

65547-7

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NO. 65547-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MARTIN,

Appellant.

2011 FEB 22 AM 10:04


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

The Honorable Vickie Churchill, Judge
Superior Court Cause No. 09-1-00177-5

BRIEF OF RESPONDENT

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY
WSBA # 22926
Law & Justice Center
P.O. Box 5000
Coupeville, WA 98239
(360) 679-7363

By: Colleen Kenimond
Deputy Prosecuting Attorney
WSBA # 24562
Attorney for Respondent

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I. STATEMENT OF THE ISSUES

- A. Whether a non-caretaking grandfather's touching of his granddaughter, under her clothes, in her chest area and her inner thighs simultaneously, while she was asleep, in a room separating them from others at the residence, is sufficient to show sexual contact and sexual motivation?**

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- C. Whether prosecutorial misconduct occurred in closing argument when the prosecuting attorney told the jury, not that the appellant rubbed his granddaughter's breasts, but that he rubbed her on her chest under the place where her bathing suit would cover, that she was alone and asleep?**

- D. Whether ineffective assistance of counsel occurs when defense counsel fails to object to potentially irrelevant information and then uses that same information in closing argument?**

II. STATEMENT OF THE CASE

A. Procedural Facts.

The state accepts Appellant's version of the procedural facts.

B. Substantive Facts.

In 2008, CR, an 11-year-old girl, lived with her paternal grandparents, Sharon and Richard Osorio, her brother, and her two cousins. Report of Proceedings Volume 2 (hereinafter RP2) at 63, 65. She was born February 12, 1997. RP2 85.

Appellant, Kenneth Wayne Martin, is CR's maternal grandfather. RP 64. Her maternal grandmother is Aida Martin. Id. She did not visit them regularly, but she did have contact with them. RP2 65. CR was removed from appellant's residence in 2003 or 2004. RP 47. Visits between appellant and CR occurred at the great-grandparents' home. RP 48.

In 2008, after school was out, she visited her great-grandparents, Betti and Bert. RP2 65-66. "Grandpa Wayne," the appellant, was there. Id. CR was there to help mow the lawn, which she did. RP2 67. After mowing the lawn, she decided to take a nap. Id. It was afternoon. RP2 68.

She woke up and Grandpa Wayne's hand was under her shirt, over her sports bra, at her chest area, and his other hand was at her inner thigh, closer to her crotch than to her knees. RP2 70. The place he touched would have been covered by a bathing suit. RP2 86. This happened in the spare room. RP2 67. CR was scared. RP2 70. The day the incident

occurred, CR went to Aida Martin's church, separated her from other people, and told her what Grandpa Wayne had done, but did not tell Sharon Osorio. RP2 74.

Sharon Osorio described an unusual behavior that CR exhibited after this visit, which was that CR would come into Mrs. Osorio's room every night to sleep. RP2 48-49.

In August, CR went to Birch Bay with her mother, Angela Martin, Aida Martin, and "the rest of their family from Kirkland." RP2 49-50. At Birch Bay, she stayed in a condo with appellant, Aida Martin, her mother, her brother Tyler, and her two little brothers. She slept in a bedroom with her mother and the little brothers. RP2 72.

CR's older brother, Tyler, described the event at Birch Bay. There were about 30 people there, from his mother's side of the family. The family rented more than two condos/suites. The family ate meals at the other side of the establishment, at Uncle Ken's. He did not spend much time with his sister, CR. RP2 56-57.

Tyler overheard a conversation between CR and her mother, with CR indicating that she was not happy to be there "because Wayne was there." RP2 58.

CR explained that she both did and did not want to be there, "because that was when it happened again. . . . My grandpa touched me

again.” RP 73. It was “a long, long day. . . . [w]e went swimming and stuff. . . . So I went to sleep. . . . I was in the bedroom that I slept in with my mom and my two little brothers. . . . And I remember like waking up because like -- Well, like I heard the door like creaking. So like I thought it was just like the wind or something. And like I remember like kind of waking up and my grandpa having his hand under my shirt again.” RP2 75-76. The hand was under her clothes, touching her skin, in her breast area. RP 77. The area he touched would have been covered by a swimsuit. RP 86.

CR ran to tell her grandma Aida, who was in a different room, down the hall. RP 78. For a second time, she pulled aside Aida Martin, who was making rolls, to tell her what happened. For a second time, she did not help CR. Id.

III. ARGUMENT

A. The jury had sufficient evidence to convict appellant of two counts of first degree child molestation.

Child Molestation in the First Degree is defined in RCW 9A.44.083:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of 18 to have, sexual contact with another who is less than twelve years old and not married

to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

Sexual contact is defined in RCW 9A.44.010(2) as “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.”

The courts have interpreted “intimate parts” as “parts of the body in close proximity to the primary erogenous areas.” *In re Adams*, 24 Wn.App. 517, 519-21, 601 P.2d 995 (1979). Intimate parts may include hips, buttocks, and lower abdomen. *Id.*

Contact is “intimate . . . 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.2d 86 (1991).

This case may present a new question: What amount of proof is necessary to convict a related, non-caretaking adult male of molesting his granddaughter?

Concerning sufficiency of the evidence, the Washington Supreme Court has explained:

“After [*In re*] *Winship* (397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)) the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction

must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” [*Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)] This inquiry does not require the reviewing court to determine whether it *believes* the evidence at trial established guilt beyond a reasonable doubt. “Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, *supra* at 319, 99 S.Ct. at 2789. . . . *The criterion impinges upon a jury's discretion only to the extent necessary to protect the constitutional standard of reasonable doubt.*

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980), emphasis added.

Appellant has been “protect[ed by] the constitutional standard of reasonable doubt” because there was sufficient evidence of both sexual contact and sexual gratification.

The law is clear that “an unrelated adult with no caretaking function who touches the intimate parts of a child supports the inference that the touching was done for purposes of sexual gratification.” More is necessary, however, when clothes cover the intimate part touched. *State v. Powell*, 62 Wn.App, 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1991).

As to count one, the evidence is clear that appellant touched CR under her shirt, but over her sports bra, and on her inner thighs at the same

time, while she was asleep, alone and in a place not likely to be seen by others. Additionally, there is no evidence in the record that appellant was performing any sort of caretaking function. As well, while related to CR, his relationship is more removed than that of “father.” Indeed, they did not see each other often.

As the court ruled in *State v. Harstad*, 153 Wn.App. 10, 22, 218 P.3d 624 (2009):

. . . a person of common intelligence could be expected to know that [the victim’s] upper inner thigh, which puts the defendant’s hand in closer proximity to a primary erogenous zone than touching the hip does, was an intimate part.

So should a “person of common intelligence” know that an 11-year-old girl’s chest area under her sports bra is an “intimate part.” Combining the two simultaneous touchings with the facts that the child was asleep and alone, there was no indication that appellant was performing a caretaking function, appellant’s hand was under her shirt, and the child was in a place not likely to be seen by others, there was sufficient evidence of sexual gratification for any rational jury to convict appellant of count one.

As to count two, the evidence is equally clear. Appellant touched CR’s breast area, under her shirt, under her sports bra, in a place that

would be covered by a swimsuit, on her skin, while she was alone and sleeping and not in a place likely to be seen by others, and appellant was not performing any sort of caretaking function.

It would be hard to imagine a caretaking function associated with touching the skin in the breast area of a sleeping 11-year-old girl by any man.

B. There was no prosecutorial misconduct in closing argument.

A prosecutor is a quasi-judicial officer with a duty to see to it that a defendant received a fair trial, and may not mislead the jury by misstating evidence. *State v. Reeder*, 46 Wn.2d 888, 892, 285 P.2d 884 (1955).

A prosecutor may not argue facts not in the record. *State v. Warren*, 165 Wn.2d 17, 44, 195 P.3d 940 (2008), *cert. denied*, --- U.S. ---, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

A jury is presumed to follow the court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 111 S.Ct. 752, 112 L.Ed.2d 772 (1991).

As explained in *State v. Martin*, 41 Wn.App. 133, 703 P.2d 309 (1985):

Even if the comments are found to be improper, however, reversal is required only if there is a substantial likelihood the comments affected the jury's decision. *State v. Reed*,

102 Wn.2d 140, 684 P.2d 699 (1984). Furthermore, reversal is not required if the error could have been obviated by a curative instruction which was not requested. *State v. Papadopoulos*, 34 Wn.App. 397, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983); *State v. Brown*, 29 Wn.App. 770, 630 P.2d 1378, review denied, 96 Wn.2d 1013 (1981).

Respondent respectfully disagrees with what appellant reports the prosecuting attorney to have argued.

Appellant argues that the prosecuting attorney misstated facts by repeating four times that appellant “stuck his hand under CR’s sports bra and rubbed her naked breasts.” Brief of Appellant at 14.

Those statements simply are not in the record. It is conceded that the prosecuting attorney, respecting count one, said appellant rubbed¹ “under” the sports bra instead of “over.” At no time did defense counsel object to this inadvertent misstatement. Moreover, any problem could easily have been cured by an instruction from the trial judge to the jury to disregard this statement.

Respecting count two, the prosecuting attorney correctly stated that appellant rubbed “under” the sports bra, consistent with CR’s testimony that the touching occurred under the sports bra on her skin.

¹ When indicating where she was touched for both counts one and two, CR made circular motions with her hand, hence, the use of the word “rub.”

At no time did the prosecuting attorney say appellant rubbed CR's naked breasts.

The question remains whether incorrectly using the word "under" instead of "over" in this context is so flagrant and ill-intentioned that no curative instruction could have cured the prejudice, and the jury's discretion should be impinged.

The trial judge had correctly instructed the jury that counsels' comments were not evidence and that they must disregard any statement that is not supported by the evidence. RP2 107.

Respecting count one, this is a situation where arguing "over her sports bra" rather than "under her sports bra" combined with the additional evidence that the child was asleep and alone, in a place not likely to be seen by others, appellant's hand was under her shirt, and touched by a non-caretaking adult, could easily have been cured with a requested curative instruction, especially in light of the court's general instruction respecting counsels' arguments. This simply is not a situation where the only evidence was the statement of touching under or over the sports bra.

C. Defense trial counsel was not ineffective for failing to object to certain evidence and then using that evidence in his closing argument.

To show ineffective assistance of counsel, an appellant must show first, that counsel's performance was deficient; and second, that the

deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A trial counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). To show prejudice, appellant must show that but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). According to the United States Supreme Court, reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Great deference is given to trial counsel's performance; there is a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Appellant contends that trial counsel was ineffective for not objecting to allegedly irrelevant evidence concerning the removal of CR and her brother from appellant's home several years prior, and for then using same in his closing argument. Appellant simply has not shown that there is a reasonable probability that the outcome would have been

different. This is clearly a trial tactic. Trial counsel did the best he could with what he had.

IV. CONCLUSION

For all the foregoing reasons, appellant's convictions in both counts one and two should be upheld, and appellant's claims of prosecutorial misconduct and ineffective assistance of counsel be denied.

Respectfully submitted this 18th day of February, 2011.

GREGORY M. BANKS
ISLAND COUNTY PROSECUTING ATTORNEY

By: 

COLLEEN S. KENIMOND
DEPUTY PROSECUTING ATTORNEY
WSBA # 24562