

65049-1

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NO. 65049-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CELESTINO S. HERNANDEZ,

Appellant.

2009-01-14 11:04 AM
CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE HOLLIS R. HILL

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether sufficient evidence supports defendant Celestino Hernandez's second-degree child molestation conviction.
2. Whether the trial court properly ordered Hernandez to obtain a substance abuse evaluation.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Hernandez with one count of second-degree child molestation. CP 1. Trial began in late December of 2009. A jury convicted Hernandez as charged. CP 70. This appeal follows.

2. SUBSTANTIVE FACTS

J.H. was born on April 9, 1997; she was 12 years old at the time of the relevant events. RP 238. She lived with her father in Bonney Lake and spent weekends at the Auburn apartment of her mother, Diana Hulford. RP 168-71, 239-40.

Defendant Celestino Hernandez¹ and his family lived in the same apartment complex as Hulford. RP 170. Hulford was good

¹ J.H. and her mother referred to Hernandez as "Sully." RP 188.

friends with Hernandez's wife, Dawn Serrano, and J.H. befriended Hernandez's son Angel. RP 151-52, 170-71, 240-42, 385.

On April 18, 2009, J.H. was staying with her mother and playing outside with Angel. RP 175-76, 243-44. Across the street was another apartment complex where there was a playground and where Hernandez and a group of friends were having a party. RP 245-49. After getting permission from J.H.'s mother, J.H. and Angel went over to the party. RP 247, 398. After approximately fifteen minutes, Hernandez called over to Angel and J.H. and asked his son to come over. RP 251. The two children went over, briefly spoke with Hernandez, and went back to the playground. RP 251.

Five minutes later, Hernandez came over to J.H. and told her that he wanted to talk to her. RP 251. He took her behind a building and asked her if she wanted some beer. RP 251-55, 323. J.H. first refused, but after he continued to pressure her, she took a few sips. RP 255-56, 323-24. As she drank, Hernandez placed his hand up J.H.'s shirt and rubbed her back. RP 256-57, 324. J.H. returned the beer can to Hernandez and left to find Angel. RP 258-59.

About ten minutes later, Hernandez called over and told Angel that he needed to talk with J.H. RP 275-77. He again took her behind a building and asked her if she wanted another drink.

RP 276. As J.H. took a sip, Hernandez rubbed her back under her shirt and grabbed her butt on the outside of her jeans. RP 276-79. J.H. felt uncomfortable and left to play with Angel. RP 276-79.

Sometime later, Hernandez asked to talk to J.H. again.

RP 263. This time Angel followed them. RP 263. Hernandez gave Angel five dollars and told him to go across the street for five minutes. RP 264-65, 280. After Angel left, Hernandez offered J.H. more beer. RP 264-65. As she pretended to drink the beer, Hernandez offered to give her twenty dollars to do whatever she wanted. RP 265-68. J.H. asked if he meant in a sexual way, and Hernandez replied, "yeah." RP 265. J.H. replied that she was only twelve years old and asked how old Hernandez was. RP 265-66. After Hernandez answered, J.H. pointed out their age difference and began walking away. RP 266. Hernandez followed her, placed his arm around her, kissed her on the forehead and told her that he thought of her as his daughter. RP 266. While the incident freaked her out, J.H. did not take it too seriously since Hernandez seemed a little drunk. RP 268. J.H. went back to Angel who was waiting at the playground. RP 270.

Sometime later, Hernandez approached the two children and offered to take them to Albertson's to get candy. RP 280-81, 328. As

they walked to Hernandez's house to pick up his car keys, Angel went ahead of them. RP 281, 328. Hernandez grabbed J.H.'s hand and used it to rub his penis over his pants. RP 281-88. J.H. pulled away and began walking faster. RP 282, 288. When they approached Hernandez's home, Angel returned without the car keys. RP 289.

J.H. decided to head home, and Hernandez insisted on walking with her. RP 290-91. On the way, when J.H. was between two vehicles, Hernandez put his hands on her hips and rubbed his groin against J.H.'s buttocks. RP 292-95. Twice, when she tried to get away, Hernandez pulled her back and continued to "dry hump" her. RP 292-95. The third time, she took a step and was able to get away. RP 296. As she walked to her mother's apartment, Hernandez followed. RP 296.

Hernandez caught up to her, grabbed her hand and made her touch his exposed penis. RP 298-300. He forced her hand to go up and down; his penis felt hard. RP 301-03. J.H. pulled her hand away, and Hernandez grabbed it, placed it back on his penis and again moved her hand up and down. RP 320. J.H. pulled away again and walked home at a quick pace. RP 302-04. As she

got to the door, Hernandez asked if he would see her the next day.
RP 304-05.

Once inside, J.H. sat down near her mother Diana Hulford, and stated "I just want to go home" and began sobbing. RP 183-84. J.H. told Hulford that Hernandez had made her drink and made her touch his penis. RP 184-85, 206-07. Hulford called 911. RP 185, 206, 307.

Hernandez's wife, Dawn Serrano, then called Hulford and asked whether J.H. had gotten home safely. RP 185. Hulford yelled, "Where is he?" and hung up the telephone. RP 185. Hulford, concerned that Hernandez might leave before the police arrived, asked neighbor Sandra Carter to watch J.H. and headed over to Hernandez's apartment. RP 153-55, 185-86, 210, 307. Carter was unable to stop J.H. from following her mother, so J.H. and Carter followed Hulford as she headed to Hernandez's apartment. RP 187, 308.

Hulford entered Hernandez's apartment and found him in a dark bedroom on the bed. RP 188-89, 310-11. She began yelling at him, demanded an explanation for his behavior and got into a pushing and shoving match. RP 189, 228-29, 311-13. J.H. threatened to kill Hernandez. RP 360. Carter persuaded Hulford

and J.H. to go back to their apartment to wait for the police.

RP 190.

The police arrived and were contacted by Hernandez and Serrano. RP 123. Hernandez appeared to be intoxicated. RP 125.

The police spoke with J.H., who described what happened and showed them the area where she had been with Hernandez. RP 101-09, 126-30, 191-92, 314. The police then arrested Hernandez. RP 131.

At the scene, police officer Ashton Pearson asked Serrano if he could speak with Angel, but he was unable to do so. RP 134-35. Later that night, Serrano called Officer Pearson at the police station, and the officer talked with Angel. RP 136-37, 514. Angel acknowledged that Hernandez had given him five dollars and asked him to walk away from Hernandez and J.H. RP 515-17. According to Angel, his father said, "Because I love, now go over there and watch the street outside our apartment." RP 517. Angel further stated that he was approaching the back of the apartment complex and heard his father say, "But you're like a daughter to me. I would do anything for you." RP 532-33. He then saw his father come around the corner of the building with J.H. following behind him. RP 533.

At trial, Hernandez testified and denied touching or molesting J.H. RP 614, 621-22.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS HERNANDEZ'S CHILD MOLESTATION CONVICTION.

Hernandez seeks reversal of his second-degree child molestation conviction, claiming that the prosecutor's closing argument misled the jury as to what kind of touching qualifies as sexual contact and that there was insufficient evidence to establish that all of his various contacts with J.H. qualified as sexual contact. The Court should reject Hernandez's claim. Hernandez does not dispute that he had sexual contact with J.H. at multiple times, and there is no basis to presume that the jury relied upon some lesser contact when convicting him. Moreover, contrary to Hernandez's claim, during closing argument, the prosecutor properly discussed those instances where Hernandez had actual sexual contact with J.H. This Court should reject Hernandez's challenge to the sufficiency of the evidence.

a. Relevant Facts

As described above, the testimony at trial established that over the course of the night, Hernandez had repeated contact with J.H. His behavior became more aggressive as the night progressed.

When Hernandez was first alone with J.H., he pressured her to drink beer and rubbed her back under her shirt. RP 251-57, 323-24. During the second contact, he rubbed her back under her shirt and grabbed her buttocks. RP 276-79. The third time that Hernandez was alone with J.H., he offered to give her twenty dollars to engage in sex acts with him. RP 263-68. Though she declined, he continued to persist. When walking to his apartment with her, Hernandez grabbed J.H.'s hand and used it to rub his penis over his pants. RP 280-88. Later, as he escorted J.H. home, Hernandez "dry humped" her and, in his final act, pulled out his penis, grabbed her hand and made her stroke it. RP 290-305.

The Court gave the jury a unanimity instruction, which stated:

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant 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 65.

In closing argument, the prosecutor discussed this instruction:

So what this means is you heard testimony from Jamie about the rubbing of her back and then the groping of her bottom. And then as they're crossing the street and walking back to Angel's apartment, the defendant makes her touch his penis over the pants. And then again as they're walking, as the defendant is walking Jamie home, between the cars, he's grinding his penis on her. And then even further than that is when he actually pulls out his penis and makes her touch it.

Each of those could be considered an act of child molestation. All of you only need to agree that one of them occurred, and you have to all agree as to which occurred in order to convict the defendant. For example, six of you for whatever reason might believe that the touching of the defendant's penis over his pants did not occur and six of you might believe that it did occur. But if all 12 of you agree that on the walk back from the defendant's apartment to Jamie's apartment that he did rub his pelvis against her, that's enough as long as all of you agree which act has been proved beyond a reasonable doubt.

CP 653-54.

b. Hernandez's Various Acts, Discussed During Closing Argument, Qualified As Sexual Contact.

In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the State. State v. Elmi, 166 Wn.2d 209, 214, 207 P.3d 439 (2009). "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). Evidence is sufficient to support a conviction if any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

A person commits the crime of second-degree child molestation when the person has sexual contact with another person who is at least twelve years old but less than fourteen years old, and the perpetrator is not married to the victim and is at least thirty-six months older than the victim. RCW 9A.44.086(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(2).

In determining whether the "sexual contact" element has been satisfied, the court looks to the totality of the facts and circumstances presented. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). "Contact is 'intimate' within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). This Court has held that genitalia and breasts are "sexual or other intimate parts" as a matter of law, and that "[t]he determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of fact." In re Welfare of Adams, 24 Wn. App. 517, 520, 601 P.2d 995 (1979). The Court has also recognized that buttocks are an intimate part and that contact may be made through clothing. Id. at 519-20.

In this case, Hernandez does not deny that the testimony established that he had sexual contact with J.H. On appeal, he does not dispute that any of the following acts qualified as sexual

contact: his grabbing of J.H.'s buttocks, his placing of J.H.'s hand on his clothing over his penis, his "dry humping" J.H., and his placing of J.H.'s hand on his exposed penis. Instead, Hernandez argues that he had other contact with J.H. that did not qualify as sexual contact. He claims that the prosecutor argued his kiss of J.H.'s forehead and his rubbing of her back qualified as sexual contact and that the jury may have been misled by this argument and convicted him based upon innocent contact. Brief of Appellant at 11 ("The prosecutor's statement was not correct as to the back rubs and kiss on the forehead.").

Hernandez's characterization of the prosecutor's argument is incorrect. The prosecutor never argued that Hernandez's act of kissing J.H. on the forehead was sexual contact. In fact, the prosecutor never mentioned this kiss in closing argument. Moreover, with respect to the backrub, the prosecutor's argument referred to the time when Hernandez rubbed J.H.'s back *and groped her buttocks*. J.H. testified that "after he handed me the bottle and I started to drink, like he slowly like went up my back. And then like he came out of my shirt and started rubbing my butt."

RP 278.² On appeal, Hernandez does not dispute that his act of groping J.H.'s buttocks qualified as sexual contact. Accordingly, the premise of Hernandez's claim -- that the prosecutor urged the jury to rely upon acts that did not qualify as sexual contact -- is incorrect.

Moreover, Hernandez's argument presumes that, despite the evidence of indisputable sexual contact, the jury might have relied upon a more questionable act in convicting him. This argument ignores a general principle governing sufficiency of the evidence challenges: a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. Salinas, 119 Wn.2d at 201. Accordingly, when considering such a challenge, the court cannot presume, as Hernandez does, that the jury simply ignored or discounted his most egregious acts. Moreover, as this case was tried and

² There were two times that Hernandez gave J.H. a backrub under her shirt. The prosecutor's argument referred to the second time when Hernandez both rubbed her back and groped her buttocks. The first time, Hernandez only rubbed her back under her shirt. The prosecutor did not argue this contact qualified as molestation; instead, she characterized it as innocuous. "[D]o you really think that [J.H.] is sophisticated enough to know how a child molester operates, to know that they start off with things that might seem innocuous with just rubbing the back and then they slowly progress to even more levels of inappropriate groping of her body." RP 652.

defended, there is no basis to make such a presumption:

Hernandez did not claim that he innocently touched J.H.; he denied ever rubbing J.H.'s back or ever touching her. RP 614.

When considering a similar claim in a case involving multiple acts, this Court refused to presume that the jury relied upon insufficient evidence to convict a defendant when there was sufficient evidence for several of the acts. In State v. Stark, 48 Wn. App. 245, 738 P.2d 684 (1987), Stark was charged with one count of statutory rape. The victim described three separate instances of sexual abuse, but one of the instances could not support a rape conviction. Id. at 250-51. On appeal, Stark sought reversal of his conviction, arguing that the court could not be sure that the jury did not rely on the one act that would be insufficient to support his conviction. This Court rejected that argument:

The argument has one very basic flaw. The jurors were instructed as to the definition of “sexual intercourse,” and they were also instructed that in order to convict they must unanimously agree that *the same act of sexual intercourse* had been proved beyond a reasonable doubt. Thus, assuming, as we must, that these instructions were followed, the jury could not have relied on the one act of the three that would not come within the definition of “sexual intercourse.”

Id. at 251 (emphasis in original and internal citation omitted).

Here, as in Stark, the jurors were advised as to the definition of sexual contact. They were further instructed that they had to be unanimous that Hernandez had committed an act of child molestation. This court presumes that the jury followed these instructions, and convicted Hernandez based upon an act of sexual contact. See State v. Swan, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990).

Hernandez attempts to distinguish Stark, arguing that the definition of "sexual intercourse" is more straightforward than the definition of "sexual contact." The facts of this case hardly support that notion. Hernandez offered J.H. twenty dollars to engage in sexual activity with him. Despite her refusal, he "dry humped" her and repeatedly placed her hand on his penis. No one disputed that this behavior, assuming it occurred, constituted sexual contact. Consistent with Stark, this Court should reject Hernandez's sufficiency of the evidence challenge and affirm his conviction.

2. THE TRIAL COURT PROPERLY ORDERED HERNANDEZ TO OBTAIN A SUBSTANCE ABUSE EVALUATION.

For the first time on appeal, Hernandez challenges the condition of community custody requiring that he obtain a substance abuse evaluation and follow all treatment recommendations, claiming that there was no evidence that substance abuse played any role in the offense. However, the term "substance abuse" includes alcohol abuse, and there was evidence that Hernandez was intoxicated at the time of this offense.

Under former RCW 9.94A.715(2)(a), the trial court was authorized to order, as a condition of community custody, that Hernandez participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense. Pursuant to former RCW 9.94A.700(5), the trial court was authorized to order that Hernandez participate in crime-related treatment.

Here, there was evidence at trial that consumption of alcohol contributed to the offense. J.H. testified that she discounted Hernandez's initial behavior because he appeared to be drunk that night. RP 268, 282, 286. An officer testified that Hernandez

appeared moderately intoxicated. RP 125. Hernandez's son Angel told an officer that his father was drunk out of his mind. RP 519.

Hernandez's argument presumes that the term "substance abuse" refers to drugs and not alcohol, and he argues that there is no evidence that he was on drugs at the time of the offense. However, alcohol is a substance and a substance abuse evaluation encompasses treatment for alcohol abuse. The American Psychiatric Association recognizes that "substance abuse" includes the abuse of alcohol. See The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000) at 191-99; see also WAC 388-805-005 ("Substance abuse' means a recurring pattern of alcohol or other drug use that substantially impairs a person's functioning in one or more important life areas, such as familial, vocational, psychological, physical, or social.").

The case cited by Hernandez, State v. Jones, 118 Wn. App. 199, 76 P.3d 258 (2003), is distinguishable. In Jones, the trial court ordered Jones to participate in alcohol counseling, although there was no evidence that alcohol had contributed to his crimes. Id. at 207. Instead, Jones had represented that he suffered from mental illness and that, at the time of the crime, he was off his medications

and using methamphetamine. Id. at 202. The Court of Appeals concluded that the trial court erred in ordering alcohol counseling because "nothing in the evidence here shows that alcohol contributed to Jones' offenses, or that the trial court's requirement of alcohol counseling was 'crime-related.'" Id. at 207-08.

Here, in contrast, there was evidence that Hernandez was intoxicated at the time of the offense, and a substance abuse evaluation involves an evaluation for alcohol abuse. Because this condition of community custody is reasonably related to the circumstances of the offense, the Court should deny Hernandez's request to strike it from his judgment and sentence.

D. CONCLUSION

This Court should affirm Hernandez's conviction and sentence.

DATED this 4th day of November, 2010.

Respectfully submitted,

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