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No. 53132-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

HOWARD E. SANFORD,

Appellant.

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

The Honorable Erik D. Price, Judge
Cause No. 18-1-01060-34

BRIEF OF RESPONDENT

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether rape of a child and child molestation convictions charged during the same time period violate double jeopardy when the jury instructions indicated that a separate crime was charged in each count and included an unanimity instruction for each count, the victim testified as to multiple acts of oral sexual abuse, and the defense attacked only the credibility of the victim's testimony.

2. If the Court finds that a double jeopardy violation occurred, the correct remedy is to remand to vacate the child molestation convictions and resentence on the remaining counts.

3. Whether this Court's decision in State v. Wilkins was correctly decided consistent with the law as set forth by the State Supreme Court.

B. STATEMENT OF THE CASE.

The appellant, Howard E. Sanford, was charged with rape of a child in the first degree/domestic violence, child molestation in the first degree/domestic violence, rape of a child in the second degree/domestic violence, child molestation in the second degree/domestic violence, incest in the first degree/domestic violence, and assault in the fourth degree/domestic violence, after

his daughter O.S. disclosed that he had placed his penis in her mouth on more than one occasion both before and after she turned 12 years old. CP 1-2, 19-20, RP 62-63, 65-67.¹ She testified that when she was 12, he would place her on top of him and perform oral sex on her as she was “sucking on his penis.” RP 65-67, 68. She indicated that the last time Sanford put his penis in her mouth was a few days after she turned 14 and the last time he licked her vagina she was “probably 13.”

O.S. described an occasion where Sanford had ejaculated into her mouth. RP 65. O.S. said that after she turned 12 almost daily she would be “sucking his penis” or he would be “licking [her] vagina while [she] was sucking his penis.” RP 69. She testified that there were a few times where Sanford licked her vagina and she did not perform oral sex on him, but those times were “few and far between.” RP 73. When O.S.’s mother confronted Sanford regarding the incidents he stated, “she came out of the shower and climbed on his lap and stuck her pee pee in his face, and he licked it.” RP 219-220.

¹ The trial proceedings January 15, 16, 17, and 22, 2019, are collectively referenced as RP in this brief. The sentencing hearing, March 12, 2019, is referred to as 2 RP.

O.S. told her friends about the abuse after she became depressed and had an altercation with Sanford which resulted in him grabbing her and shoving her on to the ground, her biting his hand and him grabbing her by the scalp and slamming her head into the floor. RP 75, 77-78, 82. One of her friends reported the information to her father, who was a mandated reporter. RP 109-110, 116. During the investigation, O.S. was interviewed and made disclosures to child forensic interviewer Sue Villa and ARNP Lisa Wahl. RP 141, 151; 242, 251. During her medical evaluation with Wahl, O.S. described "penile oral penetration" and "oral vaginal activity." RP 251, 252. When Wahl asked O.S. if anything had gone into or on her vagina, O.S. stated that his penis "was on her vagina and around her vagina lips," but did not penetrate her vaginal vault. RP 252.

The trial court instructed the jury that

Sexual intercourse means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 47, RP 297. The trial court also instructed the jury that

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 40, RP 294. Additionally, the trial court gave unanimity instructions for counts one, two, three, and four, commonly referred to as *Petrich* instructions. CP 50, 54, 57, 60. RP 297, 299, 300, 301-302.

During her closing argument, the prosecutor described the sexual intercourse related to the rape of a child counts, stating “You heard testimony that on an almost daily basis, the defendant, Mr. Sanford, was having [O.S] perform oral sex on him putting his penis in her mouth.” RP 319. The prosecutor later continued, “he began having her climb on top of him when he was in his chair in the living room, so he could put his mouth on her vagina whilst she put her mouth on his penis.” RP 319.

The prosecutor then discussed that O.S. had described “when she was ten years old where the defendant actually ejaculated into her mouth.” RP 320. The prosecutor then explained that the testimony indicated that the events occurred both before and after O.S. turned 12 years old before discussing that the jury needed to be “unanimous as to one particular act.” RP 320-321.

The prosecutor later described the child molestation events stating

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desires of either party. Ladies and gentlemen, I submit to you that you heard a lot about sexual gratification, okay? The reason the defendant put his penis in her mouth was for sexual gratification.

RP 322. She later continued,

You also heard from Nurse Wahl this morning about an incident where the defendant's penis touched [O.S.], right, touched her on the outside of her vagina. That fits the definition of child molestation, of sexual contact. Sexual contact is used in Counts 2 and 4.

RP 322-323.

During her rebuttal closing argument, the prosecutor pointed out that the abuse had occurred over years, stating, "Remember the testimony. Remember what [O.S.] told you about the abuse that she suffered over years at the hands of this man, and find the defendant guilty." RP 341. The jury found Sanford guilty of all charges and affirmatively found that [O.S.] and Sanford were family or household members for each count. CP 71-82, RP 352-355.

At sentencing, Sanford did not raise any double jeopardy or same criminal conduct arguments. 2 RP 8-12. The trial court sentenced Sanford to the high end of the standard range with a

calculated offender score of 12, stating, "I can't think of a case that is more deserving of a high-end sentence than this one. And that is what I'm going to do. Count 1, 318 to life. The rest high ends." 2 RP 14, CP 94-108. This appeal follows.

C. ARGUMENT.

1. The charges of rape of a child and child molestation did not violate double jeopardy because the instructions and record as a whole demonstrated that the State was not seeking to convict for two offenses based on a single act.

Double jeopardy issues are questions of law that are reviewed de novo. State v. Hughes, 166 Wn.2d 675, 681, 212 P.3d 558 (2009). The double jeopardy clauses of the Washington State and United States Federal constitutions protect a defendant from multiple prosecutions and multiple punishments for the same offense. Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980); State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

Federal double jeopardy utilizes the test set forth in Blockberger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed 306 (1932), which states:

The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. The test under the Washington State Constitution, known as the same evidence test, is similar, stating,

where the same act ... constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.

State v. Muhammad, ___ Wn.2d ___, ___ P.3d ___; Slip Op. No. 96090-9, (November 7, 2019) at 29-30; *citing*, State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

In the absence of clear legislative intent, the same evidence test is applied. Calle, 125 Wn.2d at 777-78; Blockberger, 284 U.S. at 304. Under that test, a defendant's double jeopardy rights are violated if he is convicted of offenses that are identical in both fact and law. Calle, 125 Wn.2d at 777. Neither the rape of a child statute nor the child molestation statute expressly authorizes

multiple convictions arising out of a single act, thus Washington Courts have applied the same evidence test when reviewing double jeopardy claims involving counts of rape of a child and child molestation. State v. Wilkins, 200 Wn. App. 794, 807, 403 P.3d 890 (2017).

In State v. Mutch, 171 Wn.2d 646, 661-662, 254 P.3d 803 (2011), our State Supreme Court considered whether five identical counts of rape, all within the same charging period, violated double jeopardy. The Court held because the jury was not instructed that each count had to arise from a separate and distinct act in order to convict, the possibility that the jury convicted the defendant on all five counts based on a single criminal act created a potential double jeopardy problem. Id. at 662.

The problem in Mutch is normally avoided when the State charges both rape of a child and child molestation. Several Washington courts have held that a single incident may support rape and molestation convictions. In State v. French, 157 Wn.2d 593, 610-611, 141 P.3d 54 (2006), the Court found that child molestation is not a lesser-included offense of child rape and concluded that convictions for both child molestation and child rape

do not violate double jeopardy even if they occur during a single incident. The Court stated,

Sexual contact, an element of child molestation, therefore continues to require a showing of purpose or intent; rape of a child does not. Rape of a child also requires a finding of penetration whereas child molestation does not. The two crimes are separate and can be charged and punished separately.

Id. at 611.

In State v. Jones, 71 Wn. App. 798, 806, 863 P.2d 85 (1993), the defendant was convicted, based on a single incident, of both child rape and molestation. Division I of this Court stated, "Child molestation requires that the offender act for the purpose of sexual gratification, an element not included in first degree rape of a child, and first degree rape of a child requires that penetration or oral/genital contact occur, an element not required in child molestation," and rejected the defendant's double jeopardy argument. Id. at 825.

In State v. Land, 172 Wn. App. 593, 600, 295 P.3d 782 (2013), Division I of this Court stated, "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," even if the charges arose out of the same incident. Despite the

statement in Jones that child molestation does not require oral/genital contact, the Land Court stated,

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.

Id. at 600. Because the case involved oral sexual intercourse, the Land Court found that there was a potential for a double jeopardy violation and conducted an analysis based on that in Mutch. Land, 172 Wn. App. at 600-601. Ultimately, the Court found that based on the victim's testimony, prosecutor's arguments, jury instructions, and the information, it was "manifestly apparent" the State was not seeking to impose multiple punishments from the same offense. Id. at 603. The Court stated, "As in Mutch, there should have been an instruction informing the jury that each count had to be based on a separate and distinct act, but the absence of such an instruction did not violate Land's right to be free of double jeopardy." Id.

In State v. Wilkins, this Court came to a similar conclusion finding that the facts in that case supported "the elements of both molestation and rape" because penetration occurred, therefore, the

“jury’s finding that Wilkins was guilty of both molestation and rape does not violated double jeopardy even though offenses stem from a single incident.” 200 Wn. App. at 808. The Court concluded, “because first degree child rape requires proof of sexual intercourse and the first degree molestation requires proof of contact, the two offenses require proof of a fact that the other does not.” Id.

This Court distinguished a fact pattern with charges of child molestation and attempted rape of a child from the facts in Wilkins in the unpublished opinion of State v. Teters, 2019 Wn. App. Lexis 379, No. 49357-8-II, at 15-16.² The Court concluded, “the evidence required to support a conviction of attempted second degree child rape was sufficient to support a conviction of second degree child molestation, so the two crimes are the same in law and fact.” Id. at 16, citing, Orange, 152 Wn.2d at 816, 820.

Utilizing the test for determining whether or not two crimes are the same in law and fact, if “the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other,” the State does not contest that, as charged in this case, the charges of rape of a child and child molestation could be based on in the same law and fact.

² This case is unpublished and is nonbinding and may be afforded whatever persuasive value as the court deems appropriate. GR 14.1.

Orange, 152 Wn.2d at 820. As instructed in this case, the definition of sexual intercourse required proof of sexual contact between the mouth and genitals. CP 47, RP 297, RCW 9A.44.010(1)(c). The crimes of child molestation likewise required proof of sexual contact. RCW 9A.44.083, RCW 9A.44.086. As in Land, under the facts of this case, there is a potential for a double jeopardy violation and which requires further analysis pursuant to Mutch. Land, 172 Wn. App. at 600-601.

At the outset, the State concedes that the trial court did not give an instruction that each count had to arise from a separate and distinct act. The question thus becomes whether the record made it “manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense.” Mutch, 171 Wn.2d at 664. Starting with the jury instructions, the trial court did include a separate crime instruction and four separate unanimity instructions. CP 40, 50, 54, 57, 60. RP 294, 297, 299, 300, 301-302.

In Mutch our State Supreme Court stated, “The Court of Appeals has specifically held that this separate crime instruction is not saving, noting that it still fails to inform the jury that each crime required proof of a different act. We agree.” 171 Wn.2d at 663

(internal quotations omitted), *citing*, State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007). The Court further indicated that an unanimity instruction does not protect against a double jeopardy violation, absent language that the jury must “unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.” Mutch, 171 Wn.2d at 663, *citing* Borsheim, 140 Wn. App. at 369; State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993). In Ellis, this Court ultimately found that the combination of an instruction that a separate crime was charged in each count and an unanimity instruction that required the jury to unanimously agree that a least one particular act had been proved for each count, sufficiently avoided a double jeopardy violation. 71 Wn. App. at 406-407.

In State v. Berg, 147 Wn. App. 923, 934-935, 198 P.3d 529 (2008), *overruled in part by* Mutch, 171 Wn.2d 646, Division I of this Court held that separate “to convict” instructions, a separate crime instruction, and an unanimity instruction that did not include “for each count” were insufficient to avoid a double jeopardy violation. In Borsheim, the Court vacated counts 2, 3, and 4 because the unanimity instruction did not include “for each count” despite the victim’s testimony that the sexual abuse occurred on a “daily basis.”

140 Wn. App. at 363, 369-371. The problem in that case was compounded by the fact that all of the counts of rape of a child were included in a single "to convict" instruction. *Id.* at 364-365.

In this case, the trial court utilized a separate unanimity instruction for each count. When combined with the separate crime instruction and the testimony of O.S. that multiple incidents occurred both before and after her 12th birthday, the instructions made it clear that the State was not seeking to convict for both rape of a child and child molestation based on a single act. While none of the unanimity instructions in this case included the phrase, "for each count," the instructions specified that the jury must be unanimous as to a particular act of each specified crime. Thus, the jury was instructed that it must be unanimous as to a specific act of rape of a child in the first degree and unanimous as to a specific act of child molestation in the first degree. After O.S. turned 12 years old, the instructions informed the jury that they must be unanimous as to a specific act of rape of a child in the second degree and unanimous as to a specific act of child molestation in the second degree.

It is also significant that Sanford did not challenge the number of incidents or whether they overlapped, but rather he

chose to attack the credibility of O.S. RP 324-337. This was one of the factors considered by the State Supreme Court in its decision that the record was manifestly clear that the State was not seeking proof of multiple crimes for a single act in State v. Pena-Fuentes, 179 Wn.2d 808, 825, 318 P.3d 257 (2014). When the defense offers only a general denial, if the jury can believe that one incident happened, it must have believed that each of the incidents happened. State v. Bobenhouse, 166 Wn.2d 881, 895, 214 P.3d 907 (2009) (finding a lack of an unanimity instruction harmless). In this case, O.S. described multiple incidents and the defense argued that all of the allegations lacked credibility. There was no reason for the jury to believe that the offenses were not based on separate events.

Because each charged offense was given its own instruction on unanimity and its own "to convict" instruction, the instructions informed the jury that they must be unanimous for each count. The State respectfully requests that this Court find that the record made it clear that the State was not seeking to convict based on a single act for the rape and child molestation charges.

2. If this Court finds that a Double Jeopardy violation occurred, the correct remedy is to remand to vacate counts two and four and resentencing on the remaining counts.

When a double jeopardy violation occurs regarding two charged crimes, the correct remedy is to vacate the lesser offense. State v. Womac, 160 Wn.2d 643, 656, 160 P.3d 40 (2007). In the event that this Court finds that the instructions in this case were inadequate to prevent a double jeopardy violation, the charge of child molestation in the first degree in count 2 would be the same as the rape of a child in count 1, and the crime of child molestation in count 4 would be the same as the rape of a child in count 3. The remedy would be to vacate the two child molestation offenses and resentencing on the remaining charges of rape of a child in the first degree, child molestation in the first degree, incest in the first degree, and assault in the fourth degree.

3. State v. Wilkins is consistent with other case law proffered by this Court and the Supreme Court. It is neither wrongly decided, nor harmful.

Sanford dedicates a significant portion of his brief to argue that this Court's decision in State v. Wilkins was wrongly decided and harmful. Brief of Appellant at 12-15. Contrary to Sanford's argument, this Court properly applied the "same evidence" test

during its consideration of Wilkins. 200 Wn. App. at 808. As the Court decided, “because first degree child rape requires proof of sexual intercourse and first degree molestation requires proof of sexual contact, the two offenses require proof of a fact that the other does not.” Id.

This Court was utilizing the correct test as set forth in Orange and Womac. Orange, 152 Wn.2d at 818; Womac, 160 Wn.2d at 652. This Court was necessarily looking at more than simply the elements of the offense when it found that the act of penetration was different than the act of sexual contact. Wilkins, 200 Wn. App. at 818. The same test continues to be utilized by our State Supreme Court. State v. Muhammad, ___ Wn.2d ___, ___ P.3d ___; Slip Op. No. 96090-9, (November 7, 2019) at 29-30. In fact, the State Supreme Court discussed the same presumption as Wilkins, in its decision of Muhammad. Id. at 30 (if one of two charged crimes requires proof of a fact not required by the other, the crimes will not constitute the same offense and cumulative punishment is presumptively allowed); Wilkins, 200 Wn. App. at 818.

The State Supreme Court adopted similar reasoning in State v. Pena-Fuentes, 179 Wn.2d 808, 824-825, 318 P.3d 257 (2014). In Pena-Fuentes, the Court focused on the fact that the prosecutor

distinguished the acts of penetration in which the rape charges were based from other acts of “inappropriate behavior” which formed the basis for the molestation charges. Id. at 825-826.

This Court’s decision in Wilkins was correct. As charged in that case, the act of penetration necessary for rape of a child was not the same as acts of sexual contact necessary for child molestation. As noted above, this case presents a different factual scenario in that the jury was not instructed regarding penetration. This Court should decline Sanford’s invitation to reconsider its holding in Wilkins.

D. CONCLUSION.

While the factual scenario presented in this case presents the possibility of a double jeopardy issue, the record and instructions, taken as a whole, indicated to the jury that the State was not seeking to convict for both rape of a child and child molestation based on single acts. The State respectfully requests that this Court find that the convictions for rape of a child and child molestation do not violate double jeopardy and affirm Sanford’s convictions and sentence. This Court should not revisit its decision

in State v. Wilkins, which is factually distinguishable from this case and was correctly decided.

Respectfully submitted this 25th day of November, 2019.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellant's Court Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: November 25, 2019

Signature: Linda L. Olsen

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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