

64604-4

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NO. 64604-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN J. MONTGOMERY,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Can a defendant challenge the sufficiency of the evidence without obtaining a record that sets out *all* of the evidence considered by the jury?

2. The defendant engaged the victim in a sexualized conversation while masturbating. He then touched the victim's breast over clothing. If the issue can be considered, does this evidence support an inference that the touching was for sexual gratification?

II. STATEMENT OF THE CASE

A. SUMMARY OF TRIAL TESTIMONY FROM LIMITED RECORD.

Direct examination of the State's witnesses¹ yields the following:

On the afternoon of July 13, 2008, the defendant and his wife picked up 15-year-old C.H. to babysit their two children. Partial Verbatim Report of Trial Proceedings (hereafter "RP") 2-4, 6, 11, 36 (see n.1). The trip takes about 15-20 minutes. RP 27. The

¹ Only the direct examination of the State's witnesses has been transcribed. See RP 2-95. Cross- and redirect examination of witnesses was not transcribed, nor any testimony of defense witnesses, nor the court's decision denying the defendant's motion to dismiss for insufficient evidence at the close of the State's case. Compare RP 2-95 (partial transcript) with 2 CP 59-67 (trial minutes).

defendant and his wife went out to dinner and got back around 11:30 p.m. The defendant offered to drive C.H. home. RP 7.

At first, in the car, the conversation was normal. C.H. told the defendant some of the boys she had dated had been jerks. RP 16. The conversation then veered to more sexual topics. The defendant started talking about areolas on a woman's breasts, and how they change. C.H. thought this conversation was a bit strange. RP 17-18. Meanwhile the defendant had offered her a wine cooler, which she drank. He offered her a second one and she took that too. RP 8-9, 16.

The defendant started talking about how the tip of man's penis is very sensitive. RP 19-20. C.H. looked over and could see the defendant had exposed himself and was masturbating. She was fairly explicit in her testimony, recalling the defendant's penis was "kind of like standing up" and his right hand was moving up and down. RP 18-20, 33-34. She could see he was circumcised. RP 34. The defendant then grabbed her left hand and brought it towards his groin. C.H. pulled her hand away.

Things were quiet for a while. RP 21. They had been driving in a wooded area. RP 22.

The defendant then picked up the conversation as though nothing had happened. He started talking about breasts again. RP 22. He reached over and grabbed C.H.'s left breast, cupping it from the side. RP 22-23. C.H. recalled it was a light touching and had lasted maybe a second, if that, before she "kind of like brushed it." RP 23-24. C.H. then "skooshed" over to the car door and acted like nothing had happened, not wanting things to get any more awkward than they already were. RP 24.

There was no more sexual conversation or sexual contact after that. The defendant took her home. RP 27-28. He had taken a roundabout way to get there, and it took a lot longer than the trip had that afternoon. RP 10, 12-13, 15, 27-28, 59. When C.H. got home – late – the defendant paid her the baby-sitting money and came in briefly to say hello to her mother. RP 28-29, 36-37.

Once the defendant left – C.H. looking out the front window to be sure – C.H. told her mother what had just happened. RP 29, 37. Her mother was upset but wanted to deal with it herself, rather than call police (although C.H. wanted them called). RP 30-31, 37-38. They did call the defendant's wife that night. RP 29-30, 37. In the end the police and CPS became involved some six weeks later

when C.H. disclosed to her high school counselor. RP 31-32, 68-70.

Interviewed by police in his living room, the defendant admitted he had talked to C.H. about her sexual history, about her carrying a condom, and about the sensitive areas on a man's penis. RP 51, 77. He said he had been adjusting the swim trunks he was wearing as he drove, and while doing so his penis might have popped out and C.H. might have seen it. RP 53-54, 75-76. He denied touching her sexually. RP 52. He admitted knowing that C.H. was 15 years old. RP 59. At the time, the defendant was 46. RP 58.

B. CHARGES, VERDICT, AND SENTENCE.

The defendant was charged by amended information with one count of third-degree child molestation (a felony) and one count of communicating with a minor for immoral purposes (a gross misdemeanor). 2 CP 103-104. The jury convicted on both counts. 2 CP 58; 1 CP 2. The defendant was sentenced within the standard range on the felony charge, 2 CP 39-53, and to a year's incarceration, suspended, on the misdemeanor. 2 CP 34-38. This appeal followed. The defendant appears to challenge only the felony conviction.

III. ARGUMENT

A. BECAUSE THE RECORD IS INADEQUATE FOR REVIEW, THIS COURT SHOULD NOT REACH THE MERITS.

As noted above (see n.1) only the direct testimony of the State's witnesses was transcribed; cross and redirect were left out, as was all testimony of defense witnesses. Compare RP 2-95 (partial transcript) with 2 CP 59-67 (trial minutes); see Appendix A (chart of proffered trial testimony vs. transcribed record). Yet the sole claim of error on appeal is that evidence supporting the felony conviction – specifically, addressing the element of “sexual contact” – is insufficient. Review of this claim requires examining whether there is sufficient evidence to support a conviction after viewing *all* of the evidence. State v. Vars, 157 Wn. App. 482, 492, 237 P.3d 378 (2010); accord, State v. Harstad, 153 Wn. App. 10, 20, 218 P.3d 624 (2009). Specifically, in determining whether the “sexual contact” element has been proved, the reviewing court looks to the *totality* of the facts and circumstances presented. State v. Harstad, 153 Wn. App. at 21.

Here, however, this Court does not have all the evidence. It was appellant's duty to ensure that it did. He has the burden of providing a record sufficient to review the issues raised on appeal. RAP 9.2(b); St. Hilaire v. Food Servs. of Am., Inc., 82 Wn. App.

343, 352, 917 P.2d 1114 (1996); State v. Garcia, 45 Wn. App. 132, 140, 724 P.2d 412 (1986). It is not as if this evidence does not exist: it does. See 2 CP 59-67 and Appendix A (chart). A trial court can and should refuse to reach the merits of a claim of error when a defendant fails to meet his or her burden of providing an adequate record for review. State v. Tracy, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005), aff'd, 158 Wn.2d 683, 690-91, 147 P.3d 559 (2006); St. Hilaire, 82 Wn. App. at 352. That is the case here. This Court should affirm on this basis alone.

B. EVEN THIS TRUNCATED RECORD FURNISHES SUFFICIENT EVIDENCE TO SUPPORT THIS CONVICTION.

Should this Court reach the merits, the evidence even on this truncated record is sufficient to support the defendant's conviction for third-degree child molestation.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the

evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing sufficiency, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971); State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

The rules apply equally to a circumstantial evidence case, for circumstantial evidence is no less reliable than direct evidence. Stewart, 141 Wn. App. at 795; Delmarter, 94 Wn.2d at 638; State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034

(1978) (citing State v. Lewis, 69 Wn.2d 120, 123-24, 417 P.2d 618 (1966)).

To prove third-degree child molestation, the State must show that the defendant engaged in “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.44.089(1); WPIC 44.24 (instructing on definition of crime), WPIC 44.25 (“to convict” instruction, listing elements). The element at issue here is that of “sexual contact.” “Sexual contact” means 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.” State v. Harstad, 153 Wn. App. at 20-21; WPIC 45.07 (definition); see RCW 9A.44.010(2). The jury here was instructed accordingly. 1 CP 12 (“to convict”); 1 CP 13 (definition of crime of child molestation 3°); 1 CP 14 (definition of “sexual contact”).

The “sexual or other intimate parts” component of “sexual contact” includes genitalia and breasts as a matter of law. In Matter of Welfare of Adams, 24 Wn. App. 517, 519-20, 601 P.2d 995 (1979). (Whether body areas apart from the breasts and genitalia are “intimate” is a question for the jury, Id., and is not a question

presented here.) If an unrelated adult with no caretaking functions touches a child's intimate parts, the jury can infer that the touching was for the purpose of "sexual gratification." State v. Ramirez, 46 Wn. App. 223, 226, 730 P.2d 98 (1986). If, however, the touching occurs through clothing, or if it involves portions of the body other than the primary erogenous areas, some additional evidence of that purpose is required. State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).²

In arguing that "sexual contact" was not proved, the defendant focuses exclusively on the short duration of that contact, citing C.H.'s testimony that he had grabbed her breast for a second or less. BOA 4-5, citing RP 23. He argues that any touching so brief cannot possibly be criminal. Id. He relies for this proposition on State v. R.P., 67 Wn. App. 663, 838 P.2d 701 (1992). He is wrong.

In R.P., a juvenile defendant restrained a classmate against her will, kissed her, and touched her breast. In a second incident a few days later, the defendant picked up the same classmate, hugged her, and kissed her on the neck long enough to leave a

² For a discussion of "sexual contact" and its component parts generally, see COMMENT to WPIC 45.07 and Fine & Ende, 13B Washington Practice: Criminal Law § 2406 at 34-35 (2d ed. 1998) and its Pocket Part at 14-15 (2009-10).

bruise or “hickey.” He was charged with two counts of indecent liberties. R.P., 67 Wn. App. at 665. (Indecent liberties includes “sexual contact” as an element. R.P. at 664-65; see RCW 9A.44.100.) The defendant challenged only the sufficiency of evidence supporting his conviction for the second count, arguing “sexual contact” there was not proved. This Court affirmed, finding that lips on the neck, under these circumstances, constituted “sexual contact.” Id. at 668. On review, however, the Supreme Court reversed. State v. R.P., 122 Wn.2d 735, 862 P.2d 127 (1993). Meanwhile, the first count, involving a touching on the breast, was never challenged in the first place. R.P., 67 Wn. App. at 666.

Given its facts and procedural history, it is hard to see how this case furthers the defendant’s argument. The defendant, however, relies on a statement in the decision that “since sexual contact in this case 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.” R.P. at 669, cited at BOA 4 and 5. But the Court immediately adds, “The kiss in this case lasted long enough to leave a bruise on C.C.’s neck.” R.P. at 669. Defendant leaves this out.

Clearly the statement referred specifically to lips applied to another's neck long enough to leave a "hickey." It did not analyze a touching of the breast. It hardly stands for the broad proposition – that is, for a temporal rule generally – to which the defendant inflates it. And in any case the Supreme Court reversed. A reversed case has little or no precedential value. State v. Law, 154 Wn.2d 85, 100, 110 P.3d 717 (2005).

The defendant presents his touching of C.H.'s breast completely in isolation as well. But that is not the test either. In determining whether the "sexual contact" element has been satisfied, the reviewing court looks to the totality of the facts and circumstances presented. Harstad, 153 Wn. App. at 21. When the touching is over clothes, as here, the courts have indeed required some additional evidence that the touching was for purpose of sexual gratification. Powell, 62 Wn. App. at 917. But here, even on this limited record, there was such additional evidence. The touching occurred in a vehicle at midnight, the victim alone with the defendant, during a highly sexualized conversation, and just after the defendant had been masturbating and had tried to put C.H.'s hand on his penis. And if the touching of her breast was brief, it was only because C.H. managed to brush the defendant's hand

away. Viewed in the light most favorable to the State, there was sufficient evidence of "sexual contact" to support this conviction for third-degree child molestation. Indeed, the defendant's claim of error would fail even under a less deferential standard of review.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on January 6, 2011.

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STATE v MONTGOMERY 64604-4-I

WITNESS	TRANSCRIBED	NOT TRANSCRIBED (per trial minutes)
STATE'S		
C.H. [victim]	DIRECT	CROSS; REDIRECT; RECROSS
TERESA HALL	DIRECT	CROSS;
Det. REBECCA LEWIS	DIRECT	CROSS; REDIRECT; RECROSS
Det. PATRICK HATCHEL	DIRECT	CROSS; REDIRECT; RECROSS
COLLEEN EGGER	DIRECT	CROSS
Det. STEVEN MARTIN	DIRECT	CROSS; REDIRECT; RECROSS
Dr. DAVID JACKSON	DIRECT	CROSS; REDIRECT; RECROSS
Dr. STEVEN CARTER	DIRECT	CROSS; REDIRECT; RECROSS
DEFENSE		
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PENNY MONTGOMERY		DIRECT; CROSS; REDIRECT
COLLOQUY / ARGUMENT		GREEN MOTION; CLOSING ARGUMENT