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OCT 01, 2015

Court of Appeals  
Division III  
State of Washington

**NO. 32862-7-III**

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

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STATE OF WASHINGTON, RESPONDENT

v.

CYNTHIA LOU MICHEL, APPELLANT

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APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

No. 13-1-00643-2

The Honorable Evan E. Sperline

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**BRIEF OF RESPONDENT**

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**I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.**

***WHETHER THE STATE PRESENTED EVIDENCE SUFFICIENT TO CONVINC A RATIONAL TRIER OF FACT BEYOND A REASONABLE DOUBT THAT MS. MICHEL IS GUILTY OF ASSAULT IN THE FOURTH DEGREE AND OF AGGRAVATED FIRST-DEGREE CHILD MOLESTATION***

**II. STATEMENT OF THE CASE**

Appellant Cindy Lou Michel is the paternal grandmother of D.M., born December 17, 2000 and H.M., born May 16, 2002. RP 81–82. Ms. Michel lived in Moses Lake, Washington during the events relevant to this appeal. RP 94. Both D.M. and H.M. loved this grandmother. RP 83. They typically spent one weekend each month with Ms. Michel during the school year. RP 82. There had been frequent, regular visits in her care since both sisters were in diapers. RP 85–86. Their mother, Brandy Johnson, trusted Ms. Michel “absolutely.” RP 85.

Ms. Johnson’s mother, Laurie Reese, did not. RP 72. Ms. Reese, D.M. and H.M.’s maternal grandmother, is the person to whom the girls first disclosed Ms. Michel’s unwanted behavior in January 2013. RP 66–67, 75. H.M. was then eleven years old and D.M. had just turned twelve. RP 75. Ms. Reese testified that “in the past” she and Ms. Michel had engaged in heated discussions over the way in which Ms. Michel touched the girls, going back to when they were in diapers. RP 70. Ms. Reese had

objected to “things like rubbing them on the behind, kissing them on the lips, making them kiss her” and told Ms. Michel “a grandmother is not supposed to kiss their grandchildren like that.” *Id.* Ms. Reese did not believe Ms. Michel’s behavior was “[t]ime, age appropriate.” RP 72. Ms. Reese admitted she had disliked Ms. Michel for the past ten years. RP 72–73. When defense counsel asked whether she would have reported any illegal behavior, Ms. Reese responded, “I had turned Cindy in before.” RP 78–79.

H.M. testified she twice witnessed Ms. Michel touching D.M.’s breasts and that both times when DM told her to stop, Ms. Michel stopped. RP 102. Both incidents occurred in Ms. Michel’s bedroom. RP 100. Ms. Michel did not say anything while she was rubbing D.M. RP 103. H.M. described an incident that happened when she was around ten years old and saw Ms. Michel rub D.M.’s breasts. RP 96. D.M. was going through puberty. *Id.* She was about eleven years old. RP 136. Excited that her breasts were growing, D.M. told her grandmother. RP 101. H.M. testified Ms. Michel responded by telling D.M. to come to her “and then she just slipped her hand under her shirt.” RP 102. D.M. testified Ms. Michel touched her nipple under her clothing and “kind of like felt around . . . it wasn’t hard, it was kind of softly. But it was uncomfortable.” RP 135–136. D.M. also testified that a couple of times she had asked Ms. Michel to help

her with her brassiere, but had not been uncomfortable because “I was asking for help, you know, I wasn’t trying to be gross.” RP 139–140.

D.M. thought some of Ms. Michel’s kisses were “gross.” RP 137. She testified Ms. Michel would ask the girls “for a kiss and then she would out of nowhere stick her tongue in our mouths.” RP 136. DM testified that each of the several times it happened she pulled back and said “ew.” RP 136. In response to Ms. Michel’s “what, don’t you love me?” D.M. would respond “yes, grandma, I love you, but I mean I don’t want to do this thing with you, it’s gross.” RP 137.

H.M. told the jury that three times Ms. Michel had kissed her on the lips and put her tongue in H.M.’s mouth. RP 103. Like D.M., H.M. told Ms. Michel to stop, that she did not like kissing with tongues. *Id.* As with D.M., Ms. Michel met H.M.’s protest with “you don’t love me anymore?” RP 120.

H.M. also testified that Ms. Michel rubbed the outside of H.M.’s vagina with her hand, both on top of her clothing and underneath her underwear. RP 94–95. She said, “It just happened out of nowhere, like, I would be sitting on her lap in her chair and she just would do it.” RP 94. HM testified she knew it was on purpose “[b]ecause she would do it often.” RP 116. Ms. Michel did not “say anything at all” as she touched HM’s vagina. RP 116. The touching occurred both in Ms. Michel’s

bedroom and in her living room. RP 96. H.M. testified: “I’d tell her to stop. And then if she didn’t, I’d tell her to do it—I’d tell her to stop again, and then I’d just get up and leave.” *Id.* HM testified that when she told Ms. Michel to stop, Ms. Michel responded, as she had with objections to tongue-kissing, “what, you don’t love me?” RP 96.

Neither D.M. nor H.M. had contact with Ms. Michel following the January 5, 2013 disclosure. RP 89.

The State charged Ms. Michel with two counts of first-degree child molestation, count one involving D.M. and count two involving H.M. CP 1–3. The State later amended the information to add to both counts the aggravated circumstance of abuse of trust. RCW 9.94A.535(3)(n). CP 97–99. At the close of its case in chief, the State again amended the information, this time reducing the child molestation charge in count one to a single count of fourth degree assault against D.M. CP 113–114. Count two and its aggravator remained unchanged. *Id.*

At trial, Ms. Michel denied sexually touching either of her granddaughters. RP 302. She denied touching D.M.’s breasts and denied having touched H.M.’s vagina for sexual purposes. RP 304. Ms. Michel’s expert witness, Dr. Phillip W. Esplin, is a forensic psychologist from Scottsdale, Arizona. RP 287. He testified that information in the case record indicated H.M.’s father, Ms. Michel’s son, had told H.M. that Ms.

Michel had abused him as a child and that Ms. Michel may have been the victim of sex abuse by her father. RP 291. Dr. Esplin testified that negative stereotyping occurs when “people who may be in high status towards the child makes derogatory or negative comments or portrays a person in a negative light.” RP 292. He told the jury that negative stereotyping “can potentially adversely affect the child’s motivation or desire to make negative tone statements. So it can adversely affect the reliability of the information obtained.” *Id.* Dr. Esplin admitted on cross-examination that the alleged negative stereotyping of Ms. Michel “did not seem to affect the way [H.M.] portrayed her grandmother to the detective during the investigative interview.” RP 294.

During cross-examination, Dr. Esplin initially and specifically referred to the defendant as a male, stating H.M. had held the defendant in high regard “until she learned more about him or what he was about. But she held—she held him in high regard.” RP 293. When defense counsel interjected: “Or her,” Dr. Esplin corrected himself: “Or excuse me, I mean her.” *Id.* When defense counsel asked about derogatory statements made to “[H.M.] and the children in this case,” Dr. Esplin referred to a singular child, “her.” *Id.* Dr. Esplin did not testify concerning D.M., nor did anything in his testimony suggest he understood the allegations against Ms. Michel came from two girls, not one.

The jury found Ms. Michel guilty on both counts, and further found she used a position of trust to facilitate first-degree child molestation of H.M. CP 142–44.

### III. ARGUMENT.

***THE STATE PRESENTED EVIDENCE SUFFICIENT TO CONVINC A RATIONAL TRIER OF FACT BEYOND A REASONABLE DOUBT THAT MS. MICHEL IS GUILTY OF ASSAULT IN THE FOURTH DEGREE AND OF AGGRAVATED FIRST-DEGREE CHILD MOLESTATION.***

“The due process clause of the Fourteenth Amendment requires the State to prove each essential element of the crime charged beyond a reasonable doubt.” *Apprendi v. New Jersey*, 503 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Whether the State has met its burden—production of substantial evidence supporting each element—is a question of law subject to de novo review. *State v. Butler*, 165 Wn. App. 820, 829, 269 P.3d 315 (2012). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)).

Ms. Michel argues trial evidence was insufficient to support her

convictions for fourth degree assault and aggravated first-degree child molestation. She declines to argue failure of specific evidence to support specific elements, claiming instead that her expert's testimony, combined with other defense witness testimony, created "more than enough evidence to show reasonable doubt . . . ." This argument must fail. By claiming insufficiency, Ms. Michel admits the truth of the State's evidence, including the testimony of D.M. and H.M. *Green*, 94 Wn.2d at 222. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against Ms. Michel. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court does not "ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt." *Jackson, supra*, 443 U.S. at 318–19 (emphasis in original) (internal citation omitted). "Deference is given to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the general persuasiveness of the evidence." *Butler, supra*, 165 Wn. App. at 829 (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)).

The jury found D.M. and H.M. more credible than it found Ms. Michel's witnesses and resolved conflicting testimony in the State's favor. The appropriate focus is whether trial evidence was sufficient to convince any rational trier of fact, beyond a reasonable doubt, of the essential elements of fourth degree assault and aggravated first-degree child

molestation.

**1. Count 1: Fourth Degree Assault (D.M.)**

Here, the State had to prove beyond a reasonable doubt that on or between May 2, 2011 and May 2, 2013, Ms. Michel assaulted D.M. in the State of Washington. CP 130.<sup>1</sup> Assault in the fourth degree—simple assault—“is an intentional touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person. A touching or striking is offensive if it would offend an ordinary person who is not unduly sensitive.” 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 35.50 (3d ed.) (WPIC) (irrelevant alternatives omitted).

H.M. testified she was around ten years old when she observed Ms. Michel rub D.M.’s breasts. D.M. recalled being about eleven. D.M. was born December 17, 2000. H.M. was born May 16, 2002. During the date span charged—May 2011 to May 2013—H.M. was between nine and eleven years old and D.M., between ten and twelve. The girls testified the incident occurred in Ms. Michel’s bedroom and that Ms. Michel lived in Moses Lake.

D.M. testified Ms. Michel touched her nipple under her clothing

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<sup>1</sup> The jury was also given a *Petrich* instruction covering both counts. *State v. Petrich*, 101 Wn.2d 566, 568, 683 P.2d 173 (1984), instructing the jury that it must find “one particular act” was “proved beyond a reasonable doubt” and “must unanimously agree as to which act has been proved.” CP 134

and “kind of like felt around . . . it wasn’t hard, it was kind of softly. But it was uncomfortable.” D.M. contrasted how she felt about this incident with her lack of discomfort when she asked her grandmother’s help with her brassiere. “I was asking for help, you know, I wasn’t trying to be gross.” H.M. told the jury D.M. told Ms. Michel to stop rubbing her breasts. From these facts, the jury could infer that D.M. was offended by having her bare breasts fondled. An ordinary person, not unduly sensitive, would find such touching offensive. There is no question the touching was intentional.

Offensive, too, were Ms. Michel’s kisses. D.M. testified that several times, “out of nowhere,” Ms. Michel inserted her tongue in the girls’ mouths when she kissed them. D.M. thought this, too, was “gross.” She told the jury that each time it happened she pulled back and said “ew.” In response to Ms. Michel’s “what, don’t you love me?” D.M. answered: “yes, grandma, I love you, but I mean I don’t want to do this thing with you, it’s gross.” This testimony clearly expressed D.M.’s disgust at being tongue-kissed by her grandmother. Disgust she communicated to Ms. Michel each time it happened. Ms. Reese, the maternal grandmother, had told Ms. Michel on more than one occasion “a grandmother is not supposed to kiss their grandchildren like that.” People of ordinary sensibilities would find such kisses offensive.

Evidence was sufficient to convince the jury beyond a reasonable

doubt that Ms. Michel had intentionally and offensively touched D.M. sometime between May 2011 and May 2013, in the State of Washington.

**2. Count 2: Aggravated First Degree Child Molestation (H.M.)**

In count two, the State had to prove that sometime between May 2011 and May 2013, Ms. Michel, in the State of Washington, had sexual contact with H.M., who was less than twelve years old, and that Ms. Michel was at least thirty-six months older than H.M. and not married to her. RCW 9A.44.083. The State also had to prove Ms. Michel used her position of trust to facilitate commission of the crime. RCW 9.94A.535(3)(n).

*a. Evidence was sufficient to show Ms. Michel had sexual contact with H.M.*

The girls first reported Ms. Michel's behavior to their maternal grandmother on January 5, 2013. H.M., born May 6, 2002, was not yet eleven years old. Ms. Michel's residence was in Washington. The sole question is whether the State presented sufficient evidence of sexual contact between Ms. Michel and her granddaughter.

“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.” RCW 9A.44.010(2). “Contact is ‘intimate . . . if the conduct is of such a nature that a person of common intelligence

could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper.” *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321, 323 (2008). Direct contact with breasts and genitalia is “sexual contact” as a matter of law. *In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). Courts consider the relationship between the accused and the child, recognizing that a caretaker may need to touch a child’s breasts or genitals for legitimate, non-sexual purposes. *State v. Wilson*, 56 Wn. App. 63, 68, 782 P.2d 224, 228 (1989), *review denied*, 114 Wn.2d 1010 (1990). If there is a biological or caretaking relationship, the fact finder may also consider the circumstantial evidence surrounding the touching. *Id.* In *Wilson*, the defendant was charged with indecent liberties involving his 4-year-old daughter and another child. This Court looked at the circumstantial evidence—touching occurring outdoors in relative seclusion, the daughter was disrobed, and the father had no current caretaking function—and held the evidence sufficient to find sexual contact.

Ms. Michel rubbed the outside of H.M.’s vagina with her hand, both on top of her clothing and underneath her underwear. H.M. testified, “It just happened out of nowhere, like, I would be sitting on her lap in her chair and she just would do it.” This happened in the living room and in Ms. Michel’s bedroom. H.M. testified, “I’d tell her to stop. And then if she

didn't, I'd tell her to do it—I'd tell her to stop again, and then I'd just get up and leave." H.M. said Ms. Michel would "guilt trip [her] and say what, you don't love me?" to which H.M. would respond: "Yes, grandma, I love you, I just don't like that." While Ms. Michel had been among the girls' regular caretakers their entire lives, there is no conceivable caretaking function involving repeated rubbing of a ten-year-old's vagina. A person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. That Ms. Michel repeated this unwanted act on multiple occasions, over H.M.'s objections, allowed the jury reasonably to infer her touching was for sexual gratification.

H.M. also told the jury that Ms. Michel kissed her on the lips and put her tongue in H.M.'s mouth three times. RP 103. Like D.M., H.M. told Ms. Michel to stop, that she did not like the kissing. *Id.* As with D.M., Ms. Michel responded, "you don't love me anymore?" RP 120. Kissing mouth-to-mouth, with tongues, has been held to be the touching of intimate parts. *See State v. Allen*, 57 Wn. App. 134, 139, 788 P.2d 1084 (1990) (kissing is sexual contact when proving indecent liberties); *State v. Coleman*, 151 Wn. App. 614, 624 n.41, 214 P.3d 158, 163 (2009) (jury could reasonably infer kissing with tongues constitutes contact with intimate parts for purposes of sexual gratification). Ms. Michel's kisses were not

grandmotherly. Ms. Reese told the jury the kissing was not “time, age appropriate.” She and Ms. Michel had “heated arguments” over how Ms. Michel kissed her granddaughters. Yet Ms. Michel did not stop. H.M. objected to having her grandmother’s tongue in her mouth. Ms. Michel did not stop. From this, too, a jury could reasonably find that at least some of Ms. Michel’s grandmotherly love was sexual in nature and that the kissing was sexually motivated.

*b. Evidence was sufficient to show Ms. Michel used her position of trust to facilitate first-degree molestation of H.M.*

D.M. and H.M. loved their grandmother. She had cared for them since they were babies. Their mother trusted Ms. Michel “absolutely.” Ms. Michel’s caregiving function gave her private overnight access to H.M., access without the presence of other adults. It is unlikely H.M. would have allowed a non-family member to tongue-kiss her and rub her vagina, especially not after she had made her objections known. Ms. Michel’s “what? You don’t love me?” response is troubling. It specifically calls upon the love and trust of her granddaughter in an attempt to continue the unwanted assaults. H.M. and D.M. both referred to the response as a “guilt trip.” It is reasonable to conclude that H.M. felt some conflict about rejecting her grandmother’s kissing and fondling. It is also reasonable to conclude that only H.M.’s love and trust prevented her from immediately

seeking help from her mother or Ms. Reese.

Ms. Reese testified that in the past she had “turned [Ms. Michel] in” for what she deemed inappropriate behavior toward H.M. and D.M. It is reasonable to conclude that Ms. Reese’s concerns were discounted due to the high regard in which the girls’ mother held Ms. Michel. Evidence was sufficient to prove Ms. Michel used the family’s love and trust to facilitate H.M.’s molestation.

IV. CONCLUSION.

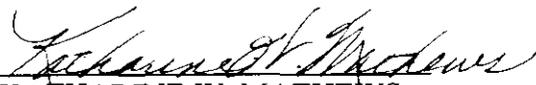
The jury chose to believe H.M. and D.M. The jury did not believe Ms. Michel. The State presented sufficient evidence for the jury to convict Ms. Michel of fourth degree assault against D.M. and of aggravated first-degree child molestation against H.M.

For these reasons, the State respectfully asks this Court to affirm Ms. Michel’s convictions for assault in the fourth degree and aggravated first-degree child molestation.

DATED: October 1, 2015

Respectfully submitted,

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COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

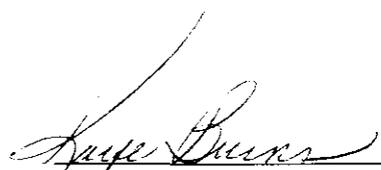
STATE OF WASHINGTON,            )  
  )  
                          Respondent,    ) No. 32862-7-III  
  )  
                  vs.                        )  
  )  
CYNTHIA LOU MICHEL,         ) DECLARATION OF SERVICE  
  )  
                          Appellant.     )  
\_\_\_\_\_                          )

Under penalty of perjury of the laws of the State of Washington,  
the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this  
matter by e-mail on the following party, receipt confirmed, pursuant to the  
parties' agreement:

Kenneth H. Kato  
khkato@comcast.net

Dated: October 1, 2015.

  
\_\_\_\_\_  
Kaye Burns