No. 31820-6-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JASON LEE DUTCHER,

Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John D. Knodell, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF APPELLANT'S ISSUES

1. The evidence was insufficient to support the jury's verdict that Mr. Dutcher committed third degree child molestation.

2. The trial court violated Mr. Dutcher's right to a unanimous verdict when it failed to instruct the jury on unanimity.

3. The trial court erred by ordering Mr. Dutcher to submit to plethysmograph examinations as directed by his community corrections officer as a sentencing condition.

4. The sentencing condition prohibiting purchasing, possessing or viewing "any pornographic materials in any form" is unconstitutionally vague.

B. RESPONDENT'S ANSWER TO APPELLANT'S ISSUES

1. Mr. Dutcher should have been required to prove his claimed "sleep sexual contact" theory as an affirmative defense.

2. No unanimity instruction was necessary because Mr. Dutcher's actions constitute a continuous course of conduct.

3. Mr. Dutcher's assignment of error to the plethysmograph sentencing condition is not ripe for review.

4. The State concedes the prohibition regarding pornographic materials should be stricken as unconstitutionally vague.

C. RESTATEMENT OF FACTS PERTIENT TO ISSUES

H.N.D. felt Jason Leet Dutcher touch her for a few seconds on her left side between her rib cage and her hip and then remove his hand. 2RP 60, 92. One minute later, Mr. Dutcher touched her clitoris for a few seconds. 2RP 61, 63, 92-93, 97. Mr. Dutcher next pulled his penis out of

his pants and rubbed it on her. 2RP 64-65. He thrust his hips into her back for a couple seconds a few minutes after touching her clitoris. 2RP 98, 102-05. He tried to reach up her shirt, but she blocked him with her knees and arms. 2RP 63, 66.

Later, when confronted with the allegations of touching H.N.D., Mr. Dutcher maintained he was sleeping, did not know what she was talking about, and denied touching her. 2RP 180-81, 226, 231.

The jury nevertheless found Mr. Dutcher guilty of third degree child molestation. CP 45. Mr. Dutcher's sentence, among other things, required him to "[a]ttend and participate in a crime-related treatment counseling program, if ordered to do so by the supervising Community Corrections Officer," and to "submit to plethysmograph[s] as directed by supervising Community Corrections Officers." CP 80-81.

D. ARGUMENT IN REPLY OT STATE'S RESPONSE

Mr. Dutcher's relies primarily upon his Brief of Appellant to address all issues raised by the State. He also argues as follows in direct reply to the State's response.

1. Mr. Dutcher's state and federal constitutional due process rights were violated because the State produced insufficient evidence of third degree child molestation by failing to show Mr. Dutcher acted with the purpose of sexual gratification.

The State suggests this Court should extend the holding in *State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012), to this case and treat Mr. Dutcher's sleep claim as an affirmative defense. In *Deer*, the Supreme Court held the defendant's claimed lack of volition in a child rape case amounted to an affirmative defense, for which she bore the burden of proof. *Id*. at 727.

Deer should not be extended to this case because the two cases are legally and factually distinguishable.

First, the two cases involve different offenses with different elements. While both child rape and child molestation are strict liability offenses, child molestation's sexual contact element uniquely requires proof of purpose. In other words, intent, while not an element, is necessary to prove child molestation's sexual contact element. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Rape of a child requires no proof of mens rea whatsoever. *Deer*, 175 Wn.2d at 731.

Second, the State bears the burden of disproving an affirmative defense when the defense negates an element of the charged offense. *Id*. at 734. In *Deer*, the Court concluded the defendant's "sleep sex" defense

negated no element of the strict liability crime of child rape. *Id*. at 740-41. Unlike the defense in *Deer*, Mr. Dutcher's sleep defense negates child molestation's sexual contact element because a defendant cannot act *for the purpose of sexual gratification* if he is unconscious. Consequently, a sleep defense to child molestation should not be treated like a sleep defense to child rape.

Third, the parties in *Deer* preserved the issue of whether the State bore the burden of proving volition or whether the defendant bore the burden of proving lack of volition. *Id*. at 730. The State made no effort here to preserve the issue of whether Mr. Dutcher must affirmatively prove his sleep defense.

The decision in *Deer* should not be extended to this case. The State's failure to produce substantial evidence that Mr. Dutcher was awake during the alleged offense demands that his conviction be reversed.

2. Mr. Dutcher was denied his constitutional right to a unanimous jury verdict where the State relied on multiple criminal acts as a basis for conviction on a single count of third degree child molestation and the court did not instruct the jury to be unanimous.

The State contends no election or unanimity instruction was required because its evidence of touching was a continuous course of conduct, involving one victim at one location over the course of a few

minutes. The State argues that its evidence of touching should be considered a continuous course of conduct because holding otherwise could subject defendants to a separate count of child molestation for each thrust or individual touch. Br. of Resp't 20. The State's argument is contrary to *State v. Soonalole*, 99 Wn. App. 207, 211-13, 992 P.2d 541 (2000).

Whether the alleged touches constitute one continuous act or multiple acts depends on the unit of prosecution, identity of the victim, the location and timing of the offense, and the defendant's intended purpose. *Id*. at 214. Here, the alleged touches involve the same victim and location over the course of several minutes.

As for unit of prosecution, each separate act of sexual contact is a separate unit of prosecution for child molestation because children are best protected by charging one count for *each separate invasion of a protected area* to ensure consequences for additional sexual assaults on the same victim. *Id*. at 212-13.

Regarding defendant's intended purpose, "sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." RCW 9A.44.010(2); *see also* CP 43 (jury instruction defining "sexual contact").

The State points out that some evidence of touching suggests an intent to gratify H.N.D. (e.g., touching her clitoris and breasts) and other evidence of touching suggests an intent to gratify Mr. Dutcher (e.g., rubbing or thrusting his penis into her back). Br. of Resp't 16, 19-20. Assuming without conceding that Mr. Dutcher acted with purpose, the unit of prosecution and evidence supports the conclusion that the touching here constitutes multiple acts, not one continuous act.

3. The sentencing condition requiring Mr. Dutcher to submit to plethysmograph examinations as directed by his community corrections officer violates his right to be free from bodily intrusion.

The State argues that plethysmograph testing is a valid sentencing condition when imposed along with therapy approved by a community corrections officer. It relies on *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), *abrogated on other grounds by State v. Valencia*, 169 Wn.2d 782, 792, 239 P.3d 1059 (2010)). *Riles*, however, does not support the State's argument. *Riles* concluded, "Courts in this and other jurisdictions have authorized plethysmograph tests *incident to* treatment programs for sex offenders." *Id*. at 344. It is impermissible to order plethysmograph testing without also imposing crime-related treatment that would rely upon such testing as a physiological assessment measure. *Id*. at 345.

Here, the trial court did not directly impose crime-related treatment but deferred the decision to the Community Corrections Officer. Because the court did not unequivocally impose crime-related treatment, the order requiring plethysmograph testing was impermissible. The plethysmograph testing requirement should be stricken.

E. CONCLUSION

For the reasons stated above and in his Brief of Appellant, Mr. Dutcher's third degree child molestation conviction should be reversed and dismissed. Alternatively, the pornography and plethysmograph sentencing conditions must be stricken.

Respectfully submitted on June 13, 2014.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 13, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of reply brief of appellant:

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