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NO. 51592-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DICKY SWING,
Appellant.

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

The Honorable Christine Schaller, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to prove Mr. Swing had “sexual contact” with L.L. when it failed to present evidence that the contact was for the purpose of sexual gratification, an essential element of Child Molestation in the First Degree.
2. The trial court abused its discretion when it included an unconstitutionally vague community custody condition in Mr. Swing’s sentence by ordering him not to “frequent or loiter in areas where children congregate.”

Issues Presented on Appeal

1. Did the state present sufficient evidence of “sexual contact” when it failed to present any evidence that Mr. Swing’s contact with L.L. was for the purpose of sexual gratification and that evidence is required to prove Child Molestation in the First Degree?
2. Did the trial court abuse its discretion by ordering Mr. Swing not to “frequent or loiter in areas where children congregate” as part of his sentence where that condition is unconstitutionally vague?

B. STATEMENT OF THE CASE

Substantive Facts

Dicky Swing is a family friend of Richard Lansford and his three children. RP 163-64. Mr. Lansford has two daughters, the youngest, L.L., was 9 years old in July 2017. RP 163. In the past, Mr. Swing lived with Mr. Lansford and his children and babysat the children. RP 167, 367. L.L. considered Mr. Swing to be her “best friend” and Mr. Lansford thought that Mr. Swing and L.L. had a good relationship. RP 167.

On July 23, 2017, Mr. Lansford was in the process of moving out of his townhouse in Lacey, Washington. RP 169-70. On that day, Mr. Lansford was packing up his belongings with the help of his brother and Mr. Swing. RP 173-74. L.L. was also present in the townhouse with her older sister, who is identified in the record as I.L. RP 170. Mr. Swing packed some boxes in the kitchen and then began to pack the entertainment center in the living room. RP 370.

Mr. Lansford and his brother and left to go to a storage unit down the street and L.L. came downstairs to play a video game on her tablet at the kitchen table. RP 371. Mr. Swing’s back began to hurt so he took a break from packing and went into the kitchen to

make some coffee. RP 371. As he was brewing the coffee, he heard Mr. Lansford pull up to the house after returning from the storage unit. RP 371-72. Before they came into the house, Mr. Swing noticed that L.L.'s bangs were hanging in front of her eyes and obstructing her view of the game. RP 372. He asked her how she could see the game and brushed her bangs away from her face to clear her view. RP 372.

Mr. Lansford and his brother entered the townhouse after returning from the storage unit and saw Mr. Swing standing behind L.L. RP 149, 181. Mr. Lansford's brother thought it was odd how close Mr. Swing was standing to L.L., but Mr. Lansford did not think it was anything unusual. RP 150, 181-82. Mr. Lansford's brother went outside to smoke a cigarette and Mr. Swing decided to join him. RP 374. L.L. approached Mr. Lansford and asked if she could tell him something. RP 188. She then told him that Mr. Swing had kissed her neck and touched her breasts and vaginal area while she was playing on her tablet at the kitchen table. RP 189, 282. She also told him that there was another incident where she had been sitting next to Mr. Swing on the couch and he had touched her vaginal area. RP 191.

Mr. Lansford called Mr. Swing into the house to discuss the allegations. RP 192, 375. He told Mr. Swing what L.L. said, and Mr. Swing was very surprised by the allegations and denied them. RP 192-93. Mr. Lansford spoke with L.L. again and she reiterated her allegations. RP 193. L.L. began to hyperventilate and cry. RP 378. Mr. Swing continued to deny the allegations after Mr. Lansford brought L.L. to Mr. Swing and had her repeat her allegations in front of him RP 198-99.

Mr. Swing went back outside where Mr. Lansford's brother was smoking. RP 151, 379. Mr. Swing was speaking to himself about being blamed for something and Mr. Lansford's brother asked what was happening. RP 152. Mr. Swing explained that he was being accused of touching L.L. inappropriately. RP 152. Mr. Lansford's brother did not react to the allegations and went back inside to speak with Mr. Lansford. RP 152. After a few minutes Mr. Lansford came outside and told Mr. Swing to leave the property. RP 380. Mr. Swing packed up his belongings and left the property. RP 381.

Mr. Lansford called the police and they arrived a few minutes after Mr. Swing had left. RP 207. L.L. repeated her allegations to

officers, and they took statements from Mr. Lansford and his brother. RP 245.

Procedural Facts

The state charged Mr. Swing with two counts of Child Molestation in the First Degree. CP 27. Count one related to the alleged molestation at the kitchen table while count two referred to the alleged molestation on the couch that L.L. disclosed after her initial disclosure. CP 27. Mr. Swing elected to proceed to a jury trial. CP 24.

Before trial, the trial court held a child hearsay hearing to determine the admissibility of L.L.'s disclosures to her father and Officer Lever of the Lacey Police Department. RP 29. After hearing testimony and argument, the trial court found that L.L.'s statements to her father and Officer Lever were admissible under RCW 9A.44.120 as child hearsay. CP 111.

Mr. Swing unsuccessfully moved to dismiss both counts at the conclusion of the state's case-in-chief on the basis that the State presented insufficient evidence to prove beyond a reasonable doubt the elements of child molestation in the first degree. RP 325, 347. The trial court instructed the jury on the lesser included

offense of assault in the fourth degree. CP 122-25. The jury found Mr. Swing guilty of Child Molestation in the First Degree as charged in count one but acquitted him of Child Molestation in the First Degree in count two. CP 127-30.

The trial court imposed a standard range sentence with a condition prohibiting him from frequenting or loitering “where children congregate”. RP 484-86. Mr. Swing filed a timely notice of appeal. CP 148-62.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT MR. SWING HAD SEXUAL CONTACT WITH L.L.

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v.*

Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of Child Molestation in the First Degree, the state must prove beyond a reasonable doubt that the defendant (1) had sexual contact with a child, (2) the child was less than twelve years old and not married to the defendant, (3) the child was at least 36 months younger than the defendant, and (4) that the act occurred in Washington. RCW 9A.44.083; WPIC 44.21.

“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). To prove Child Molestation in the First Degree, the state must prove that the defendant acted with the purpose of sexual gratification. *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Courts require additional proof of a sexual purpose when the touching is over clothing covering the intimate part. *Harstad*, 153 Wn. App. at 21.

The record in this case contains evidence that Mr. Swing had a caretaking function in the Lansford household. Mr. Swing testified that he would occasionally babysit Mr. Lansford's children. RP 367. L.L. corroborated this testimony when she testified that Mr. Swing was her "best friend" and that he would come over and babysit her and her siblings at Mr. Lansford's apartment. RP 298-99. Although Mr. Swing is not related to L.L., the evidence shows he had a caretaking function in L.L.'s life, thus evidence of touching alone is insufficient to support an inference of sexual motivation. *Harstad*, 153 Wn. App. at 21.

The record in this case establishes that L.L. was fully clothed at the time of the alleged "sexual contact" and any contact with her chest, abdomen, or legs was over her clothing. RP 248. L.L. testified that Mr. Swing first kissed her on the cheek and then her neck. RP 272. On direct examination, she testified that he began to touch her "stomach, leg, and boobs" after kissing her. RP 274. However, on cross-examination, L.L. admitted that Mr. Swing only touched her leg and that he "didn't touch [her] privates or anything." RP 316-17. Mr. Swing did not say anything while he was with L.L. in the kitchen except to make a comment about the video game she

was playing. RP 271-73.

Even taking this evidence in a light most favorable to the state, it is insufficient to prove the contact was sexual in nature. Mr. Swing never touched L.L.'s "privates" according to her own testimony. She also "didn't really care" when Mr. Swing kissed her on the cheek. RP 272. Her father noticed how close Mr. Swing was standing to L.L. when he and his brother returned from the storage unit, but he did not think it was anything unusual because of the relationship Mr. Swing had with L.L. and the other Lansford children. RP 181-82. The record shows that both L.L. and her father were comfortable with Mr. Swing having at least some physical contact with her. This fact is consistent with Mr. Swing's testimony, where he confirmed he was in the kitchen with L.L. watching her play her video game and even brushed her hair out of her face so she could see the screen. RP 371-73.

Although the record shows that Mr. Swing had contact with L.L. on July 23, 2017, the state failed to present sufficient evidence to prove that contact was "sexual contact" made for sexual gratification, an element of first degree child molestation required under RCW 9A.44.010(2). *Harstad*, 153 Wn. App. at 21. The state

failed to present evidence that Mr. Swing touched L.L. under her clothing; he never said anything to indicate he received any sexual gratification from the contact; and the record shows L.L. was comfortable enough with Mr. Swing to allow him to kiss her on the cheek. RP 272. The state presented insufficient evidence to prove the elements of Child Molestation in the First Degree. The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Swing's conviction for Child Molestation in the First degree and order dismissal of the charge with prejudice.

2. THE TRIAL COURT ABUSED
ITS DISCRETION WHEN IT
ORDERED MR. SWING TO
NOT "FREQUENT OR LOITER
IN AREAS WHERE CHILDREN
CONGREGATE" BECAUSE
THAT COMMUNITY CUSTODY
CONDITION IS
UNCONSTITUTIONALLY
VAGUE

"Vague community custody conditions violate due process under the Fourteenth Amendment to the United States Constitution

and article I, section 3 of the Washington State Constitution.” *State v. Wallmuller*, 4 Wn. App. 698, 701, 423 P.3d 282 (2018), *review granted*, 192 Wn.2d 1009, 432 P.3d 794 (2019) (citing *State v. Irwin*, 191 Wn. App. 644, 652, 364 P.3d 830 (2015)). “A community custody condition is unconstitutionally vague if either (1) it does not sufficiently define the proscribed conduct so as an ordinary person can understand the prohibition, or (2) it does not provide sufficiently ascertainable standards to protect against arbitrary enforcement.” *State v. Padilla*, 190 Wn.2d 672, 677, 416 P.3d 712 (2018). Community custody conditions are reviewed for an abuse of discretion, but a trial court abuses its discretion by imposing an unconstitutional condition. *Wallmuller*, 4 Wn. App. at 701 (citing *Padilla*, 190 Wn.2d at 677).

In *Wallmuller*, this court analyzed the constitutionality of a community custody condition that prohibited the defendant from frequenting “places where children congregate such as parks, video arcades, campgrounds, and shopping malls.” *Wallmuller*, 4 Wn. App. at 699-700. The court performed a vagueness analysis and held that the condition was unconstitutionally vague because it “invites a completely subjective standard for interpreting ‘places

where children congregate.” *Wallmuller*, 4 Wn. App. at 703. The court remanded the case for resentencing with instructions to vacate or modify that condition of the sentence. *Wallmuller*, 4 Wn. App. at 704.

The condition imposed on Mr. Swing as part of his sentence in this case is even more vague than the condition held to be unconstitutional in *Wallmuller*. In this case, the trial court’s sentence includes the condition that Mr. Swing “not frequent or loiter in areas where children congregate.” CP 161. The community custody condition at issue in *Wallmuller* contained identical language, but the trial court in that case also went on to provide examples of the types of areas the defendant may not visit by including the language “such as parks, video arcades, campgrounds, and shopping malls” in the judgment and sentence. *Wallmuller*, 4 Wn. App. at 700. Even with this clarifying language, the court still found the condition to be unconstitutionally vague. *Wallmuller*, 4 Wn. App. at 703.

In this case, the trial court abused its discretion when it included an unconstitutional community custody condition as part of Mr. Swing’s sentence. The condition that Mr. Swing “not frequent or

loiter in areas where children congregate” is unconstitutionally vague under this court’s holding in *Wallmuller*. This court should remand Mr. Swing’s case for resentencing with instructions to the trial court to vacate that condition of his sentence. *Wallmuller*, 4 Wn. App. at 704. In the alternative, this court should stay its decision on this issue pending the Supreme Court decision in *Wallmuller*, 192 Wn.2d 1009, 432 P.3d 794 (2019).

D. CONCLUSION

The state failed to present sufficient evidence to prove beyond a reasonable doubt that Mr. Swing touched L.L. for the purpose of sexual gratification. Thus, the state failed to prove that Mr. Swing has “sexual contact” with L.L., which is an essential element of Child Molestation in the First Degree. This court should reverse his conviction and order dismissal of the charge with prejudice. Furthermore, the trial court abused its discretion at sentencing when it ordered Mr. Swing not to “frequent or loiter in areas in areas where children congregate” because that community custody condition is unconstitutionally vague. This court should vacate that condition and remand for resentencing. In the alternative, this court should stay its decision on Mr. Swing’s

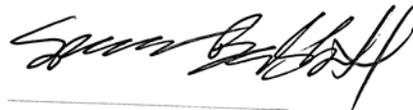
sentence until the Supreme Court issues its decision on this issue.

DATED this 9th day of April 2019.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Thurston County Prosecutor's Office paoappeals@co.thurson.wa.us and Dicky Swing/DOC#406244, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on April 9, 2019. Service was made by electronically to the prosecutor and Dicky Swing by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

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