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NO. 64604-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN J. MONTGOMERY

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SNOHOMISH

The Honorable ELLEN J. FAIR, Presiding at the Trial Court

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. There was insufficient evidence to support the conviction of Mr. Montgomery for Child Molestation Third Degree.

B. ISSUES PRESENTED

1. Should a jury verdict of guilty on the charge of Child Molestation Third Degree be reversed where the Appellant is to have alleged to have contact with the person of another temporally for a second or less?

C. STATEMENT OF THE CASE

By jury verdict, Appellant (Montgomery) was found guilty of Child Molestation Third Degree. Succinctly, in material part, the testimony at trial from the alleged victim (C.H.) indicated that Montgomery was alleged to have touched C.H.'s breast for less than "a second, maybe not even." Report of Proceedings (RP) at 23, LL 23. Though the record is unclear as to the exact alleged manner of touching, C.H. described the alleged touching as "like when you get booked into jail, how they take your thumbprint." RP at 23, LL 18-19. No physical contact is alleged to have occurred subsequent to this less than one second of physical touching, nor is there alleged physical contact prior to this one second or less touching. RP at 24, LL 1-25. This appeal results.

D. ARGUMENT

1. No rational trier of fact could have found the essential elements of Child Molestation Third Degree beyond a reasonable doubt.

In reviewing a claim of insufficient evidence, this court must determine “whether, 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 ex rel Carrol v. Junker*, 79 Wn.2d 12 (1971); *State v. Ortiz*, 119 Wn.2d 294, 311-12, 831 P.2d 1060 (1992).

Due process requires that the State bear the burden of proving each and every element of the crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). In reviewing a challenge to the sufficiency of the evidence, the test is “whether, after viewing the evidence in the 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. Grover*, 55 Wn. App. 923, 930, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1990); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); see *Jackson v. Virginia*, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be

drawn therefrom. *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990).

To convict Montgomery, the State was required to prove that he violated RCW 9A.44.089, to wit:

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.010 defines Sexual Contact:

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.08.010 (b) defines the relevant mens rea as follows:

A person knows or acts knowingly or with knowledge when:

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The determination of which anatomical areas apart from the genitalia and breasts are intimate under the relevant statutes is a question to be resolved by the trier of the facts. *In re Adams*, 24 Wn. App. 517, 520,

601 P.2d 995 (1979). Nevertheless, that determination is not left to the ‘unfettered discretion’ of the trier of fact.

In *In re Adams*, supra, the court interpreted the term ‘intimate parts’ to have a broader connotation than the word "sexual" and to include parts of the anatomy "in close proximity to the primary erogenous areas". In re Adams, supra at 519-21. See also *State v. Powell*, 62 Wn. App. 914, 917 n.3, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

Further, and importantly, the Court has addressed *the temporal element* of the sexual contact. See, *State v. R.P.* 67 Wn.App. 663 (1992). In particular, the Court reasoned “since sexual contact [...] is measured in terms of what is “intimate” *the offensiveness of the contact may ultimately depend upon not only the area of the body touched but also the duration of the contact.* Id. (Emphasis Supplied.). Thus, in a particular case, the duration of the contact is crucial in determining whether a violation has occurred.

Instantly, C.H. indicated that the touching that is alleged to have occurred, only occurred for “a second, maybe not even.” Report of Proceedings (RP) at 23, LL 23. Further, C.H. was less than descriptive of how the alleged contact occurred, opining that the alleged touching as

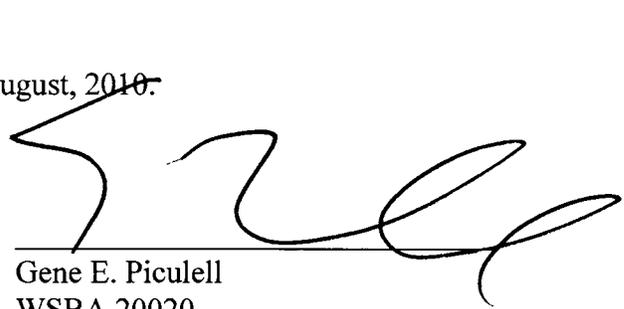
“like when you get booked into jail, how they take your thumbprint.” RP at 23, LL 18-19.

The gravamen of the Child Molestation statute is Sexual Contact. RCW 9A.44.010 Instantly, the contact or touching alleged here for ‘less than a second’ supporting a conviction is insubstantial evidence. No rational trier of fact could or should be permitted to find that such de minimis touching for temporally less than a second is sufficient to support a felonious conviction. As the Court reasoned previously, “since sexual contact [...] is measured in terms of what is “intimate” the offensiveness of the contact may ultimately depend upon not only the area of the body touched but also the duration of the contact., State v. R.P., supra. (Emphasis Supplied.). There can be no less duration than less than a second, unless we begin measuring by atomic clock precision for sufficiency for criminal convictions. A touching alleged for less than a second is insubstantial evidence to support a criminal conviction and would be unfettered discretion by the trier of fact under the circumstances of this case and this record.

E. CONCLUSION

Because no rational trier of fact could have found that the essential elements beyond a reasonable doubt this Court should reverse Montgomery's conviction.

DATED this 22nd day of August, 2010.



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