



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. JERRY CHARLES HOLLE  
CR-15-0348-PR**

**PARTIES:**

*Petitioner/Cross Respondent:* Jerry Charles Holle

*Respondent/Cross-Petitioner:* The State of Arizona

**FACTS:**

Holle's 11-year-old step-granddaughter, M.H., disclosed to a friend and school counselor that Holle had touched her breasts, buttocks, and vagina on several occasions. M.H. testified at trial that Holle touched her breast area under the clothes and kissed her there twice. She testified he had touched her "butt" both by using his hands above and under her clothes and with his "front part" fully clothed. He touched her "peepee" with his hands above and below her clothes.

After investigation, the grand jury indicted Holle for molestation of a child, sexual abuse of a minor under fifteen, sexual conduct with a minor under fifteen, and aggravated assault of a minor under fifteen. The State alleged the first three were dangerous crimes against children.

Holle filed a pretrial motion in which he: (1) objected to the statutory elements of the offense as interpreted in *State v. Simpson*, 217 Ariz. 326 (App. 2007) (holding the statute defining child molestation does not require proof of motivation by sexual interest); (2) objected to the standard jury instructions; and (3) asked the court to instruct the jury that sexual motivation is an essential element of the offense. The trial court denied the request to instruct the jury that sexual motivation is an essential element. The court later instructed the jury that the defendant had the burden to prove lack of sexual interest by a preponderance of the evidence.

When the State finished its case, Holle moved for judgment of acquittal on all counts under Arizona Rule of Criminal Procedure 20. The court granted the motion only as to the charge of aggravated assault. Holle presented testimony by his daughters and M.H.'s uncle, all of whom said they had no reason to believe he was sexually interested in M.H. or other children.

Shortly after the jury retired to deliberate, it sent a question to the trial court: "For these accusations to be a crime, must there be sexual intent proven?" The court told jurors to rely on the written instructions they had already received. The jury found Holle guilty of molestation and sexual abuse of a minor, but could not reach a verdict on the charge of sexual conduct with a minor. The court sentenced Holle to a ten-year term in prison for molestation, followed by five years' probation for sexual abuse.

The court of appeals affirmed. It agreed with Holle that contact motivated by sexual interest is precisely the way that innocent conduct is different than criminal conduct. The court of appeals disagreed with the *Simpson* case, in which another division of the Arizona Court of Appeals held that the molestation statute's language is clear and ambiguous and does not require further interpretation. The court of appeals here also held that A.R.S. § 13-1407(E) is a defense, but not an affirmative defense under A.R.S. § 13-103(B). While the court of appeals acknowledged that the trial court had erred in instructing the jury that lack of sexual motivation was an affirmative defense Holle had to prove, it concluded the error was harmless beyond a reasonable doubt.

## **ISSUES:**

### **Petition for Review:**

1. When the erroneous jury instruction not only alleviates the government's burden of proof but also shifts the burden onto the defendant, is that error properly characterized as structural?
2. Did the COA misapply harmless error in determining that the evidence overwhelming supported conviction, where A) the erroneous jury instruction went to the heart of the defense, and B) the jury asked a question directly related to the burden of proof on sexual motivation?

### **Cross-Petition for Review:**

1. Is review by this Court warranted where (1) the two divisions of the court of appeals have issued inconsistent and irreconcilable opinions on whether a defendant's sexual motivation or lack thereof is an element of child molestation or rather an affirmative defense to that offense, and (2) the court of appeals' determination in this case that the defenses under A.R.S. § 13-1407 are not affirmative defenses contrary to longstanding law?

## **DEFINITIONS:**

**A.R.S. §:** Arizona Revised Statutes section, the particular "address" in laws the Arizona Legislature has enacted where one may find a given law.

**A.R.S. § 13-103(B):** "For the purposes of this section [which abolishes common law offenses and affirmative defenses and declares that all offenses and affirmative defenses are now statutory], 'affirmative defense' means a defense that is offered and that attempts to excuse the criminal actions of the accused or another person for whose actions the accused may be deemed to be accountable. Affirmative defense does not include any justification defense pursuant to chapter 4 of this title or any defense that either denies an element of the offense charged or denies responsibility, including alibi, misidentification or lack of intent."

**A.R.S. § 13-1407(E):** "It is a defense to a prosecution pursuant to section 13-1404 [sexual abuse]"

or 13-1410 [molestation of a child] that the defendant was not motivated by a sexual interest. It is a defense to a prosecution pursuant to section 13-1404 involving a victim under fifteen years of age that the defendant was not motivated by a sexual interest.”

**Arizona Rule of Criminal Procedure 20:** An Arizona rule established by the Arizona Supreme Court pursuant to which a defendant may ask the trial court to make a judgment of acquittal, meaning to decide criminal charge(s) in favor of the accused person without further trial because the State has not proven that person’s guilt beyond a reasonable doubt, as it must to convict a person.

**Harmless beyond a reasonable doubt:** Even though the trial court made an error, that error could not have made any difference in the outcome of the case and therefore the defendant would not be legally harmed by affirming the conviction.

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