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NO. 53194-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIE GARZA,

Appellant.

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

The Honorable Kitty-Ann van Doorninck, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THERE IS INSUFFICIENT EVIDENCE OF BOTH SEXUAL CONTACT AND SEXUAL GRATIFICATION ON COUNT 3, ALLOWING THE JURY TO BE EASILY MISLED BY THE PROSECUTOR'S MISSTATEMENT OF THE EVIDENCE IN CLOSING.

The State correctly concedes I.R. “did not remember that specifically her chest was rubbed.” Br. of Resp’t, 13. The parties, therefore, appear to be in agreement that the relevant question is whether there is sufficient evidence of contact with I.R.’s “intimate parts” on count 3. But, on this point, the State provides only a cursory response: “Construing all the evidence in the light most favorable to the state, a rational juror could find that underneath the covered front torso of a young girl is such a place, whether the lustfully disposed adult touches her chest, or not.” Br. of Resp’t, 10 (emphasis added). The State asserts what constitutes “intimate parts” is a question for the jury, but does not provide any other analysis specific to Garza’s case. Br. of Resp’t, 9-10.

The State is both factually and legally incorrect. Factually, the State misrepresents the record, just as it did in closing argument. There is no evidence Garza touched I.R.’s “front torso.” Br. of Resp’t, 10. I.R.’s only testimony regarding count 3 was “he started putting his hands in my shirt” and “he ended up having his hands underneath my shirt.” RP 279-80. This does not establish any touching of I.R.’s front. The touching could have just

as easily involved I.R.'s back, which the State does not appear to argue constitutes an intimate part.

Legally, the State would essentially have this Court write the term “intimate parts” out of the statute. The State is correct that “[t]he determination of which anatomical areas apart from the genitalia and breasts are intimate is a question to be resolved by the trier of the facts.” In re Welfare of Adams, 24 Wn. App. 517, 520, 601 P.2d 995 (1979). “That determination is not, however, left solely to the unfettered discretion of the trier of fact.” State v. R.P., 67 Wn. App. 663, 838 P.2d 701 (1992), aff’d in part, rev’d in part, 122 Wn.2d 735, 862 P.2d 127 (1993).¹ Indeed, were it so, a finding of sexual contact by the jury would be completely insulated from appellate review—plainly contrary to established case law. See, e.g., R.P., 122 Wn.2d at 736 (kissing child on the neck and leaving a “hickey” insufficient for sexual contact); State v. Marcum, 61 Wn. App. 611, 612 & n.1, 811 P.2d 963 (1991) (kissing boy’s cheeks and rubbing his chest

¹ The court of appeals in R.P. considered whether kissing a child’s neck long enough to leave a hickey constituted sexual contact. 67 Wn. App. at 665. Analyzing the statutory language and case law interpreting it, the R.P. court upheld the conviction, reasoning the lips “are often associated with acts of sexual intimacy.” Id. at 669. In a per curiam opinion, the supreme court reversed, holding, “[a]fter examining the record and the facts of this case, we find that there was insufficient evidence of sexual contact to sustain count 1,” not engaging in any other analysis. R.P., 122 Wn.2d at 736. The legal reasoning, if not the result, of the court of appeals R.P. decision is therefore still good law. Indeed, this Court applied the rule of R.P. in State v. Howe, 151 Wn. App. 338, 346, 212 P.3d 565 (2009).

insufficient for sexual contact); cf. State v. Powell, 62 Wn. App. 914, 917-18, 816 P.2d 86 (1991) (fleeting touching by a known person, with an innocent explanation, insufficient for sexual gratification).

“Sexual contact,” necessary for a child molestation conviction, requires “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) (emphasis added). Not defined by statute, courts have held the term “intimate parts” to be “somewhat broader in connotation than the term ‘sexual.’” Adams, 24 Wn. App. at 519. The Adams court explained “[t]he statute is directed to protecting the parts of the body in close proximity to the primary erogenous areas which a reasonable person could deem private with respect to salacious touching by another.” Id. at 521.

The R.P. court applied canons of statutory construction to the “sexual or other intimate parts” language. 67 Wn. App. at 668. Specifically, “[t]he rule of ejusdem generis provides that specific terms modify and restrict general terms where both are used in sequence.”² Id. (quoting State v. Young, 63 Wn. App. 324, 331, 818 P.2d 1375 (1991)). Given the sequence

² “Ejusdem generis” means “of the same kind or class” in Latin. BLACK’S LAW DICTIONARY (11th ed. 2019). Our state supreme court has similarly explained the canon of construction “provides that general terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or ‘comparable to’ the specific terms.” Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 151, 3 P.3d 741 (2000) (quoting John H. Sellen Constr. Co. v. Dep’t of Revenue, 87 Wn.2d 878, 884, 558 P.2d 1342 (1976)).

of “sexual or other intimate parts,” the R.P. court held, “the phrase ‘intimate parts’ must refer to parts of the human body commonly associated with sexual intimacy.” Id. at 668-69. For this conclusion, the court cited an Oregon case recognizing, “‘Intimate parts’ are more than ‘sexual parts,’ but in context the words refer to parts that evoke the offensiveness of unwanted sexual intimacy, not offensive touch generally.” Id. at 669 (quoting State v. Woodley, 306 Or. 458, 760 P.2d 884, 886 (1988)).

The case law above makes clear that, contrary to the State’s assertion, intimate parts are not any body part underneath clothes. This was the basis for the holding in Howe. This Court in Howe considered the comparability of Washington’s child molestation statute and California’s lewd acts upon a child statute. 151 Wn. App. at 345. The California statute prohibited touching of *any* body part if done with the “‘intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child.’” Id. at 346 (quoting Cal. Penal Code § 288(a)). California’s statute was therefore broader and not comparable to Washington’s child molestation statute, which requires touching of “sexual or other intimate parts.” Id. at 347-48. In short, “the term ‘intimate parts’ does not mean every body part.” Id. at 346.

The record in Garza’s case simply does not reveal where he touched I.R. under her shirt for count 3. I.R.’s stomach, shoulders, and entire back

would all be under her shirt, but are not intimate parts, especially considering Garza's caretaking role. Howe makes clear the touching of any body part, even if done for sexual gratification, is not necessarily sexual contact within Washington's child molestation statute. The legislature has expressly limited child molestation to contact with sexual or other intimate parts.

The State's argument regarding sexual gratification is similarly problematic, both factually and legally. Factually, the State contends "[a] reasonable juror could readily conclude [Garza] put [I.R. on his lap]." Br. of Resp't, 9. Again, however, I.R. testified, "what I remember is I ended up sitting on his lap," and explained, "I can't recall," when asked how she ended up there. RP 280. The State again overstates the record, perhaps betraying its recognition that there is insufficient evidence to sustain count 3. Legally, the State essentially argues that, because there was general evidence of Garza's lustful disposition towards I.R., he must have acted with sexual gratification on count 3. Br. of Resp't, 8-9. In the State's view, apparently, any touching of a child by a lustfully disposed adult is done with sexual gratification. But this, again, is contrary to the law, which does not presume sexual gratification when a related adult with a caretaking function touches a child's intimate parts. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). And, of course, the record fails to establish where Garza touched I.R. underneath her shirt.

Finally, with regard to prosecutorial misconduct, the State agrees the challenged argument “was a misstatement of the evidence” that “created a possibility of confusion.” Br. of Resp’t, 14-15. The State nevertheless characterizes the misconduct as merely a “prosecutorial blunder” that “was not an inflammatory appeal.” Br. of Resp’t, 14. Specifically, the State contends, “[t]he elements of grandfather kissing granddaughter and grandfather rubbing granddaughter’s bare chest were already before the jury.” Br. of Resp’t, 14 (footnotes omitted).

It is precisely for this final reason that the prosecutor’s significant misstatement of the evidence on count 3 caused incurable prejudice to Garza. The prosecutor essentially conflated the facts of count 2 (kissing I.R.’s neck and face, touching her chest under her shirt) and count 3 (hands under I.R.’s shirt). But the jury heard I.R.’s testimony only once. I.R. could not remember dates or many specifics. She provided only a very brief description of count 3—just three pages of transcript. RP 279-81. The jury did not have the luxury of reviewing a transcript, as we now have on appeal, to clarify exactly what type of touching corresponded to each count. By the State’s own recognition, the misstatement could have confused the jury. Indeed, it must have, because the jury convicted where insufficient evidence supported the charge.

Furthermore, whether the misstatement was inflammatory is not really the relevant question. The Washington Supreme Court explained in State v. Emery that prosecutorial misconduct “is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” 174 Wn.2d 741, 762, 278 P.3d 653 (2012) (quoting State v. Navone, 186 Wash. 532, 538, 58 P.2d 1208 (1936)). The reviewing court should therefore “focus less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” This requires the reviewing court to “consider what would likely have happened if the defendant had timely objected.” Id. at 764.

Had defense counsel timely objected to the prosecutor’s misstatement of the evidence on count 3, the trial court likely would have given some form of one or both of the following curative instructions: “It is your duty to decide the facts in this case based upon the evidence presented to you during this trial,” CP 101, or “the lawyer’s statements are not evidence . . . You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions,” CP 102.

However, neither of these instructions would have clarified the evidence or lack of evidence regarding count 3. The court would not have repeated I.R.’s testimony for the jury. Indeed, the jury was instructed at the outset of trial, “You will not be provided with transcripts of the testimony.”

CP 214. Any summary of testimony by the court would have been a judicial comment on the evidence, prohibited by our state constitution. CONST. art. I, § 16 (“Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.”). Thus, a curative instruction would have done little to nothing to erase the confusion engendered by the prosecutor’s misstatement of the evidence. Blunder or not, the prejudicial effect was the same.

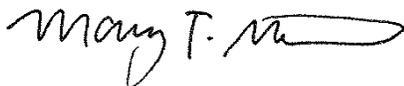
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse Garza’s conviction on count 3 for insufficient evidence or, alternatively, remand for a new trial. This Court should also accept the State’s concessions on the sentencing conditions.

DATED this 27th day of November, 2019.

Respectfully submitted,

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