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DIVISION II

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STATE OF WASHINGTON
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NO. 36153-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL H. PLANT

Appellant.

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

The Honorable James J. Stonier

BRIEF OF APPELLANT

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PM 11/16/07

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to find appellant guilty of child molestation in the first degree.

2. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Was there insufficient evidence to find appellant guilty of child molestation in the first degree when the state failed to prove beyond a reasonable doubt that appellant touched the complaining witness for the purpose of sexual gratification?

2. Was appellant denied his constitutional right to effective assistance of counsel because defense counsel failed to argue a voluntary intoxication defense and request a jury instruction on voluntary intoxication?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 5, 2006, the state charged appellant, Daniel Henry Plant, with one count of child molestation in the first degree. CP 5-6; RCW 9A.44.083. On December 11-12, 2006, the court held a *Ryan* hearing¹ and a 3.5 hearing. The court found the complaining witness, A.N. (d.o.b.

¹ State v. Ryan, 103 Wn.2d 165, 691 P.2d 197 (1984).

6/09/00), competent to testify and found statements made by Plant admissible.² 2RP³ 251-53, 258-60. Following a trial on January 22 - 24, 2007, before the Honorable James J. Stonier, a jury found Plant guilty as charged. CP 55.⁴ On March 29, 2007, the court sentenced Plant to 64 months in confinement. CP 60-73; 5RP 513-15. Plant filed this timely appeal. CP 78.

2. Substantive Facts

Susan Norbury, A.N.'s mother, testified that she had known Plant for almost three years and they "were really good friends." 4RP 352. They did not have a sexual relationship but Plant would stay overnight at her home, "he would stay there like every night for a while, and then not at all for months, and then stay there every night again for a while." 4RP 353. Plant's relationship with A.N. was "[k]ind of fatherly, like an uncle kind of relationship." 4RP 353.

On the night of June 16, 2006, Norbury and A.N. returned home close to midnight after visiting Norbury's mother who was hospitalized.

² The trial court did not file written findings of fact and conclusions of law following the 3.5 hearing as required under CrR 3.5(c).

³ There are five volumes of verbatim report of proceedings: 1RP - 6/30/06, 7/11/06, 7/18/06, 8/22/06, 8/29/06, 9/19/06, 10/17/06, 11/28/06, 12/5/06, 12/11/06; 2RP - 12/12/06, 12/19/06, 1/3/07, 1/9/07, 1/16/07; 3RP - 1/22/07; 4RP - 1/23/07, 1/24/07; 5RP - 2/22/07, 3/1/07, 3/22/07, 3/29/07.

⁴ The Clerk's Minutes indicate that there was no courtroom available and the judge advised that the verdict did not need to be recorded. The court read the verdict of guilty and polled the jury.

She and A.N. were lying on a bed in the living room watching television when Plant “staggered in.” 4RP 355-57. Plant could barely stand up and he was “wreaking of booze.” 4RP 355. He was slurring his words and could not walk without falling down. 4RP 356. Norbury reprimanded him but allowed him to stay. She had seen Plant drunk many times. 4RP 356. Plant laid down on the bed between her legs and A.N. was lying next to her, “[w]e were just joking around and being silly and giggling and stuff.” 4RP 358-60. Plant continued being playful but Norbury told him to settle down because she wanted A.N. to go to sleep. It started getting cold so she pulled a blanket up underneath Plant’s head over her lap and over A.N. 4RP 361. Plant kept rubbing A.N.’s legs underneath the blanket so Norbury told him to “knock it off.” 4RP 362. Norbury started to doze off when she heard A.N. say, “Dan, stop.” 4RP 363. She woke up quickly and when she threw the covers back, Plant jerked his hand away. 4RP 364. Norbury told him he should not be there when he was drunk but “let him go ahead and stay a little bit, and he kind of settled down a little bit, but then got really weird again and belligerent.” 4RP 365. Norbury told Plant to leave when he said he wanted to have sex and she locked the doors after he left. 4RP 366-70.

The next morning, A.N. told her that Plant touched her “where girls go pee.” 4RP 371. Norbury asked A.N. if Plant touched her on top

of or under her clothing. A.N. demonstrated by pulling down her shorts and underwear and pointing downward. 4RP 371-72. Norbury called the police and an officer arrived and took her statement. 4RP 372-73. There were no prior instances of inappropriate touching and Plant had just babysat A.N. one or two days earlier. 4RP 353-54, 395.

Norbury testified further that A.N. later revealed that her older brother had touched her. A.N.'s brother admitted to the incident that occurred in Oregon when he was eleven and A.N. was three years old. He received probation and was living at home while undergoing treatment. 4RP 375-76.

A.N. testified that she, her mother, and Plant were lying on a bed in the living room when something happened that she did not like. 4RP 329-31. Plant touched her "pee spot" with his fingers under her pajamas and underwear. 4RP 333-34. It did not hurt and his fingers did not go inside her body. 4RP 337. A.N. told her mother what Plant did to her. 4RP 338. Plant was always nice to her but she was mad at him because he did something wrong, "it is a bad thing." 4RP 346-48. After Plant had touched, her older brother touched her with his "pee-pee" at their home in Longview. 4RP 339-342.

Olga Lozano, an investigator for the Longview Police Department, testified that she interviewed A.N. at the Hall of Justice. 4RP 404-05.

A.N. said her that she, her mother, and Plant were laying in bed when Plant pulled down the waistband of her underwear and “touched her on her pee.” 4RP 407-08. A.N. told Plant to stop and her mother pulled the covers back but Plant had already moved his hand away. 4RP 409. A.N. demonstrated that Plant was “playing the piano” with his fingers on her private area. 4RP 410. A.N. said Plant’s fingers were only on the outside of her body and it hurt. She pointed to the front part of her pubic area but not in between her legs. 4RP 410.

Approximately eight to nine days later, Lozano interviewed Plant at the Longview Police Department. 4RP 415. Plant told her that he was rubbing A.N.’s belly, feet, and legs to soothe her because she had a nightmare. 4RP 420-21. Plant did not blackout that night but might have fallen asleep and he could have possibly mistaken A.N.’s body as her mother’s. 4RP 421-22. Toward the end of the interview, Plant said that he suspected that A.N. may have been molested by her older brothers because they shared the same bedroom and he was “basically testing her to see if she had been molested.” 4RP 423. Plant felt uncomfortable at the time, and “it didn’t feel right,” so he left. 4RP 432.

Lozano did not give any weight to Plant’s concerns about possible sexual abuse by A.N.’s brothers. Four months later, the prosecutor’s office contacted her to interview one of the brothers. Lozano also

interviewed A.N. again and A.N. told her that her brother had abused her at their house. 4RP 428-30.

C. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT PLANT HAD SEXUAL CONTACT WITH THE COMPLAINING WITNESS.

Reversal and dismissal is required because there was insufficient evidence that Plant touched A.N. for the purpose of sexual gratification.

In a criminal prosecution, due process requires that the state prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, sec. 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970));⁵ Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

⁵ The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). A claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

To convict Plant of child molestation in the first degree, the state must prove beyond a reasonable doubt that Plant engaged in sexual contact with A.N. RCW 9A.44.083.⁶ "Sexual contact" is defined as "any

⁶ 9A.44.083. Child molestation in the first degree

(1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen 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.

touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either or a third party.” RCW 9A.44.010(2). Sexual gratification is not an element of the crime but defines the term “sexual contact” and requires a showing of purpose or intent. State v. French, 157 Wn.2d 593, 610-11, 141 P. 3d 54 (2006).

In State v. Price, 127 Wn. App. 193, 198, 110 P.3d 1171 (2005), a jury found Price guilty of child molestation in the first degree. Four-year-old R.I.T attended a day care operated by Price. One evening when R.I.T.’s mother picked her up from the day care, she pinched herself at the front of her diaper, saying “I have an owie.” Id. at 196. The mother reported the incident after examining R.I.T. and seeing that her vagina area was bright red and swollen. R.I.T. told her that Price had “rubbed her there.” Id. During an interview with a detective, R.I.T. lifted up her skirt, pinched her vagina over her clothing, and said “[t]hat’s what he did.” Id. at 197.

This Court concluded that sufficient evidence supported Price’s conviction because R.I.T told her mother that Price had not simply touched her but had rubbed her vagina and “it was of sufficient duration to cause redness and swelling that was still visible after [the mother] had picked R.I.T. up from day care and taken her home.” Id. at 202.

Unlike in Price, here, A.N., her mother, and Plant were laying on a bed in the living room. 4RP 329. A.N. testified that Plant touched her “pee spot” with his fingers but it did not hurt and his fingers did not go inside her body. 4RP 333-34, 337. A.N. said it felt like Plant was “playing the piano” with his fingers. 4RP 410. When A.N. told her mother the next morning that Plant had touched her, there was no physical evidence of any touching. 4RP 370-73.

Furthermore, A.N.’s mother, Susan Norbury, testified that Plant had a “[k]ind of fatherly, like an uncle kind of relationship” with A.N. and he had just babysat her a day or two before the incident. 4RP 353. There were no prior instances of inappropriate touching and Norbury trusted Plant with A.N. 4RP 395. Plant had spent the night at Norbury’s home numerous times. 4RP 353. A.N. acknowledged that Plant had always been nice to her. 4RP 346.

The record substantiates there was insufficient evidence that Plant touched A.N. for the purpose of sexual gratification. The superficial touching as described by A.N. fails to constitute sexual contact done for the purpose of gratifying sexual desire. Moreover, Norbury’s testimony that Plant was like a father or uncle to A.N. and she would entrust Plant with her care dispels any inference that the touching was for sexual gratification. State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991),

review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992)(Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.)

Reversal and dismissal is required because no rational trier of fact could find beyond a reasonable doubt that Plant touched A.N. for the purpose of sexual gratification.

2. PLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO ARGUE A VOLUNTARY INTOXICATION DEFENSE AND REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION.

Plant was denied his right to effective assistance of counsel because defense counsel failed to argue a voluntary intoxication defense and request a jury instruction on voluntary intoxication. Reversal is required because counsel's performance was deficient and but for counsel's deficient performance, there is a reasonable probability the result of the trial would have been different.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. See, e.g., State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wn.2d 839, 849, 621 P.2d 121 (1980). The standard of review for an assertion of ineffective

assistance of counsel involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). First, the defendant must show that counsel's performance was deficient. Thomas, 109 Wn.2d at 225. Second, the defendant must show that the deficient performance prejudiced the defense. Id. at 225-26. To satisfy the first prong, the defendant must show that counsel's performance fell below an objective standard of reasonableness. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); Strickland, 466 U.S. at 688. To satisfy the second prong, the defendant must show there is a reasonable probability that but for counsel's performance, the result would have been different. McNeal, 145 Wn.2d at 362; Strickland, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case. Id. at 693.

Effective assistance of counsel includes a request for pertinent instructions which the evidence supports. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681 (1999), review denied, 139 Wn.2d 1027, 994 P.2d 845 (2000). Evidence of intoxication may bear upon whether a defendant acted with the requisite mental state, but the proper way to deal with the

issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state. State v. Coates, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987).⁷

A criminal defendant is entitled to a voluntary intoxication instruction if: (1) one of the elements of the crimes charged is a particular mental state; (2) there is substantial evidence of ingesting an intoxicant; and (3) the defendant presents evidence that this activity affected his ability to acquire the required mental state. State v. Harris, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004) (citing State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)).

In State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006), Stevens testified that he drank two 40-ounce bottles of beer and two shots of whiskey before encountering two girls, aged twelve and thirteen. The girls testified that Stevens "appeared to be drunk." Id. at 306. The girls thought Stevens looked like a member of the band Metallica and asked if they could take pictures with him. While taking pictures, Stevens grabbed

⁷No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state. RCW 9A.16.090

one of the girl's breast. The girl said the touch made her feel "very violated." Id. at 306-07. The trial court declined to give a voluntary intoxication instruction and the jury found Stevens guilty of child molestation. Id. at 307-08.

On appeal, our State Supreme Court held that failure to give the proposed involuntary intoxication instruction constitutes reversible error:

Although Stevens was allowed to present evidence of intoxication, the jury was not instructed on how or whether they could consider this evidence in determining if Stevens acted with the purpose of sexual gratification. Because we find intent is a component of "sexual contact," Stevens was entitled to present evidence of his intoxication and to have the trial court instruct the jury on voluntary intoxication. Had the jury believed Stevens' evidence, and had they been properly instructed, the jury could reasonably have found that Stevens' intoxication prevented him from acting for the purpose of sexual gratification.

Id. at 310.

In State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003), Kruger showed up at Jennifer Kuntz's house drunk and became obnoxious and rude. When Kruger refused to leave, Kuntz called the police. An officer responded and during a struggle, Kruger head-butted the officer. Another officer arrived and they used pepper spray to subdue Kruger but it had little effect

on him. Id. at 688-89. The state charged Kruger with third degree assault and a jury found him guilty. Id. at 689.

On appeal, Kruger argued that he was denied effective assistance of counsel because defense counsel failed to request a voluntary intoxication instruction. Id. at 690. This Court concluded that he was entitled to the instruction and defense counsel was ineffective for failing to request the instruction because even though the issue of Kruger's intoxication was before the jury, "without the instruction, the defense was impotent." Id. at 691-95.

Here, Norbury testified that Plant came to her home drunk:

Q. Okay, do you remember what time he got there?

A. I don't remember.

Q. Okay. What was --

A. I know he staggered in later.

Q. Okay, you say staggered; how so?

A. Well, he staggered.

Q. Okay.

A. I mean he could barely stand up. He was really wreaking of booze.

Q. You mean alcohol?

A. Yeah.

Q. Okay. You said he was staggering; was he slurring his words at all?

A. Oh, a lot.

Q. Okay. Was he able to walk around without falling down?

A. Not really.

....

Q. Have you seen him drunk prior?

A. Oh, a lot.

4RP 355-56.

As in Stevens and Kruger, Plant was entitled to a voluntary intoxication instruction because it is evident from the record that he was so highly intoxicated that his intoxication prevented him from touching A.N. for the purpose of sexual gratification. Consequently, defense counsel's performance was deficient for failing to argue a voluntary intoxication defense and request the instruction. Plant was prejudiced by counsel's deficient performance because had the jury been properly instructed, there is a reasonable probability that the result of the trial would have been different in light of the unsubstantial evidence against him.

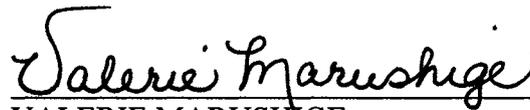
Reversal is required because Plant was denied his constitutional right to effective assistance of counsel.

D. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Mr. Plant's conviction.

DATED this 16th day of November, 2007.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelop, a copy of the document to which this declaration is attached to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626-1799.

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

DATED this 16th day of November, 2007 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

STATE
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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DECLARATION OF SERVICE

STATE OF WASHINGTON
DEPUTY
BY *CM*

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626-1799 and Daniel Plant, DOC # 302561, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, Washington 98520.

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

DATED this 16th day of November, 2007 in Kent, Washington.

Valerie Marushige
Valerie Marushige
Attorney at Law
WSBA No. 25851