

65547-7

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NO. 65547-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MARTIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Vickie Churchill, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MARTIN'S CONVICTIONS.

The State faces higher proof requirements for sexual gratification where the alleged touching is over clothing and/or by a family member. See State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992); State v. Wilson, 56 Wn. App. 63, 68, 782 P.2d 224 (1989), review denied, 114 Wn.2d 1010 (1990). The higher standard makes sense because touching over clothing and physical contact with family members is expected, common, and should not be presumed to involve a sinister intent.

In arguing the evidence was sufficient on count one, the State notes that Martin touched C.R. on her thigh and cites State v. Harstad, 153 Wn. App. 10, 218 P.3d 624 (2009). Brief of Respondent, at 7. But in Harstad, the defendant was not a family member. Harstad, 153 Wn. App. at 15. Moreover, as discussed in the opening brief, the touching was accompanied by rubbing, and sexual statements or heavy breathing. The defendant also frequently exposed himself to his victims. Id. at 19-23. Thus, there

could be no doubt about Harstad's intent. The contact was clearly for sexual gratification.

In contrast, C.R. merely claimed that Martin's hand was on her inner thighs, and she apparently wore pants at the time. There was no claim of exposure, rubbing, talking dirty, or heavy breathing. See RP 68-70. The evidence is far different from that in Harstad. The State nonetheless claims this evidence is sufficient to demonstrate sexual gratification when combined with the touch under the shirt and because Martin and C.R. were in a location where they were not likely to be seen. Brief of Respondent, at 7. In making this argument, however, the State overstates the evidence below.

Specifically, the State claims that a person of common intelligence should know "that an 11-year-old girl's chest area under her sports bra is an 'intimate part.'" Brief of Respondent, at 7. *But C.R. never claimed that Martin touched her under her sports bra.* Instead, C.R.'s testimony establishes – at most – that Martin placed his hand underneath her outer shirt (she also wore a tank top), and not over her sports bra. See RP 69-70. Moreover, the contact occurred in a location where the two might be seen. See RP 66-68 (three other adults present in single-story home).

The State makes a similar argument regarding count two, claiming that Martin touched C.R. “under her sports bra” and in a location inside the condo where he was not likely to be seen. Brief of Respondent, at 8. But C.R. never testified that Martin touched her under her sports bra for this count, either. She merely said he made contact with skin somewhere in her “breast area,” pointing to an area mid chest. RP 76-77, 85, 96, 127. And, as with count one, the contact allegedly occurred in close proximity to other family members, who were just down the hall. See RP 77-78.

One last point on this issue. In a footnote, the State alleges, “When indicating where she was touched for both counts one and two, CR made circular motions with her hand” Brief of Respondent, at 9. There is no citation to the record in support of this assertion. Therefore, it is not properly considered. See RAP 10.3(a)(5)-(6) and (b) (requiring citation to the record for every factual statement in a responsive brief).

2. PROSECUTORIAL MISCONDUCT DENIED MARTIN A FAIR TRIAL.

As just discussed, there was no evidence presented that Martin stuck his hand under C.R.’s sports bra and rubbed. Yet, the prosecutor maintained there was such evidence four different times

during closing argument. See RP 117-119, 130. For the reasons already discussed in the opening brief, because these misstatements were directed at the only real issue in dispute (whether there was sexual contact, i.e., touching for sexual gratification), they denied Martin a fair trial.

3. INEFFECTIVE ASSISTANCE OF COUNSEL.

The State does not argue that Sharon Osario's testimony that Child Protective Services had removed C.R. and her brother from the Martin home was relevant to any issue at trial. It was not. Instead, the State contends counsel's failure to object was "clearly a trial tactic." Brief of Respondent, at 12. The State does not reveal, however, the tactic it believes defense counsel employed. And the record does not reveal one, either.

The State also argues there is no reasonable probability evidence of the CPS removal impacted jurors. Brief of Respondent, at 11-12. But there is. The improper evidence left jurors to speculate that Martin had probably engaged in inappropriate touching before, requiring CPS to intervene and remove both children from his home. This made it more likely jurors would vote for guilt on the charges before them. See Brief of Appellant, at 18-20.

B. CONCLUSION

For the reasons discussed in Martin's opening brief and above, this Court should reverse his convictions.

DATED this 23rd day of March, 2011.

Respectfully submitted,

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DIVISION ONE**

STATE OF WASHINGTON)	
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Respondent,)	
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vs.)	COA NO. 65547-7-I
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KENNETH MARTIN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF MARCH, 2011.

x Patrick Mayovsky