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

STATE OF WASHINGTON,

Respondent,

v.

MELFORD JOHN WARREN, JR.,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00549-7

BRIEF OF RESPONDENT

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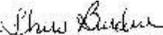
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether there was sufficient evidence to convict Warren of two counts of sexual exploitation of a minor where he did the affirmative act of ordering his minor son to have sex with his minor daughter, a clear violation of the sexual exploitation statute?

2. Whether the conduct meets the definition of live performance where Warren directed a live show of his children having sex while he watched?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Melford John Warren, Jr. was charged by third amended information filed in Kitsap County Superior Court with twenty two counts:

| Count | Charge | Victim | Aggravator(s) |
|-------|--|--------|---|
| I. | Rape of a Child in the First Degree | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| II. | Rape of a Child in the First Degree | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| III. | Child Molestation in the First Degree (Knowingly Cause Another Under 18) | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |

| | | | |
|-------|--|--------|---|
| IV. | Sexual Exploitation of a Minor | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| V. | Child Molestation in the First Degree (Knowingly Cause Another Under 18) | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| VI. | Sexual Exploitation of a Minor | G.P.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| VII. | Assault in the Fourth Degree | G.P.J. | Domestic Violence |
| VIII. | Rape of a Child in the First Degree | G.O.J. | Domestic Violence Position of Trust |
| IX. | Assault of a Child in the Second Degree | G.O.J. | Domestic Violence Position of Trust |
| X. | Assault of a Child in the Second Degree | G.O.J. | Domestic Violence Position of Trust |
| XI. | Assault of a Child in the Second Degree | G.J. | Domestic Violence Position of Trust Particularly Vulnerable Victim |
| XII. | Criminal Mistreatment in the Second Degree | G.Z.J. | Domestic Violence Position of Trust |
| XIII. | Child Molestation in the First Degree | G.Z.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |

| | | | |
|--------|--|----------------|---|
| XIV. | Child Molestation in the First Degree (Knowingly Cause Another Under 18) | G.Z.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| XV. | Assault of a Child in the Second Degree | G.Z.J. | Domestic Violence Ongoing Pattern of Sexual Abuse Position of Trust |
| XVI. | Rape of a Child in the First Degree | G.S.J. | Domestic Violence Position of Trust |
| XVII. | Assault of a Child in the Second Degree | E.N.E. | Domestic Violence Position of Trust Particularly Vulnerable Victim |
| XVIII. | Assault of a Child in the Third Degree | V.M.W. | Domestic Violence Position of Trust Particularly Vulnerable Victim |
| XIX. | Assault of a Child in the Second Degree | V.M.W. | Domestic Violence Position of Trust Particularly Vulnerable Victim |
| XX. | Assault of a Child in the Third Degree | G.H.J. | Domestic Violence Position of Trust Particularly Vulnerable Victim |
| XXI. | Assault in the Second Degree | Shannon Smith | Domestic Violence |
| XXII. | Assault in the Second Degree | Amanjot Jaswal | Domestic Violence |

CP 819-844.

At trial, Warren was found guilty of fifteen of the twenty two counts. He was acquitted on Counts XXI, XXII and XIX and counts XVIII, XX, XXI and XXII were dismissed by the State after a hung jury on each. CP 924, 986-87. Warren was sentenced to 1710 months. CP 988-1002.

B. FACTS

Warren is the biological father of twelve children, including the victims charged in the information, GPJ (7/5/2004), GOJ (9/10/2009), GJ (12/31/2010), GZJ (9/7/2005), GSJ (2/16/2007), ENE (5/25/2013), VMW (3/23/2012), and GHJ (7/28/2012). 11RP 1765; 1820. The offenses took place at a home in Port Orchard, Washington, where all of the children resided with Warren and their mothers Shannon Smith and Amanjot Jaswal from September 1, 2013, through September 15, 2014. 11RP 1765; 1820.

On August 27, 2014, ENE was brought into MultiCare hospital with an injury to her arm. 11RP 1703-04. Dr. Sara Ahmed, the treating physician, found that ENE had a full bone fracture in her arm where the ends had been pushed away. 11RP 1706. Because of the complete displacement of the bones, it was considered to be a Level 3, or the most severe type of fracture. 11RP 1706. Since the injury did not match Ms. Jaswal's explanation that ENE had rolled over on her arm, Dr. Ahmed did

a non-accidental trauma work up and reported her suspicions to law enforcement. 11RP 1706-09. Dr. Ahmed said that it would take considerable force, more than simply rolling over on one's arm, to cause a fracture like the one ENE had. 11RP 1708.

On September 15, 2014, a Department of Natural Resources officer responded to a call of unsupervised children at Twenty Nine Pines Campground. 11RP 1720-21. Several hours after the children were taken into protective custody, Warren arrived at the campsite and was arrested for an outstanding warrant. 11RP 1725-27. After being taken into protective custody, the children began disclosing abuse. 12RP 1858. At trial, all of the children who testified detailed extensive physical and sexual abuse at the hands of Warren. See generally 13RP and 14RP. This abuse included two occasions when Warren directed GPJ's brother GMW to have sex with her.

The first time, Warren purportedly wanted to see if the kids knew anything about sex. 14RP 2268. Warren stayed in the room with his two kids and instructed GMW on how to have sex with his sister GPJ. 14RP 2268-69. Warren told GMW to put his penis in GPJ's vagina while he stayed in the room watching. 14RP 2269-70. GMW was not able to get his penis inside of GPJ's vagina, although it did touch her vagina. 13RP 2037-2039. On the second occasion, Warren was mad at something GPJ had

done. 14RP 2271. He told GMW to rape his sister, instructing him the whole way. 14RP 2271. GMW put his penis in GPJ's vagina while Warren watched, stopping when Warren told him to. 14RP 2271-72. After telling him to stop, Warren complained that GMW did not do it right and hit him. 14RP 2272.

Warren was charged with two counts of sexual exploitation of a minor (Counts IV and VI). CP 823-26. Both counts alleged that:

On or between September 1, 2013 and September 15, 2014, in the County of Kitsap, State of Washington, the above-named Defendant compelled a minor, to-wit: G.P.J. 07/05/2004, being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct knowing that the conduct would be photographed or be part of a live performance;

CP 823-26. The jury was instructed that "a person is guilty of sexual exploitation of a minor if the person being a parent permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance." CP 864. Live performance was defined as "any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more." CP 869.

III. ARGUMENT

A. **THERE WAS SUFFICIENT EVIDENCE TO CONVICT WARREN OF TWO COUNTS OF SEXUAL EXPLOITATION OF A MINOR WHERE HE DID THE AFFIRMATIVE ACT OF DIRECTING HIS MINOR SON TO HAVE SEX WITH HIS MINOR DAUGHTER.**

Warren argues that the evidence was insufficient to convict him of the two counts of sexual exploitation of a minor. This claim is without merit because Warren's actions were clearly a violation of the sexual exploitation statute.

A defendant may challenge the sufficiency of the evidence for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998). Evidence is sufficient to support a verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a sufficiency of evidence challenge, a defendant admits the truth to all of the State's evidence. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). All reasonable inferences are interpreted in the State's favor. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

In *State v. Chester*, 82 Wn. App. 422, 424, 918 P.2d 514 (1996), the defendant was convicted of sexual exploitation of a minor for hiding a

video camera beneath his 14-year old stepdaughter's bed and filming her while she was naked. The defendant was charged under RCW 9.68A.041(1)(b) and (c). *Chester*, 82 Wn. App. at 425. Paragraph (b) states that a person is guilty of sexual exploitation of a minor if the person “[a]ids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance.” *Id.* In reversing the conviction, the Court noted that there was no evidence that “Chester took an affirmative act to cause his daughter’s conduct under either RCW 9.68A.040[(1)](b) or (c).”¹ *Chester*, 82 Wn. App. at 428. The Court held that the statute required acts by someone other than the minor:

To be a criminal act, there must be evidence that someone other than the minor induced the minor’s behavior ... RCW 9.68A.040 requires a perpetrator to take some affirmative act that induces the minor to engage in sexually explicit conduct. A parent could be held criminally liable under subsection (c) only when the parent gives a third party express permission to sexually exploit the parent’s child.

Id. The Court noted that “[t]he Legislature did not intend that a parent could violate paragraph (c) without evidence that someone violated either paragraph (a) or (b). When the parent is the only actor who has induced the conduct of the minor, that parent can be convicted only under RCW

¹ The Court omits the (1) from most of its citations to the statute. The present statute, however, is unchanged from that cited by the Court. *See Chester*, 82 Wn. App. at 425; *State v. Chester*, 133 Wn.2d 15, 19, 940 P.2d 1374 (1997). Paragraphs (a), (b) and (c), then and now, fell under subsection (1).

9.68A.040[(1)](a) or (b).” *Chester*, 82 Wn. App. at 429.

The *Chester* court found that the deficiency of the State’s case was its failure to provide any causal link between Chester’s behavior and his step daughter’s conduct. *Chester*, 82 Wn. App. at 430. The Court noted that there was no evidence that Chester induced his daughter’s behavior in any way or that he gave someone express permission to do so. *Id.*

On discretionary review, the Supreme Court further described the statute’s purpose:

While “permit” may suggest passive conduct, it appears that the *aim of subsection (c) of the sexual exploitation statute is to prohibit a parent from allowing a child to be exploited under subsection (a) or (b) of the statute.* The language of the statute does not support a contrary interpretation. If a parent, or stepparent, were actively involved in causing the exhibition or other sexually explicit conduct, then the parent would be subject to the terms of subsection (a) or (b).

State v. Chester, 133 Wn.2d 15, 23, 940 P.2d 1374 (1997) (emphasis the Court’s).

The main issue in *Chester* was that the defendant did nothing to encourage the conduct—while still contemptible, the defendant’s actions were passive because all he did was set up a camera and view it at a later time. Further, the Court found that the defendant did not induce his daughter’s behavior in any way under subsections (b) or (c), so there was

“no evidence that someone violated subsection (a) or (b), and, therefore, no evidence that Chester gave someone express permission to do so.” *Chester*, 82 Wn. App. at 430. The conduct in *Chester* is clearly distinguished from the conduct in this case.

Here, Warren played an active role in directing his children in sexually explicit conduct. He ordered GMW to have sex with GPJ while he watched. He even became upset when he felt that GMW did not do the act correctly. By directing his son to have sex with his daughter, Warren did an affirmative act that induced both minors to engage in sexually explicit conduct. Instead of protecting GPJ from sexually explicit conduct, Warren’s own actions caused her to be a victim. He gave GMW express permission to violate subsection (b). Therefore, Warren is criminally liable under subsection (c). His conduct was precisely the type that RCW 9.68A.040 intends to punish.

B. THE SEXUALLY EXPLICIT CONDUCT CLEARLY FITS THE DEFINITION OF LIVE PERFORMANCE WHERE WARREN WAS THE DIRECTOR OF A LIVE SHOW THAT FEATURED HIS CHILDREN HAVING SEX WHILE HE WATCHED.

Warren next claims that his direction for GMW and GPJ to have sex while he watched is conduct that does not meet the statutory definition of “live performance.” This claim is without merit because the sexually

explicit conduct here was the very definition of a live performance.

“Live performance” was defined for the jury in Instruction 18 as “any play, show, skit, dance, or other exhibition performed or presented to or before an audience of one or more.” CP 869. In *State v. Wissing*, 66 Wn. App. 745, 753, 833 P.2d 424 (1992), the Court held that the phrase “other exhibition” means “a type of performance similar in nature to those terms immediately preceding it in the statute, *e.g.*, play, show, skit or dance.”

Here, unlike in *Wissing*, where the defendant only asked the victim to expose his pubic hair, Warren acted as the director for a show of his children having sex, instructing them on what to do and critiquing the result. It was a piece that he watched live—a performance that he had them act out just for him. This is clearly conduct that fell under the definition of “live performance.”

Finally, Warren’s reliance on the unpublished case *State v. Wheeler*, 193 Wn. App. 1013, 2016 WL 1306132, *review denied*, 186 Wn.2d 1005 (2016), is misplaced. The issue here, *i.e.* what constitutes a live performance, was not before the court: “There is also no dispute that ... the conduct was part of a live performance.” *Wheeler*, 2016 WL 1306132 at *4.

IV. CONCLUSION.

For the foregoing reasons, Warren's conviction and sentence should be affirmed.

DATED November 30, 2017.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Kellie L. Pendras". The signature is fluid and cursive, with the first name "Kellie" and last name "Pendras" clearly distinguishable.

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