

FILED
Court of Appeals
Division II
State of Washington
2/22/2019 12:02 PM
NO. 52239-0-II

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

STATE OF WASHINGTON, Respondent

v.

ZACHARY RYAN PARKER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00042-6

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (564) 397-2261

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

 I. The trial court has now entered findings of fact and conclusions of law regarding the CrR 3.5 hearing and therefore Parker’s assignment of error to the failure to enter findings is moot. 1

 II. The error in admitting Parker’s statements to police was harmless..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT..... 5

CONCLUSION..... 8

TABLE OF AUTHORITIES

Cases

In re Personal Restraint of Cross, 180 Wn.2d 664, 327 P.3d 660 (2014). 6,
7
In re Personal Restraint of Woods, 154 Wn.2d 400, 114 P.3d 607 (2005) 5
Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1966)
..... 6
State v. Mayer, 184 Wn.2d 548, 362 P.3d 745 (2015)..... 6, 7

Rules

CrR 3.5..... 5

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court has now entered findings of fact and conclusions of law regarding the CrR 3.5 hearing and therefore Parker's assignment of error to the failure to enter findings is moot.**
- II. The error in admitting Parker's statements to police was harmless.**

STATEMENT OF THE CASE

J.Z. testified that at the time of trial he was thirteen years old, born on April 14, 2004. RP 74. Parker was a family friend that J.Z. had known for years. RP 76. J.Z. would spend time with Parker sometimes at his house, playing video games. RP 77. J.Z. spent the night with Parker three or four times. RP 77. About a year and a half prior to trial, J.Z. was at a family birthday party and asked his parents if he could go home with Parker; they agreed. RP 79. At around 9pm, Parker and J.Z. went to Parker's house and played video games. RP 79. The only other person at Parker's house was his sister, Jessica Parker, and she was already in bed. RP 79-80.

At about 1a.m., Parker started showing J.Z. inappropriate photographs including some of his old boyfriend's penis. RP 79-82. Parker also showed J.Z. a photograph depicting a woman's vagina. RP 82. J.Z. and Parker stayed up most of the night on this night; the conversation

progressed to oral sex. RP 82-83. They then go to Parker's bedroom, which had a bunkbed in it. RP 83-84. Parker directed J.Z. to get on the bottom bunk. RP 84. Parker put pornography on the television and on his laptop computer (two different sites with different pornography showing). RP 84-86. The pornography that Parker played involved two people having sexual intercourse. RP 85. Both Parker and J.Z. start masturbating while under the blanket. RP 88. Parker then offered J.Z. \$25 and an old Xbox to perform oral sex on Parker. RP 86-87. Parker then put his penis inside J.Z.'s mouth for a few seconds; J.Z. moved away because he felt uncomfortable after a few seconds. RP 90. J.Z. resumed masturbating. RP 90. Then, Parker moved J.Z.'s hand and put J.Z.'s penis in his (Parker's) mouth. RP 89. J.Z. moved soon because he was uncomfortable and left the room. RP 90-92.

J.Z. went to sleep in the living room soon after the incident, and the next day Parker gave J.Z. \$25. RP 92.

J.Z.'s mother, Yesica Gutierrez testified that she had known Parker for about five years. RP 112. Parker was a close family friend whom they routinely socialized with, and whom they trusted around their children. RP 113. J.Z. told his mother about what happened with Parker and Ms. Gutierrez and her husband went over to Parker's house to confront him. RP 116. Parker did not answer the door so they eventually left. RP 116-18.

Ms. Gutierrez recalled an evening a few weeks prior to J.Z.'s disclosure when Parker had picked J.Z. up to spend the night and the next day J.Z. came home with \$25. RP 119. J.Z.'s step-father, Raymond Gutierrez testified to much the same information as Mrs. Gutierrez. RP 160-67.

Deputy Andrew Kennison of the Clark County Sheriff's Office made contact with Parker regarding J.Z.'s allegation. RP 144. He went to Parker's house and knocked on the door repeatedly and rang the doorbell. RP 144. The light was on inside the house, but nobody came to the door. RP 144-45. Soon after, a man, later identified as Parker, exited the rear door of the residence; Deputy Kennison approached the man and identified him as Parker. RP 145. Parker told Deputy Kennison that J.Z. was a close family friend and that he had spent the night a week or two prior after J.Z. had gotten into an altercation or argument with his family and needed a place to cool down for the night. RP 147. Parker told Deputy Kennison that J.Z. had been over to his residence a number of times and that it was a normal thing. RP 147. Parker indicated that his boyfriend, Landon, had been over that evening and in his bedroom, but that J.Z. had not been in his bedroom that night. RP 147. Parker also told Deputy Kennison that he did have a play station and that he had recently obtained possession of another play station that he was planning to "flip" to make a profit. RP 148.

Parker's sister, Jessica Parker, testified at trial. RP 173-86. She indicated that Mr. and Mrs. Gutierrez were her best friends and that she had lived with them for a solid seven years. RP 173. She was at the party on December 9 when her brother, Parker, left the party with J.Z. RP 179. Ms. Parker testified that Parker's boyfriend, Landon, was with them when they left the party. RP 179-80. Ms. Parker testified that she came home a little bit after her brother left the party and found only J.Z. at her house; J.Z. told her that her brother, Parker, and his boyfriend, Landon, had gone to the store. RP 180-81. Ms. Parker was unsure when or if Landon left the house that evening. RP 182.

Parker testified in his defense. He indicated that J.Z. had last been at his house on the night of December 9th, the night of a birthday party when J.Z.'s mom asked if J.Z. could go home with Parker. RP 192. Parker testified that he brought J.Z. home, dropped him off while he went to a store briefly, then he and his boyfriend, Landon, spent the rest of the evening with J.Z., playing video games, before he and Landon retired to his bedroom where they watched a movie and then went to Landon's house until Parker returned at 6a.m. RP 193-94. When Parker got home at 6a.m., J.Z. was asleep on the couch and Parker went to his bedroom and went to sleep. RP 194.

The jury convicted Parker of two counts of Rape of a Child in the Second Degree. CP 135-36. Parker was sentenced to a standard range sentence. CP 215. This appeal timely follows.

After the appeal was filed, the State asked the trial court to enter findings of fact and conclusions of law from the CrR 3.5 hearing, which were entered in January 2019. Those documents have been designated as supplemental clerk's papers.

ARGUMENT

Parker argues the trial court improperly admitted statements Parker made to police because the *Miranda* warnings given to him were insufficient. The admission of the statements Parker made to police was harmless as his statements were not inculpatory, were consistent with his testimony at trial, and the untainted evidence shows the outcome would have been the same.

In *In re Personal Restraint Petition of Woods*, our Supreme Court found that *Miranda* warnings require four main components: 1) right to remain silent; 2) anything said can be used in court; 3) right to counsel present before and during questioning; 4) right to counsel even if the suspect cannot afford one. *Woods*, 154 Wn.2d 400, 434, 114 P.3d 607 (2005). In Parker's case, the State proved only that Parker was informed of

his right to remain silent, right to counsel, that anything he said would be used in court, and that he would be provided counsel even if he could not afford one. RP 13, 22-23. The State's witnesses did not testify that Parker was informed that he had the right to counsel to be present before and during questioning, which is a main requirement of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, (1966). Therefore, the State agrees with Parker in the conclusion, but not his analysis, that the State did not prove that the *Miranda* warnings given to Parker were sufficient. However, the error in admitting the statements Parker made to the police was harmless. None of the statements were inculpatory and the overwhelming evidence supports that any reasonable juror would have convicted him had the statements not been admitted.

Constitutional error is harmless if the untainted evidence of the defendant's guilt is so overwhelming that it necessarily leads to the same outcome. *State v. Mayer*, 184 Wn.2d 548, 566, 362 P.3d 745 (2015) (citing *In re Personal Restraint of Cross*, 180 Wn.2d 664, 688, 327 P.3d 660 (2014)). The key issue in Parker's case was whether Parker engaged in the sexual conduct that the victim said he did. The statements that Parker made to police were not a confession and only slightly corroborated the victim's version of events. Additionally, the defendant testified at trial wholly consistently with the statements he made to police,

and his statements were consistent with the victim's version of events except for the exclusion of the sexual contact that occurred. The statements the defendant made to the police were not the linchpin of the State's case, they were not overwhelming evidence, and offered only slight corroboration of things like the abuse of trust aggravator, and that the defendant admitted he was with the victim during the time period, which defense witnesses agreed to as well. There was no prejudice to the defendant by the admission of these statements.

When an error is constitutional in magnitude, the error is harmless if the untainted evidence is so overwhelming that it necessarily leads to the same outcome. *Mayer*, 184 Wn.2d at 548 (citing *Cross*, 180 Wn.2d at 688). The key issue at trial was whether the defendant engaged in sexual intercourse with the victim. There was no dispute from all the witnesses – the victim, his parents, the defendant's sister – that the defendant and the victim were together during the time period charged and potentially alone, or at least in a situation during which there was sufficient opportunity for the allegations to have occurred. Thus, the matter came down to a credibility determination between the victim and the defendant. As Parker indicated in his brief – this was essentially a he said-he said case, with the jury deciding whether they believed the defendant or the victim. If we remove the tainted evidence, as we must in doing the proper constitutional

harmless error test, the same exact issue is still the only thing to be determined by the jury – do they believe the victim or the defendant? The defendant’s statements to police did nothing to lessen his credibility with the jury and therefore their admission had no impact on the actual issue decided by the jury. Accordingly, the error was harmless.

CONCLUSION

The State did not present evidence of what actual warnings were given to Parker and therefore did not show that he was fully and appropriately advised of the warnings as required by *Miranda*. However, this error was harmless as the overwhelming, untainted evidence still shows the jury would have convicted Parker of Rape of a Child in the Second Degree. This Court should affirm his convictions, finding any error was harmless.

DATED this 22nd day of February, 2019.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:



RACHAEL A. ROGERS, WSBA #37878
Senior Deputy Prosecuting Attorney
OID# 91127

CLARK COUNTY PROSECUTING ATTORNEY

February 22, 2019 - 12:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52239-0
Appellate Court Case Title: State of Washington, Respondent v Zachary Ryan Parker, Appellant
Superior Court Case Number: 17-1-00042-6

The following documents have been uploaded:

- 522390_Briefs_20190222120136D2859932_0112.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief - Respondent.pdf

A copy of the uploaded files will be sent to:

- tweaver@tomweaverlaw.com

Comments:

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

Filing on Behalf of: Rachael Rogers - Email: rachael.rogers@clark.wa.gov (Alternate Email: CntyPA.GeneralDelivery@clark.wa.gov)

Address:

PO Box 5000

Vancouver, WA, 98666-5000

Phone: (360) 397-2261 EXT 5686

Note: The Filing Id is 20190222120136D2859932