

FILED
Court of Appeals
Division II
State of Washington
12/29/2017 2:11 PM

NO. 50445-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

NESTOR RICHARDO POZOS-RIVERA,

Appellant.

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

The Honorable Gretchen Leanderson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's convictions violate the prohibition against double jeopardy given deficiencies in the jury instructions.

Issue Pertaining to Assignment of Error

Appellant was convicted of two counts of first degree child molestation, allegedly committed against the same person during the same charging period. The jury instructions failed to make it manifestly apparent the counts must be based on separate and distinct conduct. Did inadequate jury instructions expose Appellant to multiple punishments for one criminal act, violating double jeopardy and necessitating vacation of one child molestation conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 2, 2016, the Pierce County Prosecutor charged appellant Nestor Ricardo Pozos-Rivera with two counts of first degree child molestation. CP 3-4. The prosecution alleged that between December 4, 2015 and December 7, 2015, Pozos-Rivera molested his step-daughter, SMM, twice in his bed, once in the middle of the night when he allegedly fondled her vagina under her clothes, and again the next morning when he allegedly bit and licked her nipples. CP 1-2. The

prosecution subsequently amended the charges, adding an allegation Pozos-Rivera used his position of trust to commit the offenses. CP 5-6.

A jury trial was held April 10, 2017, through June 1, 2017, before the Honorable Gretchen Leanderson. 1RP; 2RP.¹ Pozos-Rivera was convicted as charged. CP 38-41; 1RP 540-43. Pozos-Rivera was sentenced to concurrent sentences of 89-months to life, and now appeals. CP 73-89, 98-115; 1RP 554.

2. Substantive Facts

In 2011, Pozos-Rivera married Cassie Pozos-Rivera (“Cassie”²). 1RP 120. At the time, Cassie had a daughter, SMM (d.o.b. 10/4/2005), through another man who died when SMM was very young. 1RP 164-65. SMM entered puberty relatively early, and began wearing bras at the age of eight and was menstruating by age 10. 1RP 139, 246. SMM would frequently wet her bed in 2015, with her mother claiming it occurred on a “weekly basis,” and SMM claiming it occurred about three times a month. 1RP 222, 438. SMM agreed it happened at least once at Pozos-Rivera’s home. 1RP 440-41.

¹ There are five volumes of verbatim report of proceedings referenced herein as: 1RP –consecutively paginated four-volume set for the dates of April 10, May 1, 15, 16, 17, 22, 23, 30, 31, June 1 and July 28, 2017; and 2RP – April 17, 2017.

² For purposes of clarity, Cassie Pozos-Rivera will be referred to herein as “Cassie.” No disrespect is intended.

After they married, Pozos-Rivera and Cassie had a child together, JP-R (d.o.b. 1/17/2012). 1RP 119, 121, 164-65. In 2013, they moved into a mobile home in Sumner, Washington. 1RP 167-68. Sometime prior to February 2015, Pozos-Rivera's friend, "Juan," moved into an outbuilding associated with the mobile home. 1RP 169, 192, 393.

In February 2015, Cassie confronted Pozos-Rivera about the content on his phone. 1RP 170. This led to a physical confrontation, which SMM saw at least part of, that resulted in visible bruising to Cassie's face. 1RP 171-73. Two weeks later, Cassie, SMM and JP-R, moved out of the mobile home and eventually got an apartment in Tacoma. 1RP 185-87.

Beginning in about October 2015, Cassie started having the girls (SMM & JP-R) spend weekends (Friday through Sunday) with Pozos-Rivera at the mobile home in Sumner. 1RP 187. As part of this routine, Pozos-Rivera picked up the girls on Friday, December 4, 2015, and returned them to Cassie on Sunday, December 6, 2015. 1RP 191, 193.

Following dinner on Thursday, December 10, 2015, Cassie told the girls to pack their stuff for the weekend because Pozos-Rivera would be picking them up at daycare Friday afternoon. 1RP 196-97. According to Cassie, JP-R was excited to get ready, but SMM was not. 1RP 197. When SMM asked if she had to go, Cassie told her "yes." 1RP 198.

Later that evening SMM again asked her mother if she had to go to Pozos-Rivera's, and again Cassie told her, "yes," but then asked her why she did not want to go. 1RP 198-99. SMM started to cry. 1RP 199. When Cassie asked her why she was crying, SMM told her Pozos-Rivera "had touched [her] in a place that [she] didn't want him to." 1RP 199-200, 414-15. Cassie reacted with anger, hitting a wall, and according to SMM, throwing her phone and screaming at SMM. 1RP 201, 416. Cassie then called her sister, then her mother, and eventually the police, who launched an investigation. 1RP 111, 114, 201-02, 349, 416.

The investigation included both a forensic physical examination and a forensic interview of SMM, both conducted on December 21, 2015. 1RP 238, 310, 353. SMM said she was in no pain, and refused to allow examination of her "private area." 1RP 244. SMM was not particularly emotional during the forensic interview, although she did smile on occasion and act sullen at other times, but nothing extreme. 1RP 312-13.

A three-minute and 40-second portion of the recorded forensic interview was played for the jury. 1RP 339; Ex. 6A. It shows SMM alone in the interview room during a break taken just after she disclosed the alleged abuse to the interviewer. 1RP 339-40.

SMM testified at trial. 1RP 384-448. She admitted she never liked Pozos-Rivera. 1RP 422. She recalled having to spend weekends with him

after he and Cassie separated, and said it was “[b]ecause my mom didn’t want [JP-R] to forget about her dad.” 1RP 393.

According to SMM, Pozos-Rivera’s home was always messy, so messy in fact that the only bed to sleep on was Pozos-Rivera’s, as the others had too much stuff on them. 1RP 397, 426-27. She also claimed it was “always cold in the house,” and there was not “much good food in this house.” 1RP 400, 428. She said the home was infested with flies because of the food Pozos-Rivera would leave sitting out. 1RP 399. SMM said Pozos-Rivera would go to work early every weekend morning, leaving her to care for JP-R and clean his home and laundry. 1RP 398. SMM recalled the sleeping arrangements on the weekends was for Pozos-Rivera and SMM to sleep on either side of the bed with JP-R in between them. 1RP 398-99.

SMM recalled being dropped off at Pozos-Rivera’s mobile home on Friday, December 4, 2015. That night they slept in their usual positions and nothing of consequence occurred. 1RP 397-99. Pozos-Rivera went to work Saturday morning, leaving SMM to care for JP-R, who was tired, hungry and having tantrums. 1RP 399. When Pozos-Rivera returned that evening they went out for dinner and then returned to the mobile home and went to bed. 1RP 400.

SMM wore pajamas to bed. 1RP 401, 407. SMM claimed she woke up at some point during the night and felt Pozos-Rivera's hand underneath her clothing "messing around" with her "private."³ 1RP 401-02. She said it lasted about 30 seconds, then she got up and went into the bathroom. 1RP 402. SMM said Pozos-Rivera turning over and went back to sleep, as if nothing had happened. 1RP 403. SMM claimed she pretended to go to the bathroom by flushing the toilet so Pozos-Rivera would think she had not noticed what he had been doing, then got back in bed and slept until morning without further incident. 1RP 404.

SMM said that after waking up Sunday morning, she, her sister and Pozos-Rivera were "playing around" in bed, with Pozos-Rivera tickling them and SMM and JP-R telling jokes and laughing. 1RP 404-05. SMM agreed this was not the first time they had played the "tickling game." 1RP 414. She said when they stopped "playing around," Pozos-Rivera asked her if she wanted to "play a biting game." 1RP 404, 407. SMM told him "no." Id. SMM said Pozos-Rivera seemed "irritated" by her reply, and then he allegedly rolled on top of her pinning her to the bed, pulled up her shirt and bra exposing her breasts, and then started sucking,

³ SMM was asked by the prosecution to identify the "private part" Pozos-Rivera touched based on what its function was. SMM replied that it was for "[p]eeing." 1RP 402.

biting and licking her nipples. 1RP 407-08, 410. SMM claimed it stopped when they heard Juan come in the mobile home. 1RP 410-11.

Later that day Pozos-Rivera took SMM and JP-R to a swap meet before picking up take-out food and then taking them back to Cassie's. 1RP 412-13. SMM agreed she only reported Pozos-Rivera's alleged sexual misconduct to her mother several days later when she did not want to return Pozos-Rivera's the following weekend. 1RP 414. She denied making up the molestation claims so she would not have to spend weekends with Pozos-Rivera. 1RP 447.

C. ARGUMENT

THE JURY INSTRUCTIONS VIOLATED POZOS-RIVERA'S RIGHT AGAINST BEING PLACED IN DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME CRIMINAL ACT.

Freedom from double jeopardy under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Appellate courts review double jeopardy claims de novo and they may be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions ““must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.”” Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). On review, the court considers insufficient instructions “in light of the full record” to determine if they “actually effected a double jeopardy error.” Mutch, 171 Wn.2d at 664. A double jeopardy violation occurs if it is not “manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. The jury instructions in Pozos-Rivera’s case fail under this standard.

Pozos-Rivera was convicted of two counts of first degree child molestation, allegedly committed against SMM, both counts allegedly occurring between December 4, 2015 and December 7, 2015. CP 5-6, 38, 41. With respect to each count, the jury was instructed:

To convict the defendant of the crime of child molestation in the first degree as charged in Count [I or II], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the time period between December 4, 2015, and December 7, 2015, the defendant had sexual contact with S.M.M.;

(2) That S.M.M. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That S.M.M. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 21-22 (Instructions 4 & 5). While these instructions may correctly set forth the elements jurors had to consider, it did not ensure each conviction was based on separate and distinct conduct, nor does any other instruction provided by the court to jurors. See CP 15-36 (“Court’s Instructions to the Jury”).

The Borsheim court held that an instruction that the jury must find a “separate and distinct” act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. The court vacated three of Borsheim’s four child rape convictions for failing to instruct the jury using the separate and distinct language. Id. at 371. Reversal of one of the child molestation charges here is likewise required.

In response, the state may argue the prosecutor’s election in closing remedied Pozos-Rivera’s exposure to double jeopardy. See 1RP 491-92 (in closing arguments, prosecutor states “count one pertains to . . . when he fondled her vagina” and “count two pertains to . . . when he sucked on and bit her nipples.”). But counsel’s closing argument is just

that: argument. See CP 17 (Instruction 1 reminds jurors that “The lawyers’ remarks, statements, and argument are intended to help you understand the evidence and apply the law[,]” but that “The evidence is the testimony and the exhibits[,]” and “The law is contained in [the court’s] instruction to you.”)

In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the state argued Kier’s assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was somewhat analogous to a multiple acts case, the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant’s favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdicts were ambiguous and would violate double jeopardy to not merge the offenses. Id. at 814. The Supreme Court likewise intimated as much in Mutch, when it opined it will be a “rare circumstance” where jury instructions like those here – that do not make it manifestly apparent that each count must be based on a separate and distinct act – will not result in a double jeopardy violation. Mutch, 171 Wn.2d at 665. However, it was a “rare circumstance” in Mutch’s case because the five

charges lined up perfectly with five discrete acts described and the five to-convict instructions. Id.

The “rare circumstances” that existed in Mutch are absent here. Instead, the evidence presented at Pozos-Rivera’s trial consisted of multiple alleged acts of sexual contact against the same complaining witness over the same course of time, including allegedly touching the exterior of SMM’s vagina, massaging her vagina, tickling her, exposing her breasts by pulling up her bra, biting her nipples, licking her nipples and sucking her nipples. 1RP 402, 405, 407-08, 410, 446. Under Kier and Borsheim, one of Pozos-Rivera’s child molestation convictions violates double jeopardy and should be vacated.

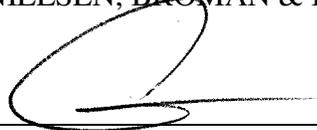
D. CONCLUSION

For the reasons stated, this Court should vacate one of Pozos-Rivera’s child molestation convictions and remand for resentencing.

DATED this 29th day of December 2017.

Respectfully submitted,

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December 29, 2017 - 2:11 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Nestor Pozos Rivera, Appellant
Superior Court Case Number: 16-1-03115-5

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