecture to find the elements of the crime beyond a reasonable doubt. *Id.* at 5. Michel’s argument relies on isolated snippets of testimony taken out of context, e.g. when pointing to the two instances where H.M. said Michel’s touching was not “sexual,” Michel omits H.M.’s testimony that the rubbing of her vagina was intentional and occurred over her protest on multiple occasions. RP 115–18. In this instance, Michel appears to assert the child victim’s characterization of her grandmother’s offensive behavior—a lay opinion on an ultimate issue—is sufficient to overturn the jury’s independent determination concerning “sexual contact.” Not only is this contrary to law, the child’s understanding of what is or is not sexual was never developed at trial. H.M. could just as easily have been telling defense counsel that she, herself, was not aroused, or was not penetrated.

Michel has failed to identify the “longstanding jurisprudence”—whether in this Court or the Court of Appeals—with which this decision conflicts. She cites no cases, no treatises, nor any rule of law that might shed light on the longstanding jurisprudence to which she refers. Her impassioned belief that there simply was not enough evidence to convict does not implicate an erroneous decision making process, nor an erroneous decision.

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B. The decision of the Court of Appeals does not involve a significant question of law under the Constitution of the State of Washington or of the United States.

Michel asserts the affirmation of her convictions in the Court of Appeals involves a significant question of constitutional law because, having affirmed a conviction on insufficient evidence, it relieved the State of its constitutional burden of proof.

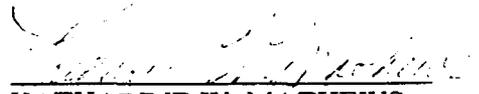
There is no constitutional issue here. The Court of Appeals did not hold that in this case the State's burden was lower than in any other criminal case. A constitutional issue cannot be shoehorned into what is simply a restatement of Michel's arguments concerning sufficiency.

V. CONCLUSION

Michel fails to demonstrate either of her asserted grounds supporting discretionary review. This Court should deny her petition.

Respectfully submitted this 18th day of March, 2016.

GARTH DANO
Grant County Prosecuting Attorney



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SUPREME COURT OF THE STATE OF WASHINGTON

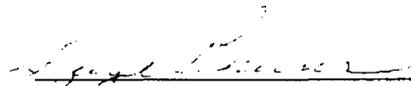
STATE OF WASHINGTON,)	
)	
Respondent.)	No. 92818-5
)	
vs.)	
)	
CYNTHIA LOU MICHEL,)	DECLARATION OF SERVICE
)	
Petitioner.)	

Under penalty of perjury of the laws of the State of Washington,
the undersigned declares:

That on this day I served a copy of the State's Response to Petition
for Discretionary Review in this matter by e-mail on the following party,
receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
khkato@comcast.net

Dated: March 18, 2016.



Kaye Burns

OFFICE RECEPTIONIST, CLERK

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Supreme Court Clerk's Office

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Cc: 'Kenneth H. Kato' <khkato@comcast.net>
Subject: State of Washington v. Cynthia Lou Michel - Supreme Court No. 928185

Attached for filing is a Response to Petition for Discretionary Review in the above matter. Thank you for your consideration.

Kaye Burns

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