

FILED

AUG 03, 2015

Court of Appeals
Division III
State of Washington

No. 32862-7-III

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent
v.

CYNTHIA LOU MICHEL, Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

The State's evidence was insufficient to support the convictions for fourth degree assault and first degree child molestation.

Issue Pertaining to Assignment of Error

Was the evidence insufficient to support the convictions?

II. STATEMENT OF THE CASE

Cynthia Lou Michel was charged by information with count 1: first degree child molestation of DM and count 2: first degree child molestation of HM. (CP 1). The case proceeded to jury trial. During the trial, the information was amended to charge fourth degree assault of DM in count 1, while count 2 remained the same with an aggravator of abuse of a position of trust. (8/22/14 RP 194).

Ms. Michel, the paternal grandmother of DM and HM, had taken care of them for the past 12 years of their lives. (8/22/14 RP 299-300). DM, born 12/17/2000, testified she had been touched by her in a way she did not like. (8/21/14 RP 133-34). As DM was hitting puberty, Ms. Michel touched her breasts. (*Id.* at 134-35). She was around 11 years old. (*Id.* at 136). DM felt uncomfortable.

(*Id.* at 135).

HM, born 5/16/2002, said Ms. Michel touched her where she did not like. (8/21/14 RP 93). More than once, her grandmother touched her private parts, *i.e.*, her vagina, with her hand, rubbing both on top of her clothes and underneath. (*Id.* at 94). Ms. Michel rubbed outside HM's vagina. (*Id.* at 95). It happened in the living room and the bedroom. (*Id.* at 96, 102). HM told her to stop and said I love you, but not like that. (*Id.* at 96). She said DM knew what was going on. (*Id.*).

HM did not remember the last time it happened. (8/21/14 RP 98). She did not remember how old she was when Ms. Michel touched her private parts. (*Id.* at 108). HM also saw Ms. Michel rub DM's breasts underneath her pajamas. (*Id.* at 98-99). DM was going through puberty and had told her grandmother. (*Id.* at 101).

HM was recalled by the State in its case in chief. Realizing it had not presented any evidence as to when Ms. Michel had allegedly touched HM's vagina, the State then elicited testimony from HM that she had thought real hard about when it happened and was able to recall the incidents happened when she was 10 or 11. (8/22/14 RP 261-63).

Ms. Michel, born 11/24/51, testified she never hurt DM and HM and never touched them sexually. (8/22/14 RP 302). She did not touch DM's breasts, but DM did show her the inverted nipple on the left breast because she was concerned and frightened by it. (*Id.* at 304). Ms. Michel never touched HM's vagina for sexual purposes. (*Id.* at 313).

Dr. Phillip Esplin, a psychologist, testified that derogatory comments about Ms. Michel were made concerning her relationship with her son and her being a victim of sexual abuse by her father. (8/22/14 RP 291). Dr. Esplin said this could lead to negative stereotyping of the accused. (*Id.* at 292).

No exceptions were taken by the defense to the court's instructions to the jury. (8/22/14 RP 321). Ms. Michel was found guilty as charged. (8/25/14 RP 384-89). The court imposed a standard range sentence of 51 months for first degree child molestation and 180 days for the fourth degree assault misdemeanor. (10/28/14 RP 116). This appeal follows.

III. ARGUMENT

A. The State's evidence was insufficient to support the convictions for third degree assault and resisting arrest.

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, 25, 225 P.3d 237 (2010).

Here, the State's evidence did not prove beyond a reasonable doubt the elements for fourth degree assault and first degree child molestation. Questions of credibility are determined by the trier of fact, but 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). With the testimony of Dr. Esplin meshing with the testimony of HM on how she was treated better than DM at grandmother's house and Ms. Michel's son, her father, disparaging his own mother, there was more than enough evidence to show reasonable doubt whether the touching of DM's breasts and HM's vagina ever occurred. Nonetheless, the jury speculated on the existence of those facts to convict. This, it cannot do. *Id.*

Particularly telling is the State's decision to amend the first

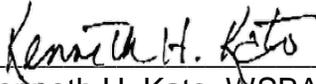
degree child molestation charge involving the touching of DM's breasts to a fourth degree assault. Even the State knew it did not have enough evidence to prove the molestation charge. By the same token, the State did not have enough evidence to prove the molestation charge involving HM, but rolled the dice anyway to save face and see if it could make the charge stick. The untoward and baiting comments by the deputy prosecutor to the able trial judge concerning his sentence and his permitting Ms. Michel to stay out of jail pending appeal speaks volumes. (See 10/28/14 RP 116-18, 130-32). The convictions were obtained through the very nature of the charges, not the evidence.

Even when viewed in a light most favorable to the State, there is no evidence, or reasonable inference from it, for a jury to determine that that Ms. Michel committed the offenses beyond a reasonable doubt. *Green, supra*. The convictions must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Michel respectfully urges this Court to reverse her convictions and dismiss the charges with prejudice.

DATED this 2nd day of August, 2015.



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CERTIFICATE OF SERVICE

I certify that on August 2, 2015, I served a copy of the brief of appellant by email, as agreed, on Garth Dano at kburns@grantcountywa.gov.

