

FILED
SUPREME COURT
STATE OF WASHINGTON
3/14/2022
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FILED
COURT OF APPEALS
DIVISION II
2022 MAR 11 PM 2:06
STATE OF WASHINGTON
BY
DEPUTY

No. 54606-0-II

100741-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

SMOKEY FERNANDEZ, Petitioner

PETITION FOR REVIEW

Smokey Fernandez/ DOC 338222
Stafford Creek Corrections
191 Constantine Way
Aberdeen, WA 98520

I. IDENTITY OF PETITIONER

Petitioner Smokey Fernandez, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Smokey Fernandez seeks review of the Court of Appeals unpublished opinion entered on 2/2/2022. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

A.

B.

IV. STATEMENT OF THE CASE

V. ARGUMENT WHY REVIEW SHOULD BE

ACCEPTED

VI. CONCLUSION

Submitted this _____ day of _____, 2022.

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DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY _____
DEPUTY

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that enter the date, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to the following: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov; Clark County Prosecuting Attorney 1013 Franklin Street PO Box 5000 Vancouver WA 98666-5000

Signature

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DIVISION II

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STATE OF WASHINGTON

BY

DEPUTY

my Due process the 14th amendment was violated by not having correct time or date of when this crime happened. for due process probable cause. No DNA I was not arrested till after trial.

I fill (my) Due process that requires that every defendant be presumed innocent see state v Green Wn 2d, 216, 221 616 P.2d 628 (1980) Jackson v virginia

Due process requires the state to prove every element of the charged crimes beyond a reasonable doubt. state v Kalebaugh 183 Wn 2d 578 584, 355 P.3d (2015)

US const Amends VI, XIV; Washi const Art I, §§ 3, 22 The test for determining whether the state has presented sufficient evidence is whether after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilty beyond a reasonable doubt.

state v Green 94, Wn 2d 216, 220-22 616 P1d 628 (1980) whether the state presented sufficient evidence to support a conviction is a question of constitutional law and is reviewed de novo.

insufficient description for sexual gratification a reasonable doubt can be raised from the lack of evidence. No accusation of him touching himself to come to orgasm. No accusation or testimony from any person that he is rocking in the chair to simulate physical contact. No accusation that he is grabbing her and putting her on his lap much less rubbing her on his lap to come to orgasm.

No accusation that at any other point in time he had any inappropriate contact with this child. pg 780

The state and courts seem to focus on the three party story from a mentor that was not there time this has happened and the state even says it's unclear if this was made up by the mentor. pg 785, 786

There was no truth to the alleged victim was naked for sure she was asked what she was wearing she said she don't remember pg 648

she was also asked what had happened to the juice that there supposed was she said she does not know pg 639-640

alleged victim said she don't remember being home alone with me pg 636

alleged victim don't remember telling Lori anything pg 637

The mentor Lori is not a reliable person of info she said she was always buying food and gifts for the alleged victim. pg 596, 762

she also lied when asked about taking her to her house pg 607-763

alleged victim said she went there four times and the mom believes she been there also pg 629, 649

The cps story of liqurid was not true the officer said she didn't hear about liqurid pg 528

The alleged victim never told her mom about coming into contact or touching it. pg 684

Her mom says it was not to her knowledge she sat on my lap pg 668

Even the grandmother said she never sat on a lap she sits on the arm of the chair pg 619

state v Zamora 6 wn App 130, 132, 491 p 22 1342 (1971) The evidence produced in this matter is not substantial and insufficient to sustain the conviction. It's based on speculation. Because the state failed to present sufficient evidence for the jury to convict MR Fernandez of first degree child molestation the court must reverse the conviction and dismiss with prejudice. state v Smith 155, wn 2d, 496, 505 120 p 3d 559 (2005)

My 5th amendment was violated by interviewing the alleged victim and not letting my lawyer be present.

They also gave transcribed of the forensic interview to the jury because you can not hear the interview pg 410

my 8th amendment was violated by not having a fair sentence of 78 months to life and The JSRB Board for a crime that is false.
Pg 817

I have not got any help for medical treatment or fair treatment at all.

I'm writing for a reconsider because there could be lots of benefits to help other people in a similar situation there is lots of people that have been falsely convicted of a crime they didn't commit and didn't have any evidence to back it up it's all speculation or hearsay. Anyone can say anything that a person committed a crime then they find themselves in court and the state finds a bias jury to get an easy conviction. Then the person finds no hard time to fight to get out. The law is supposed to be innocent till proving guilty but it's guilty till proven innocent because if there is no proof or DNA how is there a crime. It could be a 3rd party that took something innocent and make it worse. or if they don't like the person because they know their past or talk someone to say something about someone that's not true then when someone get mad they use the story. Because the person tries to punish them. you might have someone in your family that got falsely charged. I hope you can look into this story and see stuff is not always what it seems to be. A good person's words and actions speak for themselves. In another light you might look at someone that has a conviction before but they might have had someone lied and change their story and the reason someone took a deal was because they were scared or threatened by the state. The judge asks the person were you threatened to take the deal they say no because they're scared. Hope you find it in your heart to relook at the case and change the decision.

Thank you for your time and understanding I didn't get time at law library to do a better job I was on lock down do to the virus.

I have a disability a learning disability and help did my best.
developmental disability

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Washington State
Supreme Court

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DIVISION II

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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY _____
DEPUTY

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that enter the date, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Petition for Review to the following: Clark County Prosecuting Attorney at [cntypa.generaldelivery@clark.wa.gov](mailto:cntyipa.generaldelivery@clark.wa.gov); Clark County Prosecuting Attorney 1013 Franklin Street PO Box 5000 Vancouver WA 98666-5000

Signature

Smokey Fernandez


Smokey Fernandez 338222
Stafford creek corrections center
191 Constantine way H2-B58h
Aberdeen, wa 98520

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February 8, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SMOKEY FERNANDEZ, aka BRIAN ADAM
FERNANDEZ,

Appellant.

No. 54606-0-II

UNPUBLISHED OPINION

WORSWICK, J. — Smokey Fernandez appeals his conviction and sentence for first degree child molestation. He argues that there was insufficient evidence to sustain his conviction and the trial court erred and violated his constitutional right to parent his children when it ordered a community custody condition that prohibited Fernandez's contact with his minor child unless approved by a sexual deviancy treatment provider.¹ We hold that sufficient evidence supports Fernandez's conviction, and, as the State concedes, the trial court did not engage in the required fact-specific inquiry or address the scope and duration of the community custody condition. Accordingly, we affirm Fernandez's conviction but remand to the trial court to reexamine his community custody condition concerning contact with his minor children.

¹ Fernandez filed three separate statements of additional grounds (SAGs) but only one was timely, so the Court Clerk filed the latter two without action. Then Fernandez filed a letter to the Court Clerk requesting to withdraw his SAG and asking the Clerk to return his documents. We considered this as a motion, and we grant Fernandez's motion to withdraw his SAG, but hold that the SAG documents shall remain in the file without action.

FACTS

I. BACKGROUND

Fernandez began a relationship with AK around 2014 that lasted for four years. In 2015, he moved in with AK, into a home they shared with AK's mother and AK's minor daughter, OK. Fernandez would sometimes stay home with OK while AK and her mother were at work.

On one occasion, when OK was about age 7, she ended up naked on Fernandez's lap in a rocking chair.² OK then noticed Fernandez's bare penis outside of his shorts and that it felt wet on her bottom. OK saw and felt that Fernandez's penis had fluid on it.³ When she felt it "wet on [her] butt" and saw his penis, she jumped out of the chair and said "eww." 2 Verbatim Report of Proceedings (VRP) at 640.

When AK returned home, OK told her that she had seen Fernandez's penis. Fernandez told AK that his shorts rode up and that OK had merely glimpsed it.

Sometime later, OK related what happened to her adult mentor from the Great Life Mentoring Service. OK brought up to her mentor that she had seen Fernandez's penis. She told the mentor that it came out of Fernandez's pants, and then OK motioned to her crotch. OK told the mentor that his penis had "pee juice coming out the end" that she said "eww," but that Fernandez did not immediately put it away. OK then told the mentor that the "pee juice" got "on [her] butt."

² At that time, Fernandez would have been at least 30 years old.

³ OK referred to the fluid in various ways ("boy pee," "pee juice," and "natural juices") but it was never established for the record whether the fluid was urine or ejaculate. 1 VRP at 490-92; 2 VRP at 579, 600-01, 639; *see also* 2 VRP at 734.

The mentor reported this to her supervisor, which led to the involvement of Child Protective Services (CPS) and the Washougal police. OK later told a CPS worker what happened consistent with what she reported to her mentor, including that she had been in the rocking chair with Fernandez and that his penis had “juice coming from it.” 2 VRP at 551-56, 564-65. OK was removed to protective custody. While in protective custody, OK gave an account to a police child forensic interviewer that was consistent with her prior reports to her mentor and CPS worker. OK also drew a depiction of what she saw for the forensic interviewer.

II. PROCEDURAL HISTORY

Washougal police arrested Fernandez in September 2018. The State charged him with one count of first degree child molestation. The case proceeded to a jury trial in March 2020.

At trial, witnesses testified to the facts above. OK, AK, the mentor, the CPS worker, and Washougal police officers all testified consistent with OK’s initial report. OK testified that she was sitting on Fernandez’s lap watching television, when his penis “slipped out of his shorts.” 2 VRP at 639. She said that it “had natural juices on it,” and when asked what part of the penis had those juices on it, she replied, “everything.” 2 VRP at 639. She also testified that Fernandez’s penis was “on my butt for sure.” 2 VRP at 640.

The jury found Fernandez guilty of first degree child molestation. The trial court sentenced Fernandez to a minimum term of 78 months as part of an indeterminate sentence. *See* RCW 9.94A.507. As part of the community custody conditions, the court imposed a condition prohibiting Fernandez from contacting any minors without approval of the Department of Corrections and his sexual deviancy treatment provider. Fernandez has a daughter from another relationship who lives with her biological mother out of state.

Fernandez appeals.

ANALYSIS

I. SUFFICIENT EVIDENCE

Fernandez first argues that there is insufficient evidence to support the jury's conviction.

We disagree.

When considering a sufficiency of evidence argument, we must determine whether “*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Condon*, 182 Wn.2d 307, 314, 343 P.3d 357 (2015) (quoting *State v. Luvene*, 127 Wn.2d 690, 712, 903 P.2d 960 (1995)) (internal quotation marks omitted) (alteration in original). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201; *see also Condon*, 182 Wn.2d at 314. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Canfield*, 13 Wn. App. 2d 410, 418, 463 P.3d 755 (2020).

To convict Fernandez of first degree child molestation, the State had to prove that Fernandez had sexual contact with a person less than twelve years old and that he was at least thirty-six months older than the victim. RCW 9A.44.083(1). “‘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(13). We have interpreted the term “intimate parts” to have a broader meaning than “sexual” and includes “parts of the body in

close proximity to the primary erogenous areas,” including the hips, buttocks, and lower abdomen. *In re Welfare of Adams*, 24 Wn. App. 517, 519-21, 601 P.2d 995 (1979).

Sexual gratification is not an essential element of first degree child molestation, but merely clarifies the term “sexual contact.” *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Including sexual gratification in the definition of “sexual contact” serves to exclude inadvertent touching or contact from being a chargeable offense. *State v. Stevens*, 158 Wn.2d 304, 309, 143 P.3d 817 (2006). However, the State has a burden to show sexual gratification to prove sexual contact. *Stevens*, 158 Wn.2d at 309. Contact is “intimate” if a person of common intelligence could determine from the circumstances that parts touched were intimate and therefore touching was improper.⁴ *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

Here the State presented evidence that Fernandez touched OK’s unclothed intimate parts. 1 VRP at 490; 2 VRP at 552, 579-80, 600, 639-40. Further, the State presented uncontroverted evidence that OK came in contact with Fernandez’s penis, which had “natural juices” all over it. 1 VRP at 490; 2 VRP at 552, 579-80, 600, 639-40. Drawing all inferences in the State’s favor, this evidence was sufficient for a rational trier of fact to have found the elements of the crime beyond a reasonable doubt.

Fernandez argues that because the State presented no evidence that the liquid on Fernandez’s penis was semen, and not urine, the State therefore cannot prove sexual contact because it cannot show sexual gratification. This argument strains credulity. Moreover, our Supreme Court has explained that under certain circumstances, urine may be indicative of sexual

⁴ A jury may determine that parts of the body in close proximity to the primary erogenous areas are intimate parts. *Harstad*, 153 Wn. App. at 21.

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gratification in the context of sexual contact. *State v. Jones*, 112 Wn.2d 488, 497, 772 P.2d 496 (1989). Accordingly, we hold that sufficient evidence supports Fernandez's conviction.

II. COMMUNITY CUSTODY CONDITION

Next, Fernandez argues that the trial court erred when it imposed the community custody condition prohibiting any contact with minors without first gaining approval from the Department of Corrections and his sexual deviancy treatment provider. He argues that the trial court's order violated his fundamental liberty interest in parenting his children. The State concedes that the trial court did not properly consider the community custody condition to ensure that it was "sensitively imposed." Br. of Resp't at 9; *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010); *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). We accept the State's concession.

Although a parent's fundamental right to parent may be limited by a community custody condition, the trial court must conduct a "fact-specific" inquiry that examines the no-contact order, its scope, its duration, and whether its conditions are reasonably necessary. *State v. Peters*, 10 Wn. App. 2d 574, 584, 455 P.3d 141 (2019). The court must impose the condition so that it is "reasonably necessary to accomplish the essential needs of the State and public order." *Peters*, 10 Wn. App. 2d at 583 (quoting *Rainey*, 168 Wn.2d at 377). We remand the community custody condition to the trial court and instruct the trial court to conduct the appropriate fact-specific inquiry.


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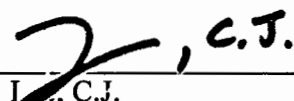
Thus, we affirm Fernandez's conviction but remand to the trial court to consider the scope and duration of the community custody provision that prevents Fernandez's contact with his minor child.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


Worswick, J.

We concur:


Maxa, J.


I., C.J.