

ORIGINAL

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RECEIVED BY CLERK
SUPREME COURT

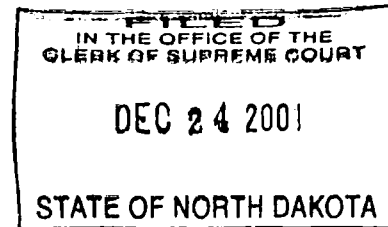
DEC 24 '01

State of North Dakota,)
)
Plaintiff/Appellee,)
)
vs.)
)
David Radcliffe,)
)
Defendant/Appellant.)

Supreme Court No. 20010254

Burleigh Co. No. 08-01-K-1012

20010254



BRIEF OF APPELLANT RADCLIFFE

Appeal from the District Court
Judgment of Conviction of July 31, 2001
Burleigh County, North Dakota
South Central Judicial District
Honorable Benny Graff

STEVEN BALABAN (ND BAR ID# 05204)
418 East Rosser Avenue, Suite 102
Bismarck, ND 58501
(701) 224-0977

Attorney for Defendant/Appellant Radcliffe

TABLE OF CONTENTS

	page
Table of Contents	i
Table of Authorities Cited	ii
Statement of the Issue:	
Was Sufficient Evidence Presented to Convict Defendant Radcliffe of Gross Sexual Imposition?	1
Statement of the Case	2
Argument	5
Statement of Jurisdiction and Standard of Review	5
Was Sufficient Evidence Presented to Convict Defendant Radcliffe of Gross Sexual Imposition?	6
Conclusion	8
Certificate of Service	9

TABLE OF AUTHORITIES CITED

CASES:

	Page
<u>State v. Gagnon</u> , 1999 ND 13, 589 N.W.2d 560	5. 6

STATUTES:

N.D.C.C. § 29-28-06(2)	5
------------------------	---

COURT RULES:

N.D.R.Crim.P. 29	6
------------------	---

CONSTITUTIONS:

N.D. Const. Art. VI, § 2	5
N.D. Const. Art. VI, § 6	5

STATEMENT OF THE ISSUE

Was Sufficient Evidence Presented to Convict Defendant Radcliffe of Gross Sexual Imposition?

STATEMENT OF THE CASE

In this matter, a jury convicted Defendant/Appellant David Radcliffe (Radcliffe), on July 31, 2001, of one count of Gross Sexual Imposition. Transcript at 157, lines 1-5, Appendix at 8. On October 4, 2001, the Trial Court sentenced Radcliffe to ten years at the North Dakota State Penitentiary, with five years suspended for a period of six years. Appendix at 8. Defense counsel moved for acquittal, and the Court denied that motion. Transcript at 120-121, lines 16-8. On appeal, Radcliffe requests that this Court reverse the conviction from the Trial Court and reverse the denial of his Motion for Acquittal based on insufficiency of the evidence against him.

At trial there was testimony that, when Serena Claymore, the resident of the apartment, came home, both children were awake. Transcript at 34, line 18. There were no allegations of any misconduct, sexual or otherwise, and Ms. Claymore even noted that she was "pretty good at body language." Transcript at 37, line 8. Claymore testified that, even out of Radcliffe's presence that evening, "they didn't indicate anything was wrong" and "[n]either of them were acting strange" and further that she knew the children well and could sense their body language and reactions. Transcript at 54, lines 19-22. Claymore testified that she walked directly into the apartment, the door being unlocked, and Radcliffe did not leap up or act surprised in any manner. Transcript at 51, lines 8, 15. He was not aroused in any manner. Id., line 21. Claymore further testified that she could see the alleged victim uncovered from her head down to her knees. Transcript at 52, lines 9-11. There was no mention or allegation of any underwear being pulled down or nightshirt or T-shirt being pulled up, and nothing was out of the ordinary. Claymore testified that, even the next day, neither child acted suspicious or scared or nervous.

Transcript at 56-57, lines 22-4.

Tammy Stoltz, the alleged victim's mother, testified at trial as well. There were other major inconsistencies between her testimony and Claymore's. Stoltz testified that her daughter did not leave the apartment until 9:00 a.m. the following morning. Transcript at 71, line 25. However, Claymore testified that Stoltz's daughter was at her door at 7:30 a.m. Transcript at 56, line 11. Stoltz did not have much further to offer, except what she was told by her daughter.

The alleged victim, Megan Berger, testified at trial. She insisted that she remained on her stomach, and, when asked whether Radcliffe "touch[ed] you in the front or the back of your privates," answered "Both." Transcript at 86-87, lines 23-2. Under cross-examination, Megan again testified that she remained on her stomach the entire time, and that her legs remained closed as well. Transcript at 89, lines 17-25. Megan further agreed that Radcliffe was not aroused in any manner. Transcript at 97. Again, on re-cross, Megan insisted that "I always stayed on my tummy." Transcript at 99, line 11

Finally, the alleged victim's friend, Lydia McCrorie testified. Lydia maintained that at no time did she ever see Radcliffe touch Megan "in her private areas." Transcript at 108, lines 6-9. In fact Lydia agreed that she "could not see Megan's private area" and it was only that Megan had told her Radcliffe touched her there. Transcript at 108, lines 14-19. Finally, Lydia stated that, even though she could not see what Radcliffe was doing or have a clear view of Megan, she was sure that Radcliffe had touched Megan inappropriately. Transcript at 108-109, lines 20-12.

The above conflicting testimony was the entirety of the State's case. Defense counsel moved for acquittal, and the Court denied that motion. Transcript at 120-121.

lines 16-8. On appeal. Radcliffe requests that this Court reverse the conviction from the Trial Court and reverse the denial of his Motion for Acquittal based on insufficiency of the evidence against him.

ARGUMENT

Jurisdictional Statement and Standard of Review

This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, and under N.D.C.C. § 29-28-06(2) to review a final judgment of conviction by appeal of the Defendant.

This Court has set forth its standard of review for a challenge to the sufficiency of the evidence presented at trial:

To successfully challenge the sufficiency of the evidence on appeal, a defendant must show there is no reasonable inference of guilt when viewing the evidence in the light most favorable to the verdict. By presenting evidence after the denial of the motion, the defendant permits this Court to review on appeal the entire record to determine whether sufficient evidence exists to sustain the verdict. In deciding whether there is sufficient evidence, we do not resolve conflicts in the evidence, nor do we weigh the credibility of the witnesses. We determine only whether there is competent evidence which could have allowed the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction.

State v. Gagnon, 1999 ND 13, ¶ 23, 589 N.W.2d 560.

Was Sufficient Evidence Presented to Convict Defendant Radcliffe of Gross Sexual

Imposition?

At the conclusion of the State's case, the defense moved for a Judgment of Acquittal under N.D.R.Crim.P 29. Transcript at 120, line 16. That rule states that

The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right.

N.D.R.Crim.P 29(a). That Motion was denied in its entirety by the Trial Court, however the issue was preserved for appeal. Transcript at 121, lines 6-8. On appeal, in viewing the evidence in a light most favorable to the verdict, the entire record is reviewed for sufficiency of the evidence. State v. Gagnon, 1999 ND 13, ¶ 23, 589 N.W.2d 560. In this case, as recited above in the Statement of the Case, the evidence did not sufficiently give the jury cause to convict Radcliffe. Notwithstanding that this Court does not reweigh evidence and does not determine credibility of witnesses, it is submitted that there was still simply not enough evidence submitted to the jury to convict Radcliffe of Gross Sexual Imposition.

Radcliffe's own girlfriend, who testified that she knew him well and was a good judge of character, expressed surprise to the allegations, and did not notice any odd behavior of Radcliffe or the alleged victim. She also testified that she could see the alleged victim's legs, and that there was no sign of any underwear pulled down. These factors do not point to one guilty of such an offense.

One of the children witnesses that testified, Lydia, stated that she never actually saw Radcliffe touch the alleged victim inappropriately at any time. She further testified, by

pointing to a drawing, that any time Radcliffe did touch the alleged victim, it was always above the waist, despite prodding to the contrary by the State. As such, this “witness testimony” added nothing the evidence that could be used by the jury to convict Radcliffe, but instead, pointed to an appropriate acquittal. The remainder of the testimony by both Serena and the alleged victim’s mother, Tammy, was hearsay and speculation and not to be considered by the jury.

The alleged victim herself, Megan, testified that her legs were closed and she was on her stomach the entire time. Therefore, there was no physical way that Radcliffe could have pulled down her underwear or touched her in the manner in which she claimed she was touched. The entire conviction was based upon a story that grew over time, and none of the facts matched up at trial.


Finally, one of the elements included in Gross Sexual Imposition, in the definitions, is the factor that the defendant had to have the purpose of arousing or satisfying sexual or aggressive desires. From the testimony of Radcliffe’s girlfriend, Serena, he was calm and collected when she returned to the apartment, apparently immediately after the alleged act occurred. She saw nothing out of the ordinary, and there was no evidence presented that Radcliffe was aroused in any manner.

Thus, even in the light most favorable to the verdict, as sufficiency of the evidence cases are viewed, there was insufficient evidence to convict Radcliffe of Gross Sexual Imposition. There is no manner in which a jury could have determined, from the evidence presented, that Radcliffe committed that offense and was guilty beyond a reasonable doubt. Radcliffe requests that this Court overturn his conviction on the grounds of insufficiency of the evidence.

CONCLUSION

From the arguments set forth above, and from the Record in this matter, Radcliffe requests that this Court reverse the conviction from the Trial Court based upon insufficiency of evidence, and direct the Trial Court to grant his Motion for Acquittal.

Dated this Monday, December 24, 2001.



STEVEN BALABAN (ND BAR ID# 05204)
418 East Rosser Avenue, Suite 102
Bismarck, ND 58501
(701) 224-0977

Attorney for Defendant/Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court No. 30010254
)	
Plaintiff/Appellee,)	Burleigh Co. No. 08-01-K-1012
)	
vs.)	CERTIFICATE OF SERVICE
)	
David Radcliffe,)	
)	
Defendant/Appellant.)	

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Steven Balaban, the attorney for Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Monday, December 24, 2001, he served the attached:

**BRIEF OF APPELLANT RADCLIFFE and APPENDIX OF APPELLANT
RADCLIFFE**

upon the following person(s) by personally delivering a copy of same:

Burleigh County States Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501



Steven Balaban