

FILED
11/1/2017 4:22 PM
Court of Appeals
Division II
State of Washington

NO. 49482-5-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PATRICK JAMES EDWARD DOCKERY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR GRAYS HARBOR COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. TESTIMONY ELICITED BY THE STATE REGARDING "INTERACTION" BETWEEN M.N. AND THE APPELLANT ON THE COT WAS PRESENTED AS CONSTITUTING A CRIME AND A LIMITING INSTRUCTION REGARDING ITS CONSIDERATION WAS MERITED

The prosecution initially charged Mr. Dockery with child molestation in Count 2. Contrary to the argument contained in the Brief of Respondent, the testimony by B.D. and V.R. that M.N. came out of the tent while nude or partially nude and got on top of Mr. Dockery who was on a cot outside the entrance to the tent was initially intended to prove the charge of child molestation. The State argues that the testimony in fact "would show that the Appellant did not commit a wrongful or criminal act at all." Brief of Respondent at 15. The testimony, however, was at least initially elicited to show evidence of an offense. Due to the trial court's provisional ruling that if convicted of both counts, the counts would probably merge for purpose of sentencing. 3RP at 583. The State accordingly appeared to elect that both offenses occurred while in the tent. 3RP at 549-50.

The specific testimony of V.R. elicited by the State about the incident on the cot was clearly not for the purpose of showing that Mr. Dockery did

not commit a wrongful act. V.R. testified as follows:

Q: And what did you see?

A: [M.N.] on top of Patrick.

Q: And could you describe what it was that you saw, for us?

A: She was completely naked on top of him.

Q: And when you say on top of him, what do you mean by that?

A: Chest to chest on top of him.

Q: And then what could you see with regard to what was going on, if- if they were laying chest to chest?

A: What do you mean?

Q: That's my question. What could you see was going on if they were laying chest to chest?

A: I just seen them laying chest-to-chest and I laid down as fast as I could and I made [M.] lay down so she wasn't seeing anymore.

2RP at 324.

The prosecutor also asked V.R. about what she saw taking place on the cot:

Q: Okay. And what efforts, if any, did you make to stop what was happening?

A: I mean we- I didn't know what to do. I just laid down. I mean. . . .

2RP at 325.

The State pursued the same inquiry with M.D.:

Q: So after you moved to the Durango, you talked about something waking you up. What woke you up?

A: I don't know what exactly woke me up. I just heard something. Like I got- I woke up and I saw [M.N.] like unzipping her tent, like getting out of it. And I thought she was just like doing something. I didn't know. But then she like undressed her- like her- the top and got on top of my brother. And I thought it was weird and I didn't know like what to do. I was just- I just sat there. And I was like dumbfounded and I didn't understand really.

3RP at 434.

Following the "halftime" motion to dismiss count 1, the State argued that the evidence supports the charge of molestation by M.N. "being on top of Patrick Dockery." 3RP at 546-47. The trial court permitted the State to proceed with both counts, but indicated that the merger doctrine would apply to the charge of child molestation if convicted of both. 3RP at 583.

The State did not explicitly argue that the incident on the cot described by V. R. and M.D. constitutes the act of child molestation charged in Count 2. Instead, the State, cognizant that the judge had previously ruled that the merger doctrine would apply, terms the incident as an "interaction," arguing

[t]hat even though there is an interaction between them,

which very well could have been an interaction before or after the rape. And that's for you to decide. I mean she got on top of him, she wasn't dressed, she didn't have her clothes on. Was that because he got turned on and followed her back in the tent and had sex with her? Could be. Was that an extension of what had already happened, that [M.N.] came out and got on top of him? Could be. But we know it that there was an interaction.

And they want you to believe that Patrick just pushed her off and that was it and nothing else, and that somehow she's just making all of this up. For what? For what? There is no answer to that. The only answer to that is because it happened.

3RP at 645-46.

Because of the trial court's provisional application of the merger doctrine, the State virtually abandoned the theory that the alleged act of molestation occurred on the cot, and emphasized the incident as evidence of the alleged rape. This election rendered the incident on the cot evidence falling within the provision of ER 404(b), for which the court should have provided a limiting instruction given the potentially exculpatory nature of the testimony.

2. **THE TRIAL COURT ERRED BY RELYING ON THE "PARTICULARLY VULNERABLE" AGGRAVATING FACTOR BECAUSE THE JURY'S FINDING IS FACTUALLY UNSUPPORTABLE**

RCW 9.94A.535(3)(b) states that it is an aggravating sentencing factor where the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

For a victim's vulnerability to justify an exceptional sentence, the defendant must know of the particular vulnerability, and the vulnerability must be a substantial factor in the accomplishment of the crime. *State v. Jones*, 59 Wn.App. 744, 752, 801 P.2d 263 (1990), review denied 116 Wn.2d 1021, 811 P.2d 219 (1991). The focus is on the victim: Was the victim more vulnerable to the offense than other victims and did the defendant know, or should he have known, of that vulnerability? *State v. Vermillion*, 66 Wash.App. 332, 348, 832 P.2d 95 (1992), review denied, 120 Wash.2d 1030, 847 P.2d 481 (1993); *State v. Jackmon*, 55 Wash.App. 562, 567, 778 P.2d 1079 (1989). The critical inquiry regarding victim vulnerability focuses on:

whether or not the victim was more vulnerable to the offense than other victims due to extreme youth, advanced age, disability, or ill health and whether the defendant knew of that vulnerability. Accordingly, the *mens rea* element of the crime with which the defendant is charged has no relevance; instead, what is critical is whether the defendant knew or should have known of the victim's vulnerability, and whether the particular vulnerability was a substantial factor in accomplishment of the crime.

Jones, 59 Wash.App. at 753 (citation omitted.) . The trier of fact erred in finding that there was sufficient evidence to support the aggravating factor of victim vulnerability. Victim vulnerability in this case was based upon M.N.'s alcohol consumption. M.N. testified that she consumed Fireball whiskey and Mikes Harder Lemonade. 1RP at 171, 172, and 178.

All three girls, however, took great effort to hide their drinking and no evidence was presented that Mr. Dockery - who was intoxicated to the point that he vomited - knew that any of the girls were drinking or that he was capable of recognizing that they were drinking. 2RP at 332, 334, 336, and 349. Moreover, on the night in question V.R. testified that Mr. Dockery was so intoxicated that his dad put him on the cot to sleep. 2RP at 338.

Mr. Dockery had no way of knowing how impaired M.N. may have been as her actions did not indicate that she was substantially impaired and he highly intoxicated. There was no evidence to support that Mr. Dockery knew or should have known that M.N. was particularly vulnerable based upon her alcohol intake, which all three girls took steps to conceal to avoid getting in trouble with the adults. Mr. Dockery's use of alcohol would have also impaired his ability to recognize her alleged vulnerability.

B. CONCLUSION

Based on the forgoing, as well as the previously submitted brief of the appellant, Mr. Dockery respectfully requests that his conviction be reversed, or alternatively, that the matter be remanded for resentencing within the standard range.

DATED: November 1, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on November 1, 2017, that this Appellant's Reply Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, and to Erin Jany, Grays Harbor County's Prosecuting Attorney, copies were mailed by U.S. mail, postage prepaid, to the Appellant, Patrick Dockery at the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 1, 2017.



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November 01, 2017 - 4:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49482-5
Appellate Court Case Title: State of Washington, Respondent v Patrick James Edward Dockery, Appellant
Superior Court Case Number: 15-1-00173-9

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