

No. 48331-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

LUIS G. GOMEZ-ESTEBAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 13-1-01293-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court's response to a jury inquiry denied Mr. Gomez-Esteban his right to a fair trial by jury.

2. Whether there is insufficient evidence presented to the jury when it found Mr. Gomez-Esteban not-guilty on one count of child molestation, but guilty on two other counts.

B. STATEMENT OF THE CASE.

The State is including only the facts relevant to the issue on appeal.

i. Factual History

On August 25, 2013, police were called to the Great Cuisine of India Restaurant for a possible disturbance. RP 235.¹ The owners of the restaurant, Mukesh and Maria Singh, reported they had found Luis Gomez-Esteban engaging in inappropriate contact with their daughter. RP 236. At the time of the incident, the daughter, A.K.B., was 12 years old. Gomez-Esteban was 24 years old. RP 35, 246.

On the date of this incident, Maria Singh had observed A.K.B. and Gomez-Esteban talking and laughing in a back room of the restaurant. RP 109. Maria became upset because she believed that Gomez-Esteban had had previous inappropriate contact with A.K.B. RP 109-110. Maria called Mukesh and told him to come to

1. All references to the Verbatim Report of Proceedings are to the three volume transcript from September 14 – 24, 2015.

the restaurant. RP 111. After arriving, Mukesh had another employee call the police. RP 96.

When the police arrived, Officer Henrichsen initially spoke with the parents and Officer King began to speak with A.K.B. RP 236. Henrichsen then spoke with Gomez-Esteban. Id. Gomez-Esteban stated he had been working for the Singhs for approximately one year. RP 238. He initially denied having any contact with A.K.B. Id. Officers Henrichsen and King then met to discuss what each of them had found out. RP 241. Henrichsen then spoke with Gomez-Esteban again. Id. Gomez-Esteban admitted to having contact with A.K.B. via text messages, but denied any physical contact. RP 242. Officer King then spoke to Gomez-Esteban, at which time he admitted to kissing A.K.B. on several different occasions. RP 300. Henrichsen believed that more investigation was needed by someone who had specific training in interviewing children and did not arrest Gomez-Esteban on that date. RP 244.

A.K.B.'s parents were upset that Gomez-Esteban was not being arrested. RP 244. Maria then spoke with A.K.B. and told A.K.B. to tell the whole truth to the officers. RP 112. A.K.B. then had a second conversation with Officer King. RP 297. At this

point, A.K.B. related to King that Gomez-Esteban had “put his thing in me.” RP 298. When asked to explain, A.K.B. intimated that the “thing” was Gomez-Esteban’s penis and that he placed his penis in between the cheeks of A.K.B.’s buttocks. Id. A.K.B. stated that this had occurred earlier that day. Id.

On direct examination by the State, A.K.B. testified to several other incidents that had taken place prior to the August 25th contact. A.K.B. stated that Gomez-Esteban told her that March 18th, 2013, was their anniversary and he began making heart-shaped gestures towards her with his hands. RP 32. Gomez-Esteban then began to kiss A.K.B. on the days she worked at the restaurant. Id. A.K.B. also noted that Gomez-Esteban kissed her so much he gave her a hickey. RP 62. On August 25th, Gomez-Esteban told A.K.B. to go to the bathroom of the restaurant. RP 48. He then locked the door, pulled down her pants, and “put his thing in.” Id. Gomez-Esteban did not penetrate her anus, but did move his penis up and down between the cheeks of her buttocks. RP 49. A.K.B. testified that Gomez-Esteban had done this same thing twice before, but could not remember the exact dates. RP 51. A.K.B. testified that all three incidents occurred between March 18, 2013, and August 25, 2013. RP 56.

A.K.B. was subsequently interviewed by Detective Schumacher who specializes in interviewing children. RP 274. During this interview, A.K.B. provided the clothes she was wearing on August 25th, and those clothes were sent to the Washington State Patrol where they were tested for DNA. RP 312. Gomez-Esteban's DNA and semen were present on A.K.B.'s clothes and in her underwear garments. RP 321-322.

ii. Procedural History

On March 11, 2014, per an amended information, Gomez-Esteban was charged with three counts of child molestation in the second degree (counts I, II, and III) and one count of communication with a minor for immoral purposes (count IV). CP 23-24. A jury trial began on September 14, 2015. RP 15. Following the closing of the defendant's case, the court instructed the jury. 3RP 417-428; CP 319-340. Neither counsel objected to or took exception to any instruction. RP 415.

The court provided a unanimity instruction for the child molestation charges in Instruction No. 7:

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the Second Degree, one particular act of Child

Molestation in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the Second Degree.

CP 328.

The court also gave “to convict” instructions for the child molestation charges that mirrored each other except in that they substituted the count numbers. These instructions read:

To convict the defendant of the crime of child molestation in the second degree as charged in Count [I, II, III], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or between March 18, 2013, and August 25, 2013, in a separate and distinct incident than alleged in Counts [I, II, III], the defendant had sexual contact with [A.K.B.];

(2) That [A.K.B.] was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;

(3) That [A.K.B.] was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Jury Instructions Nos. 11, 12, 13; RP 423-425; CP 332-334.

In the State's closing, the prosecutor specifically mentioned the three separate incidents as charged. The State described in detail the incident that occurred on August 25, then reiterated that "[s]he told you that this has happened three times. Each time it happened it was in the bathroom, but that the most recent – or the last time it happened was August 25th, 2013." RP 432.

During deliberation, the jury sent a question to the court:

Are the three counts referring to the three bathroom incidents, or do the hickey, kissing and one bathroom incident count as three?

3RP 465; CP 342.

The court responded, "After speaking with the attorneys, the court is directing you to re-read the court's instructions and continue to deliberate." CP 342.

The jury returned a verdict of not guilty on Count I, but found Gomez-Esteban guilty on the other two child molestation charges and the communication with a minor for immoral purposes charge. RP 471-472; CP 345-348. The court then imposed a standard range sentence of 75 months for Counts II and III, and 29 months for Count IV, which would be served concurrently. CP 395.

C. ARGUMENT.

1. The trial court ensured there was jury unanimity for all charges and Gomez-Esteban was not denied his right to a fair trial by jury.

i. A jury inquiry does not indicate confusion for the entire jury, and the court must answer the question with no affirmative information.

The appellant claims that the trial court failed to ensure the necessity of juror unanimity to the charges of child molestation when it responded to a jury inquiry in which the jury expressed some confusion. However, this misstates what occurred during the trial.

A trial court may, in its discretion, answer questions the jury posed or give the jury further instructions during deliberations. CrR 6.15(f)(1); State v. Ng, 110 Wn.2d 32, 42, 750 P.2d 632 (1988). More importantly, “the jury’s question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached.” Ng, 110 Wn.2d at 43. Even if the jury was confused at certain points in deliberation, this confusion could have been cleared at any time during deliberation. State v. Miller, 40 Wn. App. 483, 489, 698 P.2d 1123 (1985). Further, “questions from the jury are not final determinations, and the decision of the jury is contained exclusively in the verdict.” Id.

The jury in Gomez-Esteban's trial sent two questions to the court during its deliberations. CP 341-342. One of the inquiries sent by the jury asked, "Are the three counts referring to the three bathroom incidents, or do the hickey, kissing and one bathroom incident count as three?" RP 465. Upon receipt of the question, the court promptly and properly notified both sides. RP 465. The court then proffered its standard answer to jury inquiries, "After speaking with the attorneys, the court is directing you to re-read the court's instructions and continue to deliberate." Id. Neither counsel objected and the answer was returned to the jury. Id.

Gomez-Esteban is now arguing that the court should have somehow clarified the answer in favor of unanimity. However, this is not a multiple acts case as the appellant suggests, and the type of unanimity instruction Gomez-Esteban suggests would have been irrelevant. Further, the answer to the jury's question could be found in the testimony, evidence, and jury instructions already provided. It was the court's job to remind the jury of this fact. Anything more than that would have been unnecessary.

After consulting with both sides about the inquiry, the trial court responded in a neutral manner. "Generally, where the trial court's response to a jury inquiry is 'negative in nature and conveys

no affirmative information,' no prejudice results[.]” State v. Jasper, 158 Wn. App. 518, 541, 245 P.3d 228 (2010) (citing State v. Russel, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980)). In the present case, it is clear the court committed no error, as it followed the practice set out in State v. Ransom: “such supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.” State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

As the court in Ng noted, a jury’s question to the court does not create an inference that the entire jury was confused, nor does it suggest that the confusion was not clarified before a verdict was reached. Ng, 110 Wn.2d at 43. Furthermore, “[t]he individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot be used to impeach a jury verdict.” Id.

ii. The State presented three separate and distinct incidents that were charged individually. Thus, the present case is not a ‘multiple acts’ case and a Petrich instruction on unanimity would have been irrelevant.

The appellant relies heavily on the rule set forth in State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), regarding multiple acts cases. Gomez-Esteban correctly notes that in a multiple acts case, Petrich requires the State to either elect the act upon which it

will rely for conviction or, if the State does not elect, the court will instruct that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt so that a unanimous verdict on one criminal act will be assured. State v. Kitchen, 110 Wn.2d 403, 405-406, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572. In a multiple acts case, it is necessary for the court to provide this instruction to the jury. However, the present case is not a multiple acts case, and a Petrich instruction would have been improper.

The State charged Gomez-Esteban with three distinct and separate counts of child molestation in the second degree. In the first amended information, the State makes clear that each count is distinct from the two other counts. CP 23-24. Thus, Gomez-Esteban was on notice that the State was charging specific acts, not multiple ones that would necessitate a Petrich instruction.

During trial, A.K.B. testified to three distinct incidents in which Gomez-Esteban placed his penis between the cheeks of her buttocks. 1RP 51-57. A.K.B. testified in detail about these clearly distinguishable incidents. While the appellant is correct in that A.K.B. could not specifically recall the dates of the incidents, she did testify in-depth about what occurred each time. Further, this

type of “discrepancy is not sufficient to call the jury's conclusions into doubt. The jury is entitled to weigh the credibility of the victim's testimony.” State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

The jury was also clearly instructed as to these distinct counts. In the language for the Court's Instructions Nos. 11-13, which were identical except for substituting the count numbers in subsection 1 of each count, the instructions read, “in a *separate and distinct* incident than alleged in Counts [I, II, III], the defendant had sexual contact with A.K.B..” (Emphasis added). CP 332-334. These instructions informed the jury as to the distinct nature of the incidents charged.

Finally, in its closing argument, the State clearly articulated for the jury at several different points that there were three distinct and separate incidents:

She clarified that that was her – his penis, and it was going up and down between the cheeks of her bottom. She told that *this happened three times*. Each time it happened it was in the bathroom, but that the most – or the last time it happened was august 25th, 2013. (Emphasis added).

3RP 432.

I submit to you, ladies and gentlemen, that the defendant putting his penis in between the cheeks of

a 12-year-old's bottom and rubbing up and down to the point where he leaves ejaculate on her underwear satisfies this definition. It satisfies sexual contact.

RP 439.

Throughout the trial, the defendant and the jury were on notice of the three separate and distinct incidents that were charged. A Petrich instruction on unanimity would require that the State relied on several incidents for one charge. As has been demonstrated, this is not what occurred in the present case.

The trial court made no error in its response to the jury inquiry. Further, the thought process of a jury cannot be used to impeach its verdict. Ng, 110 Wn.2d at 43. Though the appellant may be upset with the verdict, he cannot appeal what is not error. Thus, no reversal is required.

2. There was sufficient evidence to support the jury's verdicts, and Gomez-Esteban's right to appeal was not violated.

As noted in the above section, the State charged Gomez-Esteban with three separate and distinct counts. Therefore, an election of which acts the State would rely on was unnecessary. As such, evidence was presented for each count, and Gomez-Esteban was acquitted on one count of child molestation and found guilty on the other two.

For a claim of insufficiency of the evidence, the defendant admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." Id. Further, in an insufficiency claim, "circumstantial evidence as well as direct evidence carries equal weight." State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

There are several reasons why a jury may find a defendant guilty on one count but acquit on another. However, "[w]here the jury's verdict is supported by sufficient evidence from which it could rationally find the defendant guilty beyond a reasonable doubt, we will not reverse on grounds that the guilty verdict is inconsistent with an acquittal on another count." State v. Goins, 113 Wn. App. 723, 734, 54 P.3d 723 (2002) (*quoting State v. Ng*, 110 Wn.2d 32, 48, 750 P.2d 632 (1988)).

In the present case, the State provided both testimonial and physical evidence in support of its case. It charged three separate and distinct child molestation charges, and provided evidence for

each one. The jury, acting on its own accord, found Gomez-Esteban not guilty on the first count, and found him guilty on the other two. However, as has been noted, “it is impossible for courts to contemplate the probabilities any evidence may have upon the minds of the jurors.” State v. Robinson, 42 Wn.2d 909, 917, 167 P.2d 986 (1946).

If the State had relied on multiple acts to support one charge, the sufficiency of the evidence as to which incident relied on could be called in to question. However, this is not a multiple acts case. As the State charged three separate and distinct incidents, the jury has the ability and the power to decide what evidence is credible for each count. Further, “[t]he courts have no right to trench upon the province of the jury upon questions of fact.” Jensen v. Shaw Show Case Co., 76 Wn. 419, 421, 136 P. 698 (1913). As the jury thoroughly and deliberately weighed the facts and the evidence presented, it made a decision as to the credibility of that evidence and to the guilt of the defendant.

Gomez-Esteban retained his right to appeal because the State charged three separate and distinct incidents. The jury was the sole trier of fact, and found the State had presented sufficient evidence on at least two counts. The court will not inquire as to


which facts and what evidence persuaded the jury as to the three counts of child molestation, and why it found the appellant guilty on two counts and not on one.

D. CONCLUSION.

Based on the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Gomez-Esteban's convictions.

Respectfully submitted this 12th day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 12th day of August, 2016, at Olympia,

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CYNTHIA WRIGHT, PARALEGAL

THURSTON COUNTY PROSECUTOR

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