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No. 69302-6-I

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

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CHRISTINE NORTON On Behalf of L.T. and M.T.,  
Respondent,

v.

RUBEN TORRES,  
Appellant.

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

The Honorable Michael Hayden, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

The trial court erred in granting a sexual assault protection order.

**II.**  
**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Should the sexual assault order be reversed because the petitioner failed to present any evidence that Torres had intentionally touched L.T. or M.T. on the breast or touched them in any way for purposes of sexual gratification?

**III.**  
**STATEMENT OF THE CASE**

Christine Norton and Adrian Torres were married. They had twin girls, M.T. and L.T., shortly before they separated and divorced. After the divorce Adrian moved in with his parents, Ruben and Tela Torres. Thus, over the years the girls spent a considerable amount of time with their grandparents while visiting with their father. RP 84, 89.

On February 6, 2012, Norton brought a Petition for Sexual Assault Protection Order. CP 5-8. At that time the twins were 12 years old. The Petition alleged that Ruben Torres had “repeatedly touched [L.T. and M.T.] inappropriately for years.” CP 7.

On January 4, 2012, both girls wrote their father, and told him that they did not want to visit him anymore. CP 10-11. They both indicated that visits with their father in Cowlitz County interfered with the activities they pursued in Seattle. In addition, both stated that “Ruben is being very inappropriate.” CP 10 & 11. L.T. also mentioned that “We don’t believe in your religion but Ruben and Tela don’t understand that even when we tell them.” CP 11. She also added that she believed that her grandmother, Tela, pushed her father around. She said: “You shouldn’t let Tela push you around, your [sic] old enough to make your own decisions.” *Id.*

At the hearing, Norton testified that on January 4, 2012, L.T. and M.T. returned to her home from a visit with their father. RP 68. They told her they did not want to visit their father anymore. *Id.* Norton told the girls that she had to follow the parenting plan. *Id.* The girls then said their grandfather was “creepy.” *Id.* Norton suggested the girls write the letters to their father. *Id.*

Norton stated that she was “shocked” by the letters. RP 70. As a result, the three began “talking for hours about what actually happened.” *Id.* During that conversation L.T. and M.T. said that Ruben tickled them and touched them on their “chest” and “butt.” When Norton called Adrian “he laughed at me.” RP 71.

On January 6, 2012, Norton wrote to Adrian. Her first concern was as follows:

First of all [L.T. and M.T.] have expressed numerous times they do not wish to go to your house; actually they have been saying this for years. Also the girls have told me many times how your parents and sister are rude to them. They are getting older and want to be more involved in school activities and their social life. I feel they should decide on their own if they want to go to your house or not.

CP 12. After that statement Norton told Adrian that the girls had told her that Ruben “grabs their butt or breasts.” *Id.*

Norton was very vague as to when this inappropriate touching was alleged to have happened. RP 76-77. Norton also claimed that Adrian, the girls’ father, “continually harassed me and my family.” RP 82.

M.T. and L.T. did not testify. Instead the parties stipulated that the judge could watch a DVD of a police interview with each of them. The DVD was not admitted into evidence. Instead, it was played in open court.

M.T. told the interviewer that she was there to answer questions because “my grandpa is being inappropriate.” RP 21. She could not remember when this had last happened, “but when I was little, he would like tickle me and like get his hand down my shirt and go like that.” RP 22. M.T. was asked again “how old were you the last time he did that?” She answered: “Probably like a couple of visits ago.” *Id.* She said Ruben

tickled her neck and her foot. He would also “go up my shirt.” RP 23. She described the area as her “chest.” RP 24. She was not wearing a bra “because I was little.” *Id.* She said it felt “awkward.” RP 25. On another occasion, M.T. said her grandfather touched her (it is unclear where) when he was covering her up with a blanket. His hands were outside the blanket. RP 30. M.T. also said that her grandfather “yelled at me a lot.” RP 32. She also said her grandfather “slapped our butt.” *Id.* She explained that he would kiss them on the cheek and then, as they walked away, slap her butt. RP 33.

M.T. also explained that she did not like her grandparents or her aunt and that her grandparents were critical of her. RP 37.

L.T. was also interviewed. She said that: “Our grandpa like sometimes he touches us in weird places.” RP 48. When asked to explain she said: “[M]y sweatshirt was getting sort of small and so like grandpa was like pulling my sweatshirt down. And my grandpa was like pulling it behind and he was like kind of touching my butt. And then my sister pulled me away.” RP 49. She said that Torres did not touch her butt. She also said that her grandfather “tickles us” and “he tries to touch my boobs.” RP 50.

The sweatshirt instance occurred when her sweatshirt was too small. She had a shirt on under it. RP 50. And her sister, her father, and

her grandpa were pulling on it. RP 51. But he did not actually touch her “butt.” *Id.* When asked if Torres tried to touch her butt at any other time she said no.

In describing the tickling L.T. said that Torres tickled her neck. RP 52. He then proceeded down towards her “boobs.” *Id.* When that happened, L.T. said she ran away and her sister did too. RP 53. Throughout the tickling she was fully clothed and his hands stayed outside her shirt. RP 53-54. She stated that both she and her sister had told Torres to stop. RP 54. She thought Torres’s behavior was “awkward and weird.” *Id.* The interviewer confirmed that L.T. was motioning between her breasts. L.T. denied the touching occurred anywhere else on her breast. She also said that Torres had not touched her in any other place. She also clearly stated that Torres had not done anything else to her body or wanted her to do anything to him.

L.T. also volunteered that her grandparents were Jehovah’s Witnesses but that “I don’t believe that kind of stuff.” RP 55.

She said that she did not like it when Torres hugged her. RP 56. She said Torres had never touched her under her clothing. RP 57. She described Torres’s hug as “longer” than “a normal hug.” RP 60. L.T. also stated that her grandfather gets “mad” and again mentioned that she was

forced to attend Jehovah's Witness's meetings. RP 62. She did not like it when her grandfather was "rude." RP 63.

L.T. said that she no longer wanted to visit her father or her grandparents. RP 63-64. She said that she was always hungry when at her father's home. RP 63. And she said that all her father did was sleep and play video games. RP 64. L.T. described her paternal aunt as strict and "very mean." *Id.* Thus, she did not want to visit with her either. *Id.*

Christine Norton, the girls' mother, testified that the matter began January 4, 2012, when the girls returned from a visit and asked why they had to continue visiting their father. RP 68. They were angry, so she told them to write a letter. RP 68. After reading the letters, she was "shocked." RP 70. She then talked to the girls "for hours." *Id.*

Christine's husband told her she needed to report the tickling to the police. Otherwise, she "could get in trouble too." RP 71. She also told the girls' father, Adrian, that the girls did not want to have anything to do with Torres. *Id.* She then put the girls in counseling at the "Children's Response Center." RP 75.

On cross-examination Christine could not put a time frame on when the acts of tickling occurred. RP 77. She also admitted that the girls had previously asked not to have to visit with their father and his family. RP 78. The reasons included the impact on their social life, the

inconvenience and their father's religion. *Id.* She also admitted that she had filed an anti-harassment petition against Adrian, the girls' father. But that petition had been denied. RP 81. Apparently, she simply stopped complying with the court-ordered visitation. As a result, Adrian filed contempt proceedings against her. *Id.* Adrian had also called the police and alleged that Christine was committing custodial interference. RP 82.

Tela Torres, the girls' grandmother, testified that Adrian had exercised his right to residential time with the girls their entire lives. RP 84. The girls visited with their extended family when staying with Adrian. RP 85. The first she ever heard about the girls' concerns regarding Torres was the letter Christine wrote Adrian in January 2012. *Id.* She stated that she had never seen her husband act inappropriately with the girls. RP 86.

Tela testified that when the girls were younger, their grandfather tickled them. RP 86. She never observed anything inappropriate when he did so. RP 87.

Torres testified that he never intentionally touched either of his granddaughters inappropriately. RP 90. He stated that he, Adrian, and M.T. had pulled on L.T.'s sweatshirt but nothing more. *Id.* He admitted that when the girls were younger he tickled them over their clothing. RP 91. He never touched them in a "private area" however. *Id.*

In closing, counsel for the petition argued that the order should be granted under RCW 7.90.010(a) or (e). RP 97.

The trial judge granted the order. He stated that:

I do find that the touching did occur on the breasts of both girls, perhaps during tickling, that the issue was brought up and then it continued for some period of time. I don't find it unusual that the girls would have complained about and that they have, I won't say made light of it, but had brushed it off as something that was of no consequence. But the Court finds that it did happen, and the Court will enter a sexual assault protection order.

RP 107-08.

Orders prohibiting contact for two years were entered. CP 13-15.

This timely appeal followed. CP 16.

#### **IV. ARGUMENT**

##### **A. THERE WAS INSUFFICIENT EVIDENCE – EVEN UNDER THE PREPONDERANCE OF EVIDENCE STANDARD – FOR ISSUING THE SEXUAL ASSAULT PROTECTION ORDER IN THIS MATTER**

There do not appear to be any published or unpublished cases discussing the issuance of a sexual assault protection order outside of the context of a criminal prosecution. There was no criminal prosecution in this case.

The statute that provides for the type of order entered in this case states:

Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims. According to the FBI, a woman is raped every six minutes in the United States. Rape is recognized as the most underreported crime; estimates suggest that only one in seven rapes is reported to authorities. Victims who do not report the crime still desire safety and protection from future interactions with the offender. Some cases in which the rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim. It is the intent of the legislature that the sexual assault protection order created by this chapter be a remedy for victims who do not qualify for a domestic violence order of protection.

RCW 7.90.005.

The Legislature then provided that a sexual assault protection order may be entered:

If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order

RCW 7.90.090(1)(a).

“Sexual conduct” means any of the following:

- (a) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing;
- (b) Any intentional or knowing display of the genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent;
- (c) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including

through clothing, that the petitioner is forced to perform by another person or the respondent;

(d) Any forced display of the petitioner's genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others;

(e) Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done for the purpose of sexual gratification or arousal of the respondent or others; and

(f) Any coerced or forced touching or fondling by a child under the age of thirteen, directly or indirectly, including through clothing, of the genitals, anus, or breasts of the respondent or others.

The evidence in this case is insufficient – even under the preponderance of the evidence standard – to support the issuance of a protection order designed to protect against the type of assault that is the “most heinous crime against another person short of murder.”

The evidence in this case, taken in a light most favorable to the petitioners established that at some undefined time in the past, their grandfather tickled them and engaged in some horseplay with a sweatshirt. At some later point, both girls expressed a dislike for these instances. This dislike was a part and parcel of other family discord, including the girls’ overall distress over the requirement that they visit their father and his family.

Based upon this general testimony, the trial judge stated only that: “I do find that the touching did occur on the breasts of both girls, perhaps

during tickling, that the issue was brought up and then it continued for some period of time.”

As counsel for petitioner conceded in closing argument, the conduct complained of here could only meet the definition of sexual conduct in RCW 7.90.010(a) or (e). As to subsection (e), there was absolutely no testimony that would support an argument that Torres engaged in this touching for purposes of sexual gratification. All of the touching took place in public or while others were present. There were no indications that anyone believed the touching to be sexual except perhaps Ms. Norton. And, the trial judge did not make any finding that the touching was for purposes of sexual gratification.

And as to subsection (a), there was no testimony that Torres “intentionally or knowingly” touched either of the girl’s breasts. There was testimony about tickling and one of the girls mentioned her chest, but neither one testified that Torres touched their breast. He admitted to tickling his granddaughters over the years. But as Mr. Torres’s counsel argued in closing, a sexual assault protection order is not an occasion for the court:

to take innocent behavior and to criminalize it and terrify parents and to terrify caregivers into not touching their kids and not having any interaction with their kids at any point because sometime later they may decide for whatever reason that they don’t like it.

RP 104-05.

**V.  
CONCLUSION**

The law requires that a sexual assault order issue only when an unconsented sexual touching has occurred. There was no such touching in this case. Thus, the trial court erred in entering an order against Torres.

DATED this 23<sup>rd</sup> day of January, 2013.

Respectfully submitted,

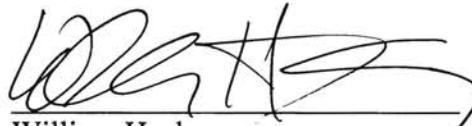
  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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