**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-1422**

In the Matter of the
Welfare of: T.R.A.

**Filed June 24, 2008**
**Reversed**
**Muehlberg, Judge***

Mille Lacs County District Court
File No. JV-06-1987
Hennepin County District Court
File No. JV-07-2433

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Minge, Presiding Judge; Wright, Judge; and Muehlberg, Judge.

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* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**MUEHLBERG,** Judge

Appellant was adjudicated delinquent for committing second-degree criminal sexual conduct, Minn. Stat. §§ 609.343, subd. 1(a), .341, subd. 11(a)(iv) (2004) (defining "sexual contact"). Appellant argues that the evidence was insufficient to sustain the adjudication of delinquency and that the district court erred by refusing to admit evidence of the victim's mother's bias and to stay the adjudication of delinquency.

Because the state failed to prove beyond a reasonable doubt that appellant touched the victim's intimate parts with sexual or aggressive intent, an essential element of the charge, we reverse.

## FACTS

On February 23, 2007, appellant T.R.A. was adjudicated delinquent for committing second-degree criminal sexual conduct, Minn. Stat. §§ 609.343, subd. 1(a), .341, subd. 11(a)(iv) (2004) (defining "sexual contact"). In this appeal, appellant challenges both the adjudication of delinquency and the disposition.

On January 27, 2006, 17-year-old appellant accompanied his adult brother and sister-in-law, Lucas and Jessica Arel, and their three-year-old daughter, L.A., to Eddy's Resort on Lake Mille Lacs. The Arels were celebrating their wedding anniversary and asked appellant to accompany them. The party rented one room at the resort; the Arels and their daughter slept in the only bed, and appellant slept on the floor.

During the weekend, the Arels decided to take a shuttle bus to the casino. Jessica Arel said they were gone for a maximum period of one-half hour. The Arels left L.A. in

appellant's care in the hotel room, and when they left for the casino, L.A. was in her pajamas but was not asleep. Appellant testified that the two watched TV for about one-half hour, and he then fell asleep on the floor. Appellant was asleep when the Arels returned. According to Jessica Arel's testimony, the following morning, while appellant and Lucas Arel were ice-fishing, L.A. told her that she had a secret, ultimately disclosing that appellant had touched her. L.A. asked Jessica Arel not to tell her father, but Jessica did so that day. The parents took no further action. In February, L.A. told her grandmother, Linda Arel, who is also appellant's mother, that she had a secret to tell her. A few days later, L.A. told Linda Arel that appellant had touched her under her belly button.

Linda Arel called a friend, who worked for Hennepin County Social Services, to see what she should do. Linda Arel testified that she "had been through something similar when I was a younger kid, and I never got any help. And I failed – if this was happening, [appellant] needed to get some counseling and so did [L.A.]." But Linda Arel also testified that she did not think appellant did anything. On March 21, 2006, about two months after the incident, the Arels took L.A. to Cornerhouse for an interview, which was recorded and introduced at trial.

The interviewer asked L.A. to identify various body parts. When asked to name her private parts, L.A. said, "[Appellant] touched me right there ya know?" She stated that appellant touched her with his hand, over her clothes, that he did not move his hand, or his fingers. She denied any other touching on any part of her body and any touching of appellant's body. She said that appellant did not say anything, did not tell her that this

was secret, and did not tell her it was okay or not okay to tell anyone. The child was distracted but cheerful during the interview and was more interested in drawing and playing with the toys. She did not remember many details of the weekend and thought her parents had been in the room during the touching. The court found that the interview is appropriate for a three year old.

At trial, L.A. stated simply that appellant had touched her with his hand over her clothes. She said it was on her private part. When asked to circle this, she drew a big circle encompassing a point about halfway below the navel to the upper thigh, including the vaginal area. On cross-examination, she agreed that she had talked to her mother about the incident and her mother told her what to say, but she could not remember what her mother told her.

Appellant sought to introduce evidence of animosity between Jessica Arel and Linda Arel, in order to cast doubt on Jessica Arel's credibility. The court strictly limited this testimony, refusing to permit testimony about the source of the animosity or about alleged prior unsubstantiated allegations of sexual abuse made by Jessica Arel.

The district court for Mille Lacs County issued a verdict adjudicating appellant delinquent on February 23, 2007. The court concluded that the child victim was credible. The court added that "although the evidence supports a finding that the juvenile committed the alleged act with the requisite sexual intent, it was done without the aggressiveness of a typical sexual predator. The evidence suggests this was more likely the act of an inquisitive adolescent." The court made no findings supporting its conclusion that the touching was done with sexual intent, beyond finding L.A. credible.

The disposition hearing was held in Hennepin County, the county of appellant's residence. The court initially considered staying adjudication based on the Mille Lacs court's comment above. Ultimately, the court decided to follow the recommendation of Court Services but commented that if appellant filed an appeal, "they can also request a stay of the disposition pending the appeal" pursuant to the juvenile rules. Appellant was placed on probation until his 19th birthday on the conditions that he complete sex-offender treatment, complete a five-day sentence, provide a biological sample, register as a predatory offender, have no new offenses, and remain law abiding. This appeal followed.

## D E C I S I O N

*Standard of Review*

In a delinquency adjudication, the state is required to prove beyond a reasonable doubt every element of the charged crime. *In re Welfare of S.M.J.*, 556 N.W.2d 4, 6 (Minn. App. 1996). We are limited to "ascertaining whether, given the facts and legitimate inferences, a fact finder could reasonably make" the determination of delinquency. *Id.* The appellate court reviews the record in the light most favorable to the adjudication and assumes that the fact finder believed all testimony supporting the adjudication of delinquency and disbelieved all contrary evidence. *Id.*

*Sufficiency of the Evidence*

Appellant was adjudicated delinquent for committing second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a), which states that "[a] person who engages in sexual contact with another person is guilty of criminal sexual

conduct in the second degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." "Sexual contact," as applied in this case, is defined as "the touching of the clothing covering the immediate area of the intimate parts" if the act is "committed with sexual or aggressive intent." Minn. Stat. § 609.341, subd. 11(a)(iv).

The basic elements of this crime are (1) a complainant under 13 years of age and an offender more than 36 months older; (2) touching of the clothing covering the immediate area of the intimate parts; and (3) touching done with aggressive or sexual intent. The first element was proved beyond a reasonable doubt: at the time of the incident, L.A. was three years old and appellant was 17 years old. If we review the evidence in the light most favorable to the adjudication, as we must, the state proved beyond a reasonable doubt that appellant touched L.A. on her clothing covering her intimate area; the district court found L.A.'s testimony credible and by implication found appellant's denial of touching L.A. not credible. We defer to the district court's credibility determinations. *S.M.J.*, 556 N.W.2d at 6. A child of L.A.'s age, three to four years old, can be a credible witness whose testimony alone can support a conviction. *See, e.g., State v. Christopherson*, 500 N.W.2d 794, 798 (Minn. App. 1993).

But all elements of the crime must be proved beyond a reasonable doubt. *S.M.J.*, 556 N.W.2d at 6. The district court stated that appellant acted with "the requisite sexual intent" but "without the aggressiveness of a typical sexual predator." "Sexual or aggressive intent" is not defined by statute, but a review of cases involving sexual contact indicate that the courts have relied on facts that clearly demonstrate an intent to engage in

sexual or aggressive behavior. *See, e.g.*, *State v. Krasky*, 736 N.W.2d 636, 639 (Minn. 2007) (in case deciding confrontation question, charging second-degree criminal sexual conduct based on repeated touching of genitals and digital penetration of child victim by adult defendant); *State v. Ness*, 707 N.W.2d 676, 680-83 (Minn. 2006) (in case determining admissibility of *Spreigl* evidence, charging second-degree criminal sexual conduct based on repeated touching of child's penis and thighs); *In re Welfare of A.A.M.*, 684 N.W.2d 925, 928 (Minn. App. 2004) (affirming finding of sexual contact, when offender pinched victim's breasts numerous times without her consent), *review denied* (Minn. Oct. 27, 2004); *In re Welfare of T.J.C.*, 670 N.W.2d 629, 631 (Minn. App. 2003) (in matter on remand from Minnesota Supreme Court to decide whether statement was erroneously admitted, charging juvenile defendant with second-degree criminal sexual conduct based on repeated touching of victim's penis), *review denied* (Minn. Jan. 20, 2004); *State v. Christopherson*, 500 N.W.2d at 798 (affirming conviction for second-degree criminal sexual conduct for French kissing child victim and putting a hand inside child victim's clothing to touch her buttocks); *In re Welfare of C.S.K.*, 438 N.W.2d 375, 377 (Minn. App. 1988) (affirming finding of sexual or aggressive intent when perpetrator repeatedly touched breasts, vaginal area, and buttocks of victim, both over and under clothing).

We acknowledge that a single contact, if made with the requisite sexual or aggressive intent, can support an adjudication of second-degree criminal sexual conduct; but equally, a single contact on the clothing covering the intimate parts may not be sufficient absent some evidence of sexual or aggressive intent. In each of the cases we

have examined, the contact was accompanied by behavior that confirmed the actor's sexual or aggressive intent, including squeezing, stroking, pinching, threatening, repeated touching, forcing the victim to touch the offender's intimate parts, or touching both over and under the victim's clothing. Here, according to L.A.'s testimony, which the court found to be credible, appellant momentarily touched her clothing over her private part, his hand did not move, and he said nothing. We accept L.A.'s testimony as credible, but we conclude that the court could not reasonably infer sexual intent beyond a reasonable doubt on this evidence. As we previously stated, "[i]t may be unnecessary to require formal proof, even as to an issue crucial to determining guilt in a criminal prosecution, of what is incontestably obvious. But some showing cannot be dispensed with when an inference is at all doubtful." *In re Welfare of P.W.F.*, 625 N.W.2d 152, 154 (Minn. App. 2001) (quoting Justice Frankfurter's concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 175, 82 S. Ct. 248, 258 (1961)). Here, the district court's sole finding on the element of sexual intent was that the act is "more likely the act of an inquisitive adolescent." This speculative statement does not meet the weighty standard of proof beyond a reasonable doubt.

The state has the burden of proving every element of a crime beyond a reasonable doubt. *S.M.J.*, 556 N.W.2d at 6. Because the state did not prove beyond a reasonable doubt that appellant acted with the requisite sexual intent, we reverse the adjudication of delinquency.

**Reversed.**