

FILED

MAY 27, 2015

Court of Appeals

Division III

State of Washington

No. 32550-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JDC, Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. Assignment of Error.....1

 1. The State’s evidence was insufficient to support the finding of guilt.....1

Issue Pertaining to Assignment of Error

 A. Was the State’s evidence insufficient to prove guilt beyond a reasonable doubt? (Assignment of Error 1).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....5

 A. The State’s evidence was insufficient to support the finding of guilt.....1

IV. CONCLUSION.....

TABLE OF AUTHORITIES

Table of Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970).....5

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010).....6

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....5, 6

State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993).....6

State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).....6

State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995).....6

State v. Hutton, 7 Wn. App. 726, 502 P.2d 1037 (1972).....6
State v. Jones, 140 Wn. App. 431, 166 P.3d 782 (2007).....7

I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support the finding of guilt.

Issue Pertaining to Assignment of Error

A. Was the State's evidence insufficient to support the finding of guilt beyond a reasonable doubt? (Assignment of Error 1).

II. STATEMENT OF THE CASE

JDC, a juvenile, was charged by information with one count of first degree rape of a child. After bench trial, the court entered these findings of fact:

1. The victim, John Doe, D.O.B. September 4, 2004, was at 603 S. 1st Avenue, Walla Walla, Washington, on July 16, 2013.
2. The respondent [JDC] was at the above address on the above date.
3. At the above address and on the above date, the respondent had sexual intercourse with John Doe by sucking on John Doe's penis.
4. John Doe was under nine years old at the time of the rape. The respondent was thirteen years old at the time.
5. John Doe is unmarried and was unmarried at the time of the rape.

6. The respondent is more than twenty-four months older than the victim.

7. The victim was found competent to testify after performing a competency hearing prior to fact finding. RCW 9.94A. 120 (requiring hearing prior to admission of child's statements); KARL B. TEGLAND, § 601, COURTROOM HANDBOOK ON WN. EVID. (2013 -2014 ed. 2013).

8. At fact finding, the Court heard testimony from the victim, the victim's father, Joe Nunan, the investigating detective, Marlon Calton, and forensic child investigator Dr. Brooke Martin.

9. In mid-July 2013, the victim's parents had to make an emergency visit to Ireland. The victim's parents left the victim with Diane Ilaoa, an Oregon child protective services employee and a close family friend, who lived at 603 S. 1st Avenue, Walla Walla, Washington. On July 16, 2013, the victim went to sleep on Ms. Ilaoa's couch. He awoke to find his pajama pants down and the respondent sucking on his penis. The victim pushed past the respondent, telling him to stop. The victim then found another location to sleep. He also texted his parents but was unable to contact them. When the victim's parents returned to pick him up, his father, Mr. Nunan, noticed that the victim was all packed up and immediately went to the car to leave. Mr. Nunan found the victim's eagerness to leave to be uncharacteristic, as Mr. Nunan and his wife had brought gifts back from Ireland to give Ms. Ilaoa and her family, and the victim usually stayed around to see what the gifts were. On August 4, 2013, the victim disclosed to his mother that the respondent had sucked on his penis. On August 5, Diane Ilaoa, a mandatory reporter, filed a report with Washington Child Protective Services.

On August 7, Detective Calton contacted the victim's family and attempted to contact the respondent as well. Dr. Martin conducted a recorded forensic child interview with the victim on August 7, 2013, during which time the victim again disclosed at three separate times during the interview that the respondent had sucked on his penis.

9. The victim was forthright in his testimony. He had no motive reason to lie, as evidenced by his testimony from the respondent that there had been no argument or provocation prior to the incident that would have motivated the victim to fabricate facts. The victim appeared trustworthy in his general character; his statements to his mother, his counsellor [sic], and to Dr. Brooke Martin were all consistent, and throughout his examination, he did not strain to say the "right" things but instead spoke freely and without hesitation. The victim's statements were made spontaneously and without leading questions prompting those statements. Respondent's counsel was able to cross-examine the victim, which demonstrated the victim had no lack of knowledge. The possibility that the victim's recollection was faulty was remote because his statements were spontaneous and consistent, both from the interview with Dr. Martin on August 7, 2013, and his statements in court.

10. In considering the victim's opportunity to observe the incident accurately, the quality of his memory, his personal interest, his lack of bias, and the reasonableness of his statements in the context of the evidence, he is found to be highly credible.

11. Dr. Martin's expert opinion, based on her years of experience, extensive training, and

continuing education in the area of forensic child interviews, was impressive, and she is highly credible.

12. Mr. Nunan's statement that the victim was packed and ready to go as soon as the victim's parents arrived clearly indicated the victim's desire to leave the residence as soon as possible.

13. The victim's statements in the forensic interview video and his testimony in court were consistent and credible.

14. The respondent's mother, Sepela Ilaoa, testified on the respondent's behalf. She stated she was at Diana Ilaoa's house at the time of the rape and was on the couch the entire night, precluding the possibility that the respondent and victim were both on the couch. However, her statements at fact finding demonstrated some inconsistencies, as she said she was only at Ms. Ilaoa's house that one night, but she also stated she had "usual" sleeping arrangements and was over numerous times during the spring and summer. Further, Sepela Ilaoa's comments were not inconsistent with the possibility something happened but that she did not observe it, as she admitted to being asleep at least part of the night.

15. In considering Sepela Ilaoa's testimony, it was apparent to the Court that she could confabulate [sic] memories by recalling events and circumstances in a way that best served her son's interest but did not necessarily describe the night in question in an accurate manner. Thus, in considering her bias for her son, her statements were insufficient to create a reasonable doubt that the events occurred.

16. The respondent stated he could not remember much about the victim's stay at Diana Ilaoa's house,

nor could he give more than vague answers to counsel's questions. Further, his denial of the allegations was not convincing. While the respondent's willingness to take the stand was commendable, his statements once on the stand did not create a reasonable doubt. (CP 62-65).

From the findings, the court made the following conclusions of law:

1. That the court has jurisdiction over the parties and subject matter of this cause.
2. The respondent committed the act of Rape of a Child in the First Degree. RCW 9A.44.073.
3. The video recording of the victim's statements were admissible as child hearsay. RCW 9A.44.120; see *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).
4. Based on the foregoing the respondent is GUILTY of Rape of a Child in the First Degree. (CP 65-66).

The court committed JDC to 15-36 weeks confinement. (CP 67). This appeal follows. (CP 78).

III. ARGUMENT

A. The State's evidence was insufficient to support the finding of guilt.

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). 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, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, 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).

No challenge is made to the court's findings of fact as they are supported by substantial evidence. *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). They are thus verities on appeal. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). But even in light of those findings, the State's evidence fell short of proving beyond a reasonable doubt that JDC was guilty of rape of a child in the first degree.

The victim was less than nine years old at the time of the incident where he was asleep and woke up to discover

JDC allegedly sucking on his penis. (RP 15, 22). The victim, however, just got down on the floor to sleep after telling JDC to leave him alone. (*Id.*). He did not go to the room of Diane Ilaoa, a friend of his mother's, where he usually slept. (RP 92). JDC testified he had no physical contact with the victim, did not pull his pants down, and did not put his mouth on the victim's penis. (RP 108-09). Indeed, the victim was not even in the same room with him. (RP 109-10). JDC's mother testified she was sleeping head-to-head with her son on a couch in Diane's house the night July 16, 2013. (RP 92). Sepela thought the victim was sleeping with Diane as she did not see him that night. (*Id.* at 92-93). And she would have if he were there. (*Id.* at 93-94).

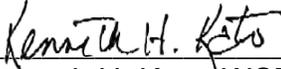
The reasonable inference is that nothing happened; not that something did happen. *Green, supra*. In order to find JDC guilty of the crime, the finder of fact necessarily had to stack unreasonable inference on unreasonable inference and guess or speculate as to what really took place that night. See *State v. Hundley*, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995). This is improper for the finder of fact to do and, even

when viewed in a light most favorable to the State, the evidence did not prove guilt beyond a reasonable doubt. *Hutton, supra*. When the evidence leaves uncertainty, the court should find that a rational conclusion beyond a reasonable doubt is foreclosed. *State v. Jones*, 140 Wn. App. 431, 437, 166 P.3d 782 (2007). The conviction must be reversed and the charge dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, JDC respectfully urges this court to reverse his conviction and dismiss the charge.

DATED this 27th day of May, 2015.



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CERTIFICATE OF SERVICE

I certify that on May 27, 2015, I served a copy of the Brief of Appellant by USPS on JDC, 513 Garfield St., Creighton, NE 68729; and by email, as agreed by counsel, on Teresa Chen at tchen@co.franklin.wa.us.