

NO. 46969-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

KARL S. HANNA,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR LEWIS COUNTY
The Honorable Suzan Clark, Judge
Cause No. 13-1-01994-9

REPLY BRIEF

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A. STATEMENT OF THE CASE

With one correction, Appellant Hanna incorporates and adopts by reference the statement of the case and law set forth in his opening brief filed July 22, 2015.¹ On October 15, the State filed its respondent's brief. For purposes of this reply brief, Hanna limits his argument to the following.

B. REPLY ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT HANNA USED A POSITION OF TRUST TO FACILITATE THE OFFENSES.

For the reasons fully set forth in Hanna's opening brief, there was insufficient evidence to support the jury's finding that he used a position of trust to facilitate the offenses. [Br. of App't at 14-15]. In response, the State asserts that Hanna "places singular focus on the fact that he was not L.S.'s official caregiver(,)" before avowing that neither statute nor case law requires such a showing in order to establish a position of trust, and then concludes by stressing that Hanna was not only "placed in a caregiver position for L.S." but "abused the trust placed in him not only by L.S. but also by her father" in arguing there was sufficient

¹ In its Brief of Respondent, the State correctly notes that Hanna did not argue in the body of his brief that there was insufficient evidence to support the special verdict that there was an ongoing pattern of sexual abuse of a minor. [Br. of Resp't at 5].

evidence that Hanna abused a position of trust. [Br. of Resp't at 8-9]. This is coupled with the State's further claim that "(t)his case is like" State v. Grewe, 117 Wn.2d 211, 813 P.2d 1238 (1991). [Br. of Resp't at 7]. There are reasons to question this response.

While it is true that the trust between the primary care giver and the perpetrator to whom the child's care is entrusted may give rise to a trust relationship subject to abuse, its application is limited and secondary to the trust relationship between the perpetrator and the child victim, given that it is the latter relationship that renders the victim particularly vulnerable to the offense. State v. Grewe, 117 Wn.2d at 20 (citing State v. Shephard, 53 Wn. App. 194, 199, 766 P.2d 467 (1988); State v. Brown, 60 Wn. App. 60, 75, 802 P.2d 803 (1990), reviewed denied, 116 Wn.2d 1025 (1991)). As indicated in Hanna's opening brief, there was no indication of particular vulnerability on L.S.'s part, as illustrated by the State "striking the aggravator of vulnerable victim.... [RP 302; Br. of App't at 15 n.4](,)" the effect of which appears to diminish any reliance on the rationale underpinning the alleged trust between Hanna and L.S. or L.S.'s father to support a finding of sufficient evidence that Hanna used a position of trust to facilitate the offenses.

Nor did Hanna focus solely on the fact that he was not L.S.'s caregiver, additionally arguing there was little evidence of a one-on-one

relationship or that L.S. was particularly vulnerable to trust him. [Br. of App't at 15]. In Grewe, the court relied, in part, on the arguable fact that the defendant had prayed upon the victim's trust by "luring" her into his house "to play with his piano and computer(,)" Grewe, 117 Wn.2d at 221, a situation absent from this record.

The court in Grewe applied a clearly erroneous standard to the trial court's findings vis-à-vis the exceptional sentence and held that it could not "say the trial court's finding that the defendant abused a position of trust ... was clearly erroneous." Id. Here the standard is whether, after viewing the evidence in the light most favorable to the State, any rationale trier of fact could have made the finding beyond a reasonable doubt. State v. Gordon, 172 Wn.2d 671, 680, 260 P.3d 884 (2011). Under this standard and the facts of this case, there was insufficient evidence to justify an exceptional sentence based on abuse of trust.

02. HANNA DID NOT WAIVE THE
ISSUE PERTAINING TO ASSIGNMENT
OF ERROR 2.

The State's assertion that Hanna waived the "issue pertaining to assignment of error 2" is misplaced. [Br. of Resp't at 4]. Assignment of Error 2 asserts that the trial court "erred in entering the jury's finding of fact that Hanna used a position of trust to commit the crime." [Br. of App't at 1]. Issue 3 pertains to this assignment and asks

whether “the trial court erred in imposing an exceptional sentence where there was insufficient evidence to support the jury’s special verdict that Hanna used a position of trust to facilitate the crime?” [Br. of App’t at 3]. Hanna argued the point in his brief at 14-15 and again in the preceding section of this reply.

What the State did present in the body of its brief is that Hanna did not argue there was insufficient evidence regarding the ongoing pattern of sexual abuse as claimed in assignment of error 7 and addressed in the corresponding issue [Br. of Resp’t at 4-5], a point conceded earlier herein and a point that is of no consequence to the remaining issues advanced by Hanna.

03. HANNA WAS PREJUDICED AS A RESULT OF THE TRIAL COURT GIVING INSTRUCTION 18 THAT DEFINED “PROLONGED PERIOD OF TIME” TO MEAN MORE THAN A FEW WEEKS.

That Hanna’s attorney proposed instruction D19, which defined ‘prolonged period of time’ to mean more than a few weeks, does not render “meritless” his assignment of error that Court’s Instruction 18 impermissibly commented on the evidence as averred by the State [Brief of Resp’t at 4-5], it merely shifts the burden and standard to Hanna to demonstrate that his counsel was ineffective and that there is “a

reasonable probability” that but for his counsel’s error in proposing the instruction, the result would have been different. [Br. of App’t at 19].

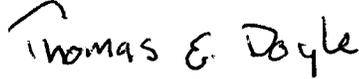
This burden is met. For the reasons argued in Hanna’s opening brief, it is a given that his counsel was ineffective. [Br. of App’t at 11-14, 19]. And there is “a reasonable probability” the result would have been different but for counsel’s actions. The State’s evidence was that L.S.’s father had lived at the residence with Hanna where L.S. visited for approximately six months. And, as noted in Hanna’s opening brief, little can be gleaned from L.S.’s testimony as to the duration of the abuse, other than she had been inappropriately touched on several occasions downstairs while visiting her dad’s house and while in Hanna’s truck.

The application of the instruction in front of this court would lead a jury to conclude that the abuse met the definition of the improper comment of “more than a few weeks,” with the concomitant result that there is a reasonable probability that the error prejudiced Hanna. In arguing harmless error, the State limits its analysis to the ““few weeks”” language in the instruction. [Br. of Resp’t at 12]. Whatever the State’s precise reason for this parameter, it neglects to address the additional prejudicial impact of the prosecutor’s closing argument to the jury that mirrors the improper comment in the instruction: “A prolonged period of time is a matter of weeks.” [RP 374].

E. CONCLUSION

Based on the above, Hanna respectfully requests this court to remand for resentencing.

DATED this 23rd day of October 2015.



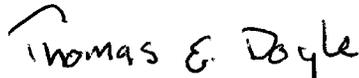
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CERTIFICATE

I certify that I served a copy of the above reply brief on this date as follows:

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