

No. 49434-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

ELBER LOPEZ HERNANDEZ,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-03599-3
The Honorable G. Helen Whitener, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Elber Hernandez was denied his constitutional right to due process of law and jury unanimity where the evidence was insufficient to enable the jury to unanimously agree on the same specific separate and distinct act to support each of the four convictions for child molestation.
2. Any future request by the State for appellate costs should be denied.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. When the state and federal constitutions require that evidence be sufficient to enable a jury to unanimously agree beyond a reasonable doubt on a specific and distinct criminal act underlying each charged offense, and where the State's evidence of sexual abuse lacked differentiating factual details, making it impossible for the jury to come to a unanimous agreement regarding whether a specific separate and distinct criminal act occurred on a particular occasion, was Elber Hernandez consequently denied his constitutional right to due process and jury unanimity? (Assignment of Error 1)
2. If the State substantially prevails on appeal and makes a

request for costs, should this Court decline to impose appellate costs because Elber Hernandez does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Elber Lopez Hernandez with one count of rape of a child in the first degree (RCW 9A.44.073) and three counts of child molestation in the first degree (RCW 9A.44.083). (CP 3-5)

The State later amended the Information to charge four counts of child molestation in the first degree after the alleged victim, D.R., failed to describe any incident that would constitute rape. (CP 50-51; RP 498-99) The State alleged that the act establishing count one occurred between April 14, 2013 and April 14, 2014, when D.R. was nine years old. (CP 50-51; RP 389) The State alleged that the remaining acts occurred between April 14, 2009 and April 14, 2015, from D.R.'s fifth birthday to just after her eleventh birthday. (CP 50-51; RP 389)

The jury found Hernandez guilty as charged. (CP 55-58; RP

1076) The trial court imposed a sentence of 198 months to life in prison. (RP 1099; CP 96-97) Hernandez timely filed a Notice of Appeal. (CP 109-10)

B. SUBSTANTIVE FACTS

Maria Farias and Jaime Delgado were married and had three children together. (RP 529, 506, 643-44) Their daughter, D.R., was born on April 14, 2004, when the family lived in California. (RP 391, 528, 643-44) Farias and Delgado divorced in 2008. (RP 529, 643) That same year, Farias's sister, Francisca Farias Mendoza, had moved from California to Lakewood, Washington with her husband, Elber Hernandez. (RP 651-52, 832, 834)

In 2009, Farias purchased a mobile home next to Mendoza and Hernandez, and moved to Lakewood with her children. (RP 529, 643, 641-52) Farias and Mendoza were close, and their families spent a lot of time together. (RP 649, 840, 844-45) Hernandez would sometimes care for Farias' children after school when Farias had to work. (RP 654-55)

But over time, the sisters' relationship started to strain because Farias became involved in a same-sex relationship while, at the same time, Mendoza attended a church with strong views

against homosexuality. (RP 668, 840, 844, 846, 847)

In the summer of 2015, D.R. and her siblings traveled to California to spend the summer with their father and his new family. (RP 400, 533-34) On a trip to Disneyland, Delgado noticed that D.R. seemed upset. (RP 534, 535, 587) She spent most of the drive to Southern California crying off-and-on while sending text messages on her telephone. (RP 401-02, 536, 683, 685) The next day, when the family finally went to Disneyland, D.R. did not seem to be enjoying herself. (RP 566, 584-85) Delgado took D.R. aside and eventually D.R. told him why she was so upset. (RP 585)

D.R. had, through texts the prior day, told her mother that Hernandez had been molesting her, and she shared this information with Delgado. (RP 401-02, 585, 686-87) According to D.R., the first time Hernandez touched her inappropriately was in California when she was about four years old before her family moved to Washington. (RP 402, 438) She testified that, when she was nine years old, Hernandez put his hands on her "privates." (RP 404-05) She thought that he did this "more than two times" when she was between the ages of nine and eleven years old, and that Hernandez would "usually" pick her up from school and take her to his house, where he would put her on his bed, pull her pants

down, and touch her privates with his hands.¹ (RP 406-07) D.R. also testified that one time Hernandez touched his penis against her “privates.”² (RP 417-18, 420) D.R. testified that Hernandez threatened to hurt D.R. or her family if she told anyone. (RP 422-23)

Hernandez and Mendoza both testified that Hernandez did not babysit D.R., and that D.R. was never alone with Hernandez in their house. (RP 839, 845, 913) Hernandez denied ever molesting or touching D.R. inappropriately, or threatening to hurt D.R. or her family. (RP 920-21)

IV. ARGUMENT & AUTHORITIES

A. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTIONS, AS NO JURY COULD UNANIMOUSLY AGREE BEYOND A REASONABLE DOUBT THAT HERNANDEZ COMMITTED FOUR SEPARATE AND DISTINCT ACTS OF CHILD MOLESTATION.

“Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). And in Washington, a

¹ These alleged incidents formed the basis for counts 2 thru 4. (RP 987, 993)

² This alleged incident formed the basis for count 1. (RP 498, 987-88, 993)

defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); Wash. Const. art. 1, § 22. Thus, when the evidence shows that the defendant committed multiple acts, the jury must agree which act it is relying upon for a guilty verdict. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In sexual abuse cases where the State alleges multiple acts within the same charging period, the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting State v. Newman, 63 Wn. App. 841, 851, 822 P. 2d 308 (1992)). The jury must be able to isolate distinct incidents, distinguish among them, and agree as to which incident occurred. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572-73. This ensures a unanimous verdict for one criminal act. State v. Coleman, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007).

The Hayes court developed a three-prong test to determine whether generic testimony was specific enough to sustain a

conviction: the alleged victim must (1) describe the act or acts with sufficient specificity to allow the jury to determine what offense, if any, has been committed; (2) describe the number of acts committed with sufficient certainty to support each count the prosecution alleged; and (3) be able to describe the general time period in which the acts occurred. 81 Wn. App. at 438.

For example, in State v. Edwards, the trial court vacated one of two counts of child molestation due to insufficient evidence of separate and distinct acts. 171 Wn. App. 379, 386, 400, 294 P.3d 708 (2012). The victim, A.G., had testified that she thought Edwards first touched her inappropriately when she was five or six years old. She testified that Edwards sat her in a chair, on his lap, in the living room, and then he removed her pajama bottoms and underwear. He then touched her vagina with his fingers. A.G. testified that he touched her “front privates” 10 to 15 times during the charging period. She stated that Edwards always touched her in the same way—he would come pick her up while she was sleeping, take her to the chair, remove her clothes, and touch her with his hand. 171 Wn. App. at 384, 403.

On appeal, this Court affirmed the trial court’s conclusion that there was not “sufficient specificity in testimony to differentiate

between any of the acts of molestation that occurred,” stating:

A.G. testified that the first time she remembered Edwards touching her was when she was about five years old, but she could have been six. There was no evidence defining the time period in which any other act occurred. A.G. testified to the specifics of the “first time” but “generally stated that Edwards” touched her “front private” 10 to 15 times....

The evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period. Because the State failed to present sufficient evidence for the jury to convict Edwards of two separate and distinct counts of first degree child molestation, the trial court did not err in vacating count II.

Edwards, 171 Wn. App. at 403.

In this case, there was specific testimony to differentiate count 1, when D.R. testified that Hernandez touched his penis against her genitals. But there was insufficient evidence for the jury to convict Hernandez of three separate and distinct additional counts of first degree child molestation.

D.R. described what Hernandez “usually” did and that he did it “more than two” times during an approximately two year period. This testimony does not describe the number of acts committed or the time period during which they occurred with “sufficient certainty,” as required by Hayes. And, like in Edwards, the testimony did not “delineate between specific and distinct

incidents.” D.R. did not provide any distinguishing facts, such as different actions, locations, or timeframes. There was simply nothing from which a juror could identify and differentiate three distinct acts of molestation.

Because D.R. only described two specific and distinct acts of molestation, the Court must vacate two of Hernandez’s child molestation convictions.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.³

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State

³ In State v. Sinclair, Division 1 concluded a defendant should object to the imposition of appellate costs in the opening brief. 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). More recently, in State v. Grant, this Court disagreed with Sinclair and held that an appellant should object to the imposition of costs through a motion to modify a commissioner’s ruling ordering costs. 2016 WL 6649269 at *2 (2016). But Hernandez has included an objection to costs in this brief in the event that a higher court adopts the Sinclair reasoning at a future time, and because this Court also noted in Grant that “a defendant may continue to properly raise the issue of appellate costs in briefing or a motion for reconsideration consistently with Sinclair.” 2016 WL 6649269 at *2.

v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Hernandez’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Hernandez owns no property or assets, has no savings, and has no job and no income. (CP 112-13; RP 1089) Hernandez will be incarcerated for at least 16 years. (CP 96-97; RP 1099) And the trial court declined to order any discretionary LFOs at sentencing in this case. (CP 94-

95) Thus, there was no evidence below, and no evidence on appeal, that Hernandez has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Hernandez is indigent and entitled to appellate review at public expense. (CP 115-16) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that

Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). See also State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015) (noting that "if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Hernandez's financial situation has improved or is likely to improve. Hernandez is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

V. CONCLUSION

Because the evidence does not clearly delineate between specific and distinct incidents of sexual abuse during the charging period, the State failed to present sufficient evidence for the jury to convict Hernandez of four separate and distinct counts of first degree child molestation. Two of his convictions must be vacated. Lastly, this Court should decline any future request to impose appellate costs.

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DATED: January 27, 2017



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CERTIFICATE OF MAILING

I certify that on 1/27/17, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Elber L. Hernandez, DOC# 391888, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

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