

NO. 49746-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

COREY PEARSON,

Appellant.

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

The Honorable Derek Vanderwood, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's convictions for child rape and child molestation violate the prohibition against double jeopardy.

Issue Pertaining to Assignment of Error

Where appellant's convictions for child rape and child molestation were based on one act involving digital penetration on one occasion, do appellant's multiple convictions for rape and molestation violate double jeopardy?

B. STATEMENT OF THE CASE

On April 1, 2016, in Juvenile Court, the Clark county prosecutor charged Corey Pearson with one count of second degree child rape, and one count of second degree child molestation, allegedly committed against K.L.M. during a time intervening between June 1, 2015 and September 30, 2015. CP 1-2. At the time of the alleged incident, Pearson was 16 years old and K.L.M. was 12. CP 5; RP 18, 19, 114.

During the charging period, Jessica Zink was the foster mother of K.L.M.¹ RP 17. At one time, Zink was married to Mr. Pearson, Corey's father. RP 12. Zink and Mr. Pearson had since divorced but Zink and Corey remained close. RP 12. Zink has

¹ Zink has since become K.L.M.'s guardian. RP 17.

been a mother figure to Corey since he was 8 years old. RP 12. As a result, Zink often took care of Corey. RP 24.

At the adjudicatory hearing held October 26, 2016, Zink testified that sometime in November 2015, K.L.M. said she needed to tell Zink something but was scared. RP 25. Zink asked if K.L.M. could text a message. RP 25. Reportedly, K.L.M. texted "C.J. half raped me."² RP 28. At the time, Corey was out of the house in California. RP 25.

A couple days later, Zink asked K.L.M. what she meant. RP 29. According to Zink, K.L.M. said, "he put his hands down there." RP 29. Zink did not ask any additional questions. RP 29.

K.L.M. testified that she and Corey would frequently hang out and watch television. RP 41, 49. One day, they were lying on the bed watching TV and Corey reportedly started kissing K.L.M. RP 41, 49. K.L.M. testified she told him to stop because she didn't want to get caught. RP 42. K.L.M. testified Corey started moving his hand toward "areas." RP 42. When the prosecutor attempted to elicit where exactly, the following exchange occurred:

Q. So you said he moved his hands toward areas. Is that your vagina?

² The family referred to Corey as "C.J." RP 19.

MS. SCHOLTS [defense counsel]: Objection. Leading.

THE COURT: Sustained. I'll let you lay more of a foundation.

Q. (By Ms. Barrar) What area did he move his hand to?

A. My vaginal area.

Q. Okay. And what was his hand doing? Was that under or over clothing?

A. Under.

Q. Okay. And was that under or over your underwear?

A. Under.

Q. Okay. So was it touching your skin – the skin of your vagina?

A. Yeah.

Q. And was his hand doing anything down there? Was it moving at all?

A. Yeah.

Q. How was it moving?

A. I don't know. It was just moving.

Q. Okay. Have you ever used a tampon?

A. Yeah.

Q. And did his fingers ever –

A. Yes.

Q. – go where a tampon would go?

A. Yeah.

Q. Okay. And what were they doing when they were inside there?

A. Moving.

Q. Okay. And did he touch anywhere else on your body?

A. No.

RP 43.

K.L.M. testified Corey stopped because the garage door opened, signifying Zink was home. RP 44. She testified the incident happened one time before school started in the summer of 2015. RP 44.

K.L.M. also reported something about what happened to her teacher Dena Picconi. K.L.M. reportedly asked to talk to Picconi in private and disclosed a sexual assault. RP 68. Picconi did not ask any details but reported the disclosure to DSHS. RP 70.

K.L.M. had been seeing therapist Sarah Arp-Howard since about December 2014. RP 30. At some point, K.L.M. reported she had been raped by C.J. RP 75. Arp-Howard asked K.L.M. about her definition of rape, but K.L.M. did not have or offer one. RP 75,

81. She said it happened at the end of the summer in 2015. RP 76.

Physician Kimberly Copeland performs medical evaluations of potentially abused children. RP 94. She met with K.L.M. on February 8, 2016, after receiving a referral from Children's Justice Center. RP 97, 100. K.L.M. declined to undergo an examination. RP 97. When asked why she was there, K.L.M. said "my foster brother molested me." RP 106. When Copeland asked what that meant, K.L.M. said: "He fingered me." RP 107. She said it happened one time.

During the prosecutor's closing argument, the court clarified that both charges were based on the singular incident:

THE COURT: (Inaudible) from the State as to both counts are focused on the same singular event, Ms. Barrar?

MS. BARRAR: Correct, Your Honor, and we would ask that the Court make independent findings on both, and then we can address whether they merge at sentencing.

RP 118-19.

The court made independent findings as to each charge. As to the rape, the court found:

...I believe that the State has met its burden of proof to find that sexual intercourse did occur in that

late-August 2015 timeframe, that there was penetration of the vagina with Mr. Pearson's finger. And based on that, I am finding him guilty of that particular count.

RP 133.

As to the molestation, the court found:

...sexual contact as [sic] a specific legal definition: Any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

I'm not going to repeat all of the reasons why I identified that I feel that there was sexual contact between these parties – because the penetration occurred, because there was the touching of the vagina that I'm finding – that does constitute sexual contact.

Whether or not, then, it was done for the purpose of sexual gratification or not, I find that the testimony indicates that, yes, I'm able to infer whether or not that was the case. I think that's the reason why there would have been touching in that area – was for purposes of sexual gratification; not another reason to be touching in that area of K.L.M.

RP 134.

At disposition on November 9, 2016, the court asked the prosecutor about merging the offenses:

THE COURT: Thank you. One question I had with the two findings – rape of the child in the second degree, child molestation in the second degree – any issues you think with merger or otherwise that would apply?

MS. BARRAR: I think there is some question under the case law as to whether they would merge. I think

arguably, under the case law, they do not, but the state has no objection to the court merging them. I think in this case, it's pretty clear the same act or offense, and I think for an equity or in the interest of justice argument, the State has no objection to this Court merging them.

RP 151. Defense counsel agreed the counts should merge. RP 151.

The court agreed the offenses merged "for purposes of the disposition:"

First, I'm going to begin by noting my analysis on those starts with a context of merger and whether or not I'm going to merge those two together. Based on the circumstances that have been presented that the conduct in both of those was a single act – it was the same act – I am going to find that those would merge for purposes of the disposition that I am making, and that is included in what my analysis would be concluded. I think that's the only appropriate approach given the circumstances with the single act being the source of the responsibility for both of those.

RP 163-64 (emphasis added).

The issue was brought up again when the parties and court later appeared to enter findings of fact and conclusions of law. RP 184. Defense counsel suggested the court should dismiss the lesser offense based on double jeopardy concerns, but the court stated: "I don't know that a dismissal would be appropriate based

on the findings that I have already made.” RP 184. This appeal follows. CP 21-25.

C. ARGUMENT

COREY’S MULTIPLE CONVICTIONS BASED ON THE SAME ACT VIOLATE THE PROHIBITION AGAINST DOUBLEJEOPARDY.

The double jeopardy clause of the United States Constitution guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. 5. The double jeopardy clause of the Washington State Constitution guarantees that “No person shall ... be twice put in jeopardy for the same offense.” Const. art. 1, § 9. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L.Ed.2d 707 (1969).

The double jeopardy clause of the Fifth Amendment has been construed to encompass three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

(Footnotes omitted.) North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), overruled on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L.Ed.2d 865 (1989).

Multiple convictions for rape of a child and child molestation may violate double jeopardy even though they are different offenses with different elements. State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013). Two offenses are not the same when “there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.” State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983).

Child molestation requires proof of sexual contact” with a child. RCW 9A.44.089(1). Sexual contact means “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.” RCW 9A.44.010(2).

Child rape requires proof of “sexual intercourse” with a child. RCW 9A.44.079(1). Sexual intercourse can be proved with

evidence of some form of penetration, but it can also be proved by “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.010(1)(c).

In Land, this Court recognized there are circumstances where convictions for child rape and child molestation violate double jeopardy:

Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation. And this is so even if the penetration and molestation allegedly occur during a single incident of sexual contact between the child and the older person. The touching of sexual parts for sexual gratification constitutes molestation up until the point of actual penetration; at that point, the act of penetration alone, regardless of motivation, supports a separate punishable conviction for child rape.

But where the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person’s sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape. In such a case, the two offenses are not separately punishable. They are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape. See State v. Hughes, 166 Wn.2d 675, 682-84, 212 P.3d 558 (2009) (convictions for second degree rape and rape of a child were the same offense, despite elements that

differ facially); In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (attempted murder and assault were the same offense where both were proved by a single gunshot directed at the same victim).

Land, 172 Wn. App. at 600.

At first blush, it may seem this case falls into the first category because the rape was premised on penetration. However, it does not fit within that example because there was no “touching of sexual parts for sexual gratification” “up until the point of actual penetration.” Rather, the touching of sexual parts for sexual gratification was the penetration. The only evidence of molestation was the actual penetration itself. Thus, this case falls into the second category because the elements of the rape as proved are included in molestation “and the evidence required to support the conviction for molestation also necessarily proves the rape.”

Indeed, the court specifically stated it was convicting Corey of both offenses based on “a single act – it was the same act.” RP 163-64. Thus, this is not one of those cases where there was a potential double jeopardy violation because the jury was not instructed each count must be based on a separate and distinct criminal act – see e.g. State v. Mutch, 171 Wn.2d 646, 254 P.3d

803 (2011) – this is a case where there is a known double jeopardy violation because the fact-finder expressly stated it was basing both counts on the exact same act. The court therefore erred in failing to dismiss the child molestation count as required. State v. Weber, 159 Wn.2d 252, 266, 269, 149 P.3d 646 (2006) (remedy for double jeopardy violation in this circumstance is to vacate the conviction for the lesser offense).

D. CONCLUSION

Because the court relied on the same act to convict Corey of child rape and child molestation, the convictions violate the prohibition against double jeopardy. The child molestation conviction must be reversed and dismissed.

Dated this ^{5th} day of ^{June} ~~May~~, 2017

Respectfully submitted

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