

NO. 42313-8-II
Cowlitz Co. Cause NO. 10-1-00986-5

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent.

v.

PEDRO HERNANDEZ,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S REPOSE TO ASSIGNMENTS OF ERROR

1. There was sufficient evidence for the jury to find the Defendant guilty of Child Molestation in the second degree of J.V. and K.V. as alleged in counts III and V.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether there was sufficient evidence the Defendant acted for the purposes of his sexual gratification when he repeatedly touched J.V. and K.V. over their clothes on their erogenous areas, requested oral sex from J.V. and touched her while she was sleeping, and put his tongue in K.V.'s mouth while kissing her.

III. STATEMENT OF THE CASE

1. Procedural facts:

The State concurs with the Defendant's rendition of the procedural facts of the case with the following addition:

The jury was given a Petrich instruction for counts III, IV, and V.

The instruction for count three stated the following:

The State alleged that the defendant committed acts of Child Molestation in the second degree or Child Molestation in the third degree in count III on multiple occasions. To convict the defendant of count III, one particular act of Child Molestation in the second degree or Child Molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not

unanimously agree that the defendant committed all the acts of Child Molestation in the second degree or Child Molestation in the third degree....

CP 174, 180, 184.¹

2. Statement of facts:

J.V. K.V. and A.V. are very different sisters and not always close. 2RP 33, 113, 179.² Their parents are divorced and the girls primarily live with their mother. 2RP 32-33, 95, 133, 183, 199. However both parents have a good relationship and the girls routinely visit their father on the weekends. 2 RP 33, 95, 181, 199. The defendant is “Uncle Pedro” to all three girls and is married to their paternal aunt, Jaime Hernandez. 2RP 35, 96, 200. Multiple family members testified generally that the family gives hugs and kisses to one another, but the kisses are merely pecks on the cheek. 2RP 43, 111, 181, 199. There was no testimony Uncle Pedro had any caretaking responsibilities for either J.V. or K.V. 2RP 36, 95, 97, 3RP 232-250.

At trial, seventeen year-old J.V. testified she was very close to her Aunt Jaime and routinely would spend the weekends with her. 2RP 32.

¹ The instructions for count IV and V were tailored to those counts and charges, but read similar to count III’s instruction above.

² The verbatim report of proceedings consists of three volumes. Volumes two and three are consecutively numbered and consists of the trial testimony from March 22, 2011, through March 24, 2011. Volume three also contains the sentencing hearing from June 9, 2011. The reports will be referred herein as 1RP, 2RP, and 3RP for the numbered volumes. At the time of trial, J.V. was 17, K.V. was 13, and A.V. was 18. 2RP 32, 94, 132

J.V. stated when she was 12 and 13 she and Aunt Jaime were best friends. 2RP 36. J.V. said she saw her aunt every day and she often spent the night at Jaime's house. 2RP 36, 205.

When J.V. was 12 years old, the Defendant started touching her inappropriately. 2RP 37. It began with the Defendant coming up behind her and rubbing against her butt or would he rub her breasts with his hands. 2RP 37. While the touching would only last a few seconds, sometimes he would hold his hands in those areas, other times he would slide his hands across. 2RP 37-38. J.V. also described that when "Uncle Pedro" gave hugs he would grab her butt with one hand. 2RP 38. The hugs would start out as normal, but then the Defendant would slide his hands around and let his hands rest on her butt for a few seconds. 2RP 39.

When "Uncle Pedro" touched her breasts, J.V. would tell him to stop and that she didn't like it. 2RP 39. The Defendant never said it was an accident or apologize, rather would shake his head and walk away. 2RP 39-40. J.V. described the touching as purposeful, and despite J.V.'s protests, the touching continued to happen. 2RP 39-40. J.V. said the touching would usually happen when they were alone or when there were a lot of people running around and it didn't feel right. 2RP 41.

J.V. also described that when she spent the night at the Defendant's, the Defendant touched her a few times. 2RP 51. One time

when she was sleeping on the couch, he rubbed her body, put his hands between her legs, and rubbed her butt and chest. 2RP 50-51. She pretended to be asleep. 2RP 51. J.V. also described a time when she was 14 and the Defendant rubbed her hips and thigh over her clothes when they were in the bed. 2RP 46-47. He then went inside her shorts and slid his finger(s) inside her vagina. 2RP 47.³ He told her not to wake her Aunt when this happened. 2RP 53.

J.V. also described that over a three year period, the Defendant would approach her multiple times and ask her to suck on his penis or ask if he could stick his tongue in her vagina. 2RP 50-51. J.V. spoke about one particular incident where she was sitting on the computer by the kitchen table. 2RP 51. The Defendant was at the table and stuck his tongue in the side of his mouth and made a motion to his mouth with his hand. 2RP 51-52. This action was obvious to J.V. as the Defendant's request she suck his penis. 2RP 51. J.V. also said at times the Defendant stood in the hallway and motioned for her to come into the bedroom with him. 2RP 52. J.V. said the Defendant was serious in his requests and if no one was around, would get angry when she would ignore him, say no or walk away. 2RP 51-53.

³ The jury hung as to the charge of Rape of a Child in the third degree in count II. CP 207, 3RP 383-84, 387.

J.V. testified when she was 15 years old she decided to tell her girlfriend S.G. about her uncle's abuse. 2RP 53-54, 161. At the time of the disclosure, J.V. was shaking, upset and at the end crying. 2RP 162-63. However, J.V. made S.G. promise not to say anything about the abuse. 2RP 54, 163-64.

Subsequent to this disclosure, S.G. testified the Defendant invited her to his home when his wife wasn't going to be present. 2RP 164-65. When S.G. told J.V., J.V. became very upset and screamed at S.G. that the invitation wasn't funny and he was serious. 2RP 165. S.G. also testified that at J.V.'s sixteenth birthday party, the Defendant touched S.G. on the butt. 2RP 55-56, 165. S.G. described to the jury she and Hernandez were standing on the porch when she felt him reach behind her and cup her butt. 2RP 165. She said she had her phone securely in her back pocket at the time and his hand was around the phone with his fingers touching her butt. 2RP 166-67. Hernandez didn't say anything to S.G. when the touching happened. 2RP 168. But S.G. was angry and upset and immediately told A.V. 2RP 168. J.V. then found out about the touching. 2RP 56-57, 169. Eventually, what happened reached Jamie. 2RP 170. Jaime and Pedro came to S.G. and told her Pedro was not grabbing her butt, but he saw her phone was falling out of her pocket and he was putting it back. 2RP 170.

S.G. demonstrated to the jury that this was very unlikely given the pants she wore and the size of her phone. 2RP 166-67.

Feeling guilty the Defendant now was touching others, J.V. told her Aunt Jaime the Defendant had been touching her breasts and butt. 2RP 56-57. Aunt Jaime asked her not to tell anyone and said she would take care of the matter. 2RP 56-58. Jaime did not address the matter however. 2RP 58, 3RP 243. It was not until A.V. told her mother about the Defendant grabbing S.G. at the birthday party, that the mother and father asked the girls about inappropriate touching and everything was reported to the police. 2RP 58-59, 185-192, 3RP 243.

K.V. testified "Uncle Pedro" began touching her and making her feel uncomfortable when she was 11 years old and was ongoing up through age 13. 2RP 97-98. An emotional K.V. described Hernandez would hug and kiss her in inappropriate ways. 2RP 97. She stated Hernandez would run his hands down her back and grab her butt with two hands. 2RP 97. This would last a couple of seconds until she'd tell him to stop or pull away. 2RP 97-98. She stated that after the first 10 times it happened, Hernandez would do it every time he hugged her. 2RP 98. K.V. did say that throughout the times Hernandez would touch her, he would sometimes tell her not to tell. 2RP 112.

K.V. also described inappropriate touching one time when her father asked her to show Hernandez something in a closet. 2RP 98. K.V. was wearing shorts and a tank top. 2RP 99. In this instance, she bent over at the waist; the Defendant deliberately moved behind her, grabbed her by her hips and pulled her into his groin. 2RP 98-99. K.V. said her butt touched the Defendant's penis through their clothing for approximately three seconds. 2RP 100. K.V. said she suddenly stood up, turned around and told him to stop. 2RP 98. The Defendant then told her to "shut up." 2RP 98, 100.

K.V. further described at her cousin's birthday party, the Defendant walked by her on his way to the bathroom and swiped his hand across her breast. 2RP 101-102. At first K.V. thought this was accidental, but on his way back Hernandez again touched her breast even though in both instances there was plenty of room for him to pass by without touching her. 2RP 102-103, 121-22. After the second time, K.V. believed both touches were purposeful. 2RP 104. K.V. described another similar incident at Thanksgiving, when the Defendant purposefully pushed his hand between her legs, touching her inner thigh, while she was sitting on a countertop. 2RP 106-108. Again, the Defendant had plenty of room to get by K.V. without touching her. 2RP 107, 123.

Lastly, K.V. told the jury about a time the Defendant put his tongue inside her mouth. 2RP 109. K.V. stated she was reclining on his couch and everyone else was gone getting pizza. 2RP 109-110. Hernandez kneeled in front of her, kissed her on her lips, and then stuck his tongue in her mouth. 2RP 109. K.V. pulled away and Hernandez said, "now you put your tongue in my mouth." 2RP 109. K.V. said no and Hernandez went away. 2RP 109. K.V. could not remember a time prior to this when Hernandez ever kissed her on the lips. 2RP 111.

Jaime Hernandez testified that J.V. would often come over to house, but that it stopped in her teenage years. 3RP 234-35. She also confirmed that when J.V. spent the night they would all sleep in the same bed, but said Pedro never slept next to J.V. 3RP 236. Jaime testified the family would hug and kiss each other, and would spank each other's butts. 3RP 239. She did remember a time when the girls told "Uncle Pedro" to stop and confirmed Pedro would talk to J.V. about wanting to have sex. 3RP 244-45.

The Defendant denied having touched any of the girls for the purpose of sexual motivation. 3RP 261-62. He said he would hug and kiss on the mouth and sometime swat on the butt, but this was like all the other members of the family. 3RP 261-63. He denied ever hugging the girls from behind, but told and demonstrated to Investigator Lozano that

he did and also poked them in the butt. 3RP 271, 297-98, 301-302. He admitted the girls sometimes told him to stop hitting them on the butt. 3RP 266. But rationalized that he didn't give them many swats. "it was only, like, one." 3RP 266. He denied asking J.V. if she wanted to have sex, explaining that he only warned her she was young to have sex and drink beer. 3RP 262, 279. However, later Hernandez admitted to telling the girl's father that he asked J.V. if she wanted to have sex to test her. 3RP 283, 287.

Hernandez described the incident with S.G. for the jury. 3RP 266. He admitted he deliberately pulled the phone out of S.G.'s back pocket and then "dropped" it back in because he wanted to see it. 3RP 266-67, 274-75. He denied touching her butt and said she ran away into the house after. 3RP 267, 275. Hernandez admitted to inviting S.G. back to his house when his wife was not home, but said he was joking. 3RP 288.

Lastly, Hernandez described an incident to the jury where he ate a hot pepper and put his tongue in K.V.'s mouth and was just joking around. 3RP 263-64. However, Hernandez admitted he lied to Investigator Lozano when he told her he never put his tongue in K.V.'s mouth. 3RP 277, 299.

IV. ARGUMENT

THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE STATE TO CONVICT THE DEFENDANT OF CHILD MOLESTATION IN THE SECOND DEGREE AGAINST J.V. AND K.V.

The defendant challenges the finding of guilt alleging there was insufficient evidence the touching was done for the purposes of sexual gratification. This court should affirm the jury's verdict as the totality of the circumstances indicate the defendant purposefully touched multiple victims multiple times, spoke to them about sex, and asked them for sex, for the purposes of his sexual gratification.

The standard for determining sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Price*, 127 Wn. App. 193, 201, 110 P.3d 1171 (Div. 2, 2005). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* citing *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992); *State v. Whisenhunt*, 96 Wn. App. 18, 980 P.2d 232 (Div 3, 1999) ("All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant."). Moreover, circumstantial evidence

is as reliable as direct evidence and the appellate court defers to the trier of fact regarding a witness's credibility or conflicting testimony. *Id.* at 202.

To convict the defendant of child molestation in the second degree the State had to show the defendant had sexual contact with J.V. and K.V., that he was at least 36 months older than the child, the child was older than 12, but less than 14 years and not married to the defendant, and the acts occurred in the State of Washington. RCW 9A.44.086 (2011). Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either or a third party.” RCW 9A.44.010(2) (2011).

To prove sexual contact, the State must show the defendant touched a child for the purpose of sexual gratification. Sexual gratification is not an element of Child Molestation in the second degree. *State v. Lorenz*, 152 Wn. 2d 22, 34-35, 93 P.3d 133 (2004). It is merely a definition of sexual contact and explains that innocent or inadvertent contact does not amount to sexual contact. *Id.*; *State v. Stevens*, 158 Wn. 2d 304, 309-10, 143 P.3d 817 (2006).

“Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (Div 3, 1991). In cases involving touching over

clothing, courts have found that physical evidence of prolonged touching or rough touching will suffice, that repeated touching may be considered, and the victim's testimony she felt violated by the touching may be argued to prove touching for sexual gratification. See *State v. Stevens*, 127 Wn. App. 269, 277-78, 110 P.3d 1179, 1184 (2005) *rev'd on other grounds*. *State v. Stevens*, 158 Wn. 2d 304, 143 P.3d 817 (2006) (allowing the State to argue the inference that because the victim felt violated, the defendant acted with intent and purpose); *State v. Price*, 127 Wn. App. 193, 201-02, 110 P.3d 1171 (Div. 2, 2005); *State v. Powell*, 62 Wn. App. 914, 917-18, 816 P.2d 86 (Div 3, 1991). The test is in looking to the totality of the facts and circumstances if there is sufficient evidence. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (Div 1, 2009); *State v. Veliz*, 76 Wn. App. 775, fnnt 6, 888 P.2d 189 (Div 1, 1995).

In *Powell*, Windy D., a fourth grader, testified a man she knew as Uncle Harry, hugged her around the chest, and as he assisted her off his lap placed his hand on her "front" and bottom on her underwear under her skirt. *State v. Powell*, 62 Wn. App. 914, 916, 816 P.2d 86 (Div 3, 1991). Additionally, at a different time while Windy was alone with Powell in his truck, he touched both her thighs over her clothes. *Id.* The Court determined that while Powell was referred to as an "uncle," the title was honorary and he was just a visitor in the child's home. *Id.* at 916, FN 1.

Additionally, the court determined Powell was never entrusted with the care of Windy D. *Id.* However, because the touching was over the child's clothing, Division Three felt the touching was subject to innocent explanation. *Id.* at 917-18. The court relied heavily on the surrounding circumstances Powell was assisting Windy D off his lap, he apologized for the touching and said it was an accident, Windy could not describe how Powell touched her, and Powell did not make any threats or request Windy not to tell. *Id.* As such, Division Three stated that touching over clothing required some additional evidence of sexual gratification. *Id.* at 917-19.

Subsequent cases have called into question the "subject to innocent explanation" reasoning used in *Powell*. In *State v. Veliz*, 76 Wn. App. 775, 888 P.2d 189 (Div 1, 1995), Division One denied the defendant's appeal for a specific instruction under *Powell*. A jury convicted Veliz of Child Molestation in the first degree. *Id.* at 776-77. The evidence showed Veliz told A.F. to lay down next to him, he covered her with a blanket and began touching A.F.'s private spot over her clothing. *Id.* at 777. A.F. described the touching as rubbing in small circles for 20-30 seconds. *Id.* At trial the defense proposed the following instruction:

Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. However, in those cases in which the evidence shows touching through clothing...,the courts

have required some additional evidence of sexual gratification.

Id. Division One upheld the trial court's decision to refuse the instruction, finding *Powell* did not stand for the position the trial court must instruct the jury as to additional evidence. *Id.* at 778. However, Division One stated it did not believe *Powell's* "susceptible of innocent explanation" test was appropriate. *Id.* at fnnt 6. Division One said,

We question whether this is the proper test for evaluating challenges to the sufficiency of the evidence. If this were the test, child molestation convictions would be subject to dismissal or reversal simply because a jury *could* believe a non-sexual explanation for the behavior.... [T]he correct test is...whether, as a matter of law, there is sufficient evidence from which a rational trier of fact could find all the elements of the crime beyond a reasonable doubt.

Id. The court held there was sufficient evidence of sexual gratification against Veliz. *Id.* at fnnt 5.

In *State v. Whisenhunt*, 96 Wn. App. 18, 23-24, 980 P.2d. 232 (Div 3, 1999), Division Three distinguished the facts in *Powell*. Mr. Whisenhunt was found to have touched a five-year old three times while she rode the school bus with him. *Id.* at 20. Specifically, the child testified Whisenhunt reached over the seat and touched her on her privates, under her skirt, but over her body suit. *Id.* at 20, 24. The court

found the touching was not equivocal or fleeting and there was no innocent explanation for the touching. *Id.* at 24. The court also pointed out the touching happened on three separate occasions. *Id.*

In *State v. Harstad*, 153 Wn. App. 10, 15, 218 P.3d 624 (Div 1, 2009), Harstad was convicted of molesting two of his son's girlfriend's children based upon evidence he touched the girls' upper inner thighs while rubbing and moving his hand back and forth and breathing heavily. There was also testimony one of the victim's saw Harstad "playing with his thing," and he told both "let me see your pussy." *Id.* at 17. While the issue in *Harstad* was whether touching of the upper inner thigh was an intimate area, the court noted since the defendant was rubbing when he touched the child's upper inner thigh, a reasonable jury could infer the touching was incidental to another activity intended to promote sexual gratification. *Id.* at 22. The court specifically cited to *In re Welfare of Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979), to make the link between touching incidental to other activities which are intended to promote sexual gratification of the actor. *Id.* at 21. The court also distinguished that covering a child with a blanket did not make him a caretaker, and certainly would not equate with conduct requiring close contact with an unrelated child's intimate parts. *Id.* at 23.

In the instant case, there was evidence the Defendant touched J.V. for the purposes of sexual gratification. First, the Defendant must admit the truth of the State's evidence, and all reasonable inferences, interpreting them most strongly against the defendant. *State v. Price*, 127 Wn. App. 193, 201, 110 P.3d 1171 (Div 2, 2005), *State v. Whisenhunt*, 96 Wn. App. 18, 23, 980 P.2d 232 (Div 3, 1999). The State's evidence showed the Defendant systematically groomed J.V. The Defendant started by touching J.V.'s butt and breasts over her clothing when giving her hugs. 2RP 36-38. The touching lasted several seconds and was repeated over a number of years, even when J.V. told Defendant to stop. 2RP 36-38. The touching made J.V. feel wrong. 2RP 41. Additionally, the Defendant repeatedly asked J.V. to give him oral sex, and made gestures of oral sex, and invited her to go back into a bedroom with him. 2RP 50-52. Lastly, the Defendant rubbed J.V.'s body, put his hands between her legs, and rubbed her butt and chest when she was sleeping on the couch. 2RP 50-51.

Each individual touch was in an intimate area and could alone or in conjunction prove the charges. Under the reasoning in *Powell* one or two instances where the Defendant would touch J.V.'s butt or breast when giving a hug might be subject to innocent explanation. But the repeated touching, especially after being asked to stop, leads to the reasonable

inference of sexual gratification. Moreover, the Defendant had no caretaking function that would explain the need to touch J.V. while she slept. 3RP 232-250. Lastly, the Defendant's sexual gestures and conversation, lead to the exorable conclusion he acted for the purpose of sexual gratification.

This case is like those of *Harstad* and *Whisenhunt*, in that the Defendant touched the victim multiple times and the circumstances surrounding the rubbing combined with the talking about sex indicate the touching was intended to promote sexual gratification. This case is easily distinguishable from those cited by the Defendant, in that the touching of J.V. involved touching of the primary erogenous area, breasts, occurred very often, and the incident on the couch was not subject to innocent explanation.

There is also sufficient evidence the Defendant touched K.V. for the purposes of sexual gratification. Again, the Defendant must admit the State's evidence. K.V. also testified to a systematic method of grooming by the Defendant over a number of years. 2RP 97-98. The Defendant would touch her butt every time he hugged her even after she would tell him to stop. 2RP 97-98. Moreover, he purposefully touched her breasts by sliding his hand across her breast and pushed his hand between her legs. 2RP 101-108, 121-22. Additionally, the Defendant deliberately

moved behind K.V., grabbed her by her hips and pulled her butt into his groin. 2RP 98-99. K.V. said her butt touched the Defendant's penis through their clothing for approximately three seconds. 2RP 100. The Defendant then told her to "shut up," after she told him to stop. 2RP 98, 100. The secrecy of his touching K.V. tells of the wrongness of his conduct. This conduct is not subject to innocent explanation, especially when taken together with the butt and breast touching. But probably the most egregious touching is when the Defendant kissed K.V. and then put his tongue inside K.V.'s mouth. 2RP 109. There is no reasonable interpretation other than sexual gratification when he then tells her "now you put your tongue in my mouth." 2RP 109.

The totality of the circumstances show "Uncle Pedro" was grooming both J.V. and K.V. to accept the sexualized touching and conversations, that the touching became more forward and directed towards the girl's erogenous zones, and that he did not want them to discuss the touching with others. The Defendant never apologized for the touching, never gave the girls an innocent explanation and the circumstances of touching K.V. at her cousin's birthday party and kitchen, indicate the touching was intentionally done without reason or cause. Combining the girls' experience together, there is little doubt that every single incident had an innocent explanation.

The Defendant cites to his own denial of sexual gratification, innocent joking and having an affectionate family. Def. Brf. at 13. However, as there was much conflicting testimony in the Defendant's explanations to the police and the jury, the court must defer to the jury's determination of credibility. 3RP 261-299; *State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 171 (Div 2, 2005). The jury did not find the Defendant's denials and innocent explanations credible as evidenced in their findings of guilt.

V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 2nd day of April, 2012.

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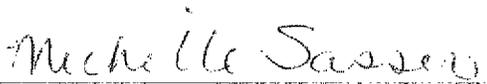
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 24th, 2012.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

April 24, 2012 - 1:34 PM

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