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Division II
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NO. 53194-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WILLIE RODRIGUEZ GARZA,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 17-1-04384-4

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

- A. Was the guilty verdict of child molestation in Count III supported by sufficient evidence?
- B. Was the element of “sexual contact” in Count III supported by sufficient evidence?
- C. Does the prosecutor’s closing argument present prosecutorial misconduct?
- D. Should this Court find prosecutorial misconduct, is any such misconduct limited to Count III and not Count II?
- E. Should this Court accept the State’s concession that the challenged paragraphs of Appendix H of the judgment and sentence should be deleted?

II. STATEMENT OF THE CASE

Willie R. Garza is the defendant. Angela Meza is defendant’s daughter. 3 VRP 238. I.J.R. is Angela Meza’s daughter. 3 VRP 329. Defendant “always” babysat Ms. Meza’s children. 3 VRP 335.

He was pretty much the one to always have them if I had to go to work or I had to go grocery shopping or if he would say I can go have my time because sometimes parents need to have their own time.

3 VRP 336. Ms. Meza relied heavily upon her father to take care of her children. 3 VRP 336.

Originally from California, Ms. Meza came to Washington in 2004. 3 VRP 329. Defendant moved up to Washington from California in 2008. 3 VRP 331. I.J.R. was three years old when defendant first moved up to

Washington.¹ 3 VRP 339. “A few years later,” around when I.J.R. was five or six years old, defendant began babysitting I.J.R. 3 VRP 339.

Initially, I.J.R. enjoyed hanging out with defendant. 3 VRP 339-40. In the fifth or sixth grade, when I.J.R. was about 10 years old, I.J.R. stopped wanting to go to defendant’s house. 3 VRP 340. When I.J.R. was in the sixth grade (when she was eleven years old) her grades started dropping. 3 VRP 341. Prior to that time I.J.R. had been a good student. 3 VRP 341.

In 2015, I.J.R. disclosed unwanted touching to Ms. Meza. 3 VRP 343. Ms. Meza confronted defendant, and after that point—in the middle to end of 2015—Ms. Meza never allowed her children to see defendant. 3 VRP 342-44.

In November, 2017, Ms. Meza got a call from I.J.R.’s school regarding I.J.R. wanting to harm herself. 3 VRP 344. CPS was involved. 3 VRP 344. Ms. Meza then took I.J.R. to a place on the Hill Top where I.J.R. could make disclosures. 3 VRP 345-46. Valaree Schelhammer, a social worker at Mary Bridge Children’s Hospital,² interviewed I.J.R. on November 2, 2017³ regarding “a psychiatric problem.”

I.J.R. was in the eighth grade when she testified on November 29, 2018. 3 VRP 231-32. I.J.R. was born on January 14, 2005. 3 VRP 231. In

¹ See also 3 VRP 338: 16-19.

² 4 VRP 409.

³ 4 VRP 412.

2015, at the time she stopped seeing defendant, she could have been no more than ten years old. *Id.*

I.J.R. described the kinds of things that defendant did that relate to her first memory of defendant doing something she did not like:

He would make smart comments. He would make me feel uncomfortable. He would pinch my butt. He would just do things that I knew wasn't right and just not okay.

3 VRP 268. I.J.R. testified to the kind of comments defendant made to her:

He would be like -- he would say something like, "oh, yeah," for example the girls that he had on his computer thing, he would be like, "One day you'll end up growing to be like them, huh, and take pictures like that." And even if we were out and about he would say things like to the waitresses or the cashier lady or even to my other aunts.

3 VRP 268-69. Those pictures were "like pictures of like cut out magazines of girls in like swimsuits and glass above it." 3 VRP 264.

Defendant did more than pinch I.J.R.'s butt. 3 VRP 269. I.J.R. testified as to the first memory of defendant doing more than pinching her butt:⁴

What happened was, it was early in the morning and my cousins and my Aunt Teresa, they were visiting from California and they were visiting for the weekend. My mom and my brother, they were sleeping in the front room with my cousins and my aunt. And I don't remember or recall how I was in his room, but all I remember was I was in his room, he was in his room. And my pants were on the floor, my underwear was off. He was touching me on my lower area. Then he heard a noise and he's like, "Hurry up. Put

⁴ 3 VRP 269.

your clothes on before your aunt or your mom comes and sees you."

3 VRP 270. This happened while I.J.R. was on defendant's bed. 3 VRP 271. When I.J.R. was on the bed she remembered that defendant was touching her whole body and kissing her. 3 VRP 272. In this incident, defendant touched I.J.R.'s vagina and inner thighs with his hands. 3 VRP 272-73.

Another incident happened at a different location. 3 VRP 275. I.J.R. testified:

I remember that we were sitting on the couch, there was nobody else home, the TV was on. And then somehow I was on his lap, he was kissing me and he was touching me inside my shirt. And then one of our neighbors ended up coming and knocking at the door and then he stopped.

3 VRP 275-76. I.J.R. testified that defendant kissed her on her neck and on her face. 3 VRP 276. The touching was under I.J.R.'s shirt and on I.J.R.'s chest. 3 VRP 277.

A third incident happened while seated at a computer desk:

I remember in the room that he had his bed, and right next to his bed was a desk-top. So it was kind of like this and then he had pictures of girls in their bikinis and models. And then he had his computer desk, like his And then he had the glass above the pictures. And then he had his computer desk, like his computer set.

I was sitting on his lap and then he would -- because I asked him, I went in there and I asked him if I could go on the computer. And then what I remember is I ended up sitting on his lap after that and then he started putting his hands in

my shirt. And then my brother, Izaak, came and asked to play with Nerf guns, if I wanted to play with him and I said "yes" and then I left with Izaak. I left out of the room. That's all I remember.

3 VRP 279-80.

Defendant could not recall I.J.R. sitting on his lap. 4 VRP 507.

Defendant further testified:

Q. And it's not right for your granddaughter to try to sit with grandpa on a lap?

A. Not on my lap, no.

4 VRP 507.

Nonspecific evidence of defendant's lustful disposition toward I.J.R. was also introduced. 3 VRP 281-82. I.J.R. testified that defendant would "constantly like touch my lower body like my waist down. Like no matter what would happen, he would just constantly do it. And then he had this thing where he would end up pinching our butts." 3 VRP 281. I.J.R. testified that defendant touched her thighs and was touching her butt and inner thighs. 3 VRP 282. She could not remember him touching anything else. 3 VRP 282.

I.J.R. first told somebody about what defendant was doing sometime after August 15, 2015. 3 VRP 283. I.J.R. testified that the last incident with defendant happened a couple months after August 15, 2015.

Defendant was charged with three counts of child molestation in the first degree. CP 3-4. The prosecutor argued each of the three distinct acts related above as separate counts.⁵ The incident at the computer desk was specifically argued as Count III.⁶ Defendant was convicted of two counts of child molestation in the first degree (Counts II and III). CP 142. The jury hung on one count of child molestation in the first degree (Count I) and the trial court later dismissed that count without prejudice. CP 144.

III. ARGUMENT

A. Sufficient evidence of sexual contact was presented to the jury as to count three.

Sufficient evidence of sexual contact was presented to the jury as to count three—the incident occurring at defendant’s computer desk.⁷

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

⁵ 5 VRP 541-42 (the incident on the bed), 5 VRP 544 (the incident on the couch), 5 VRP 545-46 (the incident at the computer desk).

⁶ The incident involving contact under the shirt while seated before the computer was argued by the prosecuting attorney as Count III. 5 VRP 545-46.

⁷ 5 VRP 545-46.

elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

“Sexual Contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” CP 110 (Instruction 8).

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational juror could have found the elements of the

crime proved beyond a reasonable doubt. A person commits the crime of Child Molestation in the First Degree when the person has sexual contact with a child who is less than 12 years old, who is not married to the person, and who is at least 36 months younger than the person. 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. In determining whether the sexual contact element has been satisfied, we must look to the totality of the facts and circumstances presented.

(citations and internal quotation omitted). *State v. Harstad*, 153 Wn. App. 10, 20–21, 218 P.3d 624, 628 (2009).

1. Count III is supported by sufficient evidence that defendant touched I.J.R. under her shirt for his own sexual gratification.

Defendant's lustful disposition toward I.J.R. is amply supported by the evidence. The jury heard about two other specific instances of child molestation—one involving the touching of the breast and the other involving the touching of the vagina. 3 VRP 269-70, 3 VRP 275-77. These unambiguous examples of "sexual contact" occurred in an environment where defendant was "constantly" touching I.J.R.'s inner thigh area and pinching her buttocks. 3 VRP 281.

The computer where the act occurred had also been sexualized by defendant:

He would be like -- he would say something like, "oh, yeah," for example the girls that he had on his computer thing, he would be like, "One day you'll end up growing to be like them, huh, and take pictures like that."

3 VRP 268-69. Those pictures were “like pictures of like cut out magazines of girls in like swimsuits and glass above it.” 3 VRP 264.

Further, I.J.R.’s placement—on defendant’s lap, above his penis—is further evidence that the touching under I.J.R.’s shirt was for sexual gratification. I.J.R. asked to use the computer. 3 VRP 279. A reasonable juror, considering defendant’s constant sexual importunities in the light most favorable to the State,⁸ could fairly conclude I.J.R. did not ask to be placed on defendant’s lap. *Id.* A reasonable juror could readily conclude that defendant put her there.⁹

2. Count III is supported by sufficient evidence that defendant touched an intimate part of I.J.R.

“Contact is ‘intimate’ within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. “Which anatomical areas, apart from genitalia and breast, are ‘intimate’ is a question for the trier of fact.” (citations omitted). *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321, 323 (2008) (quoting *In re Adams*, 24 Wn. App. 517, 520, 601 P.2d 995, 997 (1979)). “In determining what is fair notice to a citizen, it is

⁸ 3 VRP 281.

⁹ In closing argument, the prosecutor argued that I.J.R. “comes over there, sits on his lap. . .” 5 VRP 546. I.J.R. testified that she could not recall how she ended up on defendant’s lap. 5 VRP 280.

not necessary that the statute spell out every detail. Some aspects of the prohibited conduct may be left to the commonly accepted community sense of decency, propriety and morality” *In re Adams*, 24 Wn. App. at 520 (citing *State v. Stuhr*, 1 Wn.2d 521, 527, 96 P.2d 479, 482 (1939)).

The circumstances surrounding the contact are also important in determining whether an intimate part has been touched. *In re Adams*, 24 Wn. App. at 521. “The 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.*; *State v. Harstad*, 153 Wn. App 10, 22, 218 P.3d 624 (2009).¹⁰ 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.

B. Defendant has failed to establish prosecutorial misconduct.

For the first time on appeal, defendant objects to the following argument made in the prosecutor’s closing argument:

She wanted to get on the computer. Again, the defendant supported the kids to get on the computer. She comes over there, sits on his lap, starting rubbing up underneath her shirt, kissing her in places that grandpas are not supposed to kiss their grandchildren, rubbing on her bare chest, that she wasn't

¹⁰ It is clear that “intimate parts” does not mean every body part. *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993). *State v. R.P.* is not particularly helpful beyond that point because the outcome of the case was based upon an undiscussed examination of the record and the facts of the case. *Id.*, 122 Wn.3d at 736.

wearing a bra, because she wasn't old enough to be wearing a bra. And, again, she remembers how it ended. Her very young brother came into the room and wanted to play Nerf.

5 VRP 546.¹¹ In resolving this claim, this Court “must determine only whether the prosecutor’s comments were so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective.” *State v. Gregory*, 158 Wn.2d 759, 843, 147 P.3d 1201 (2006). The Supreme Court directed the focus a reviewing court must apply to such a claim in *State v. Emery*, 174 Wn.2d 741, 761–62, 278 P.3d 653 (2012):

Our standards of review are based on a defendant's duty to object to a prosecutor's allegedly improper argument. *See* 13 Royce A. Ferguson, Jr., Washington Practice: Criminal Practice And Procedure § 4505, at 295 (3d ed. 2004) (“If either counsel indulges in any improper remarks during closing argument, the other must interpose an objection at the time they are made. This is to give the court an opportunity to correct counsel, and to caution the jurors against being influenced by such remarks.”). Objections are required not only to prevent counsel from making additional improper remarks, but also to prevent potential abuse of the appellate process. *State v. Weber*, 159 Wn.2d 252, 271–72, 149 P.3d 646 (2006) (were a party not required to object, a party “could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal” (quoting *State v. Sullivan*, 69 Wn.App. 167, 173, 847 P.2d 953 (1993))); *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (“[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.”) (alteration in original)

¹¹ The underlined portion is the segment complained of in Appellant’s Brief at 12.

(quoting *Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960))). An objection is unnecessary in cases of incurable prejudice only because “there is, in effect, a mistrial and a new trial is the only and the mandatory remedy.” *State v. Case*, 49 Wn.2d 66, 74, 298 P.2d 500 (1956).

Based on these principles, “[m]isconduct is to be judged not so much by what was said or done as by the effect which is likely to flow therefrom.” *State v. Navone*, 186 Wn. 532, 538, 58 P.2d 1208 (1936). Reviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured. “The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” *Slattery v. City of Seattle*, 169 Wn. 144, 148, 13 P.2d 464 (1932).

Id. Defendant has the burden of proving “that the prosecutor’s comments engendered an incurable feeling of prejudice in the mind of the jury.” *Id.*

1. Part of the challenged argument is fair argument, and part is a misstatement of the evidence presented at trial.

In this case, the prosecutor misstated the evidence when he argued that defendant was “kissing [I.J.R.] in places that grandpas are not supposed to kiss their grandchildren” as I.J.R sat on defendant’s lap in front of defendant’s computer. 5 VRP 546. There was testimony that I.J.R. was sitting on defendant’s lap, but I.J.R. remembered no further details. 3 VRP 280. There was no evidence of kissing at the computer desk. 3 VRP 279-81. The “kissing” argument, while not supported by the record, was not especially inflammatory in this particular case because the jury already had

evidence that defendant kissed I.J.R. while molesting her in two other incidents.¹²

The argument that defendant kissed I.J.R. where “grandpas are not supposed to kiss their grandchildren” was not especially inflammatory because defendant was charged in each of the three counts with the aggravating factor that defendant used “his or her position of trust, confidence, or fiduciary facility to facilitate the commission of the current offense.” CP 96-97, (amended information), 12/3/2018 VRP 383; CP 133, 136, 139 (special verdict forms); RCW 9.94A.535(3)(n).

The prosecutor’s argument that defendant “starting rubbing up underneath her shirt, . . . rubbing on her bare chest” was a fair inference based upon the facts. In this case I.J.R. testified that defendant “started putting his hands” in I.J.R.’s shirt and “ended up having hands underneath” I.J.R.’s shirt. 3 VRP 279, 280. Those statements imply motion, and motion suggests rubbing. Given defendant’s lustful disposition toward I.J.R., it is also a fair inference that defendant rubbed I.J.R.’s bare chest.¹³ The parties are granted wide latitude in drawing inferences from the evidence. *State v. Gregory*, 158 Wn.2d 759, 844, 147 P.3d 1201 (2006). I.J.R. did not remember that specifically her chest was rubbed,¹⁴ but given defendant’s

¹² 3 VRP 270-72, 275-76.

¹³ I.J.R. was not old enough to wear a bra. 3 VRP 272, 280-81.

¹⁴ 3 VRP 279-80.

constant sexual importunities and lustful disposition toward I.J.R., it was also a fair inference from the evidence, given the “wide latitude” granted the parties. *Id.*

2. Defendant has failed to prove prosecutorial misconduct.

Defense counsel did not object to the challenged argument. 5 VRP 546. The details of the touching were peripheral to defendant’s theory of the case—defendant denied that I.J.R. sat on his lap—he testified that he remembered no contact, and declared that it was “not right” for his granddaughter to sit on his lap. 4 VRP 507.

While the challenged argument was a misstatement of the evidence, it was also a prosecutorial blunder because there was a substantial likelihood that at least one of the jurors paid more attention to the evidence presented than the prosecutor did. Such a blunder would tend to hurt the credibility of the prosecutor before the jury and weaken the sting of that prosecutor’s argument (including the sting of any misstatements).

The challenged argument was not an inflammatory appeal. The elements of grandfather kissing granddaughter¹⁵ and grandfather rubbing granddaughter’s bare chest¹⁶ were already before the jury as was the

¹⁵ 3 VRP 272, 276.

¹⁶ 3 VRP 277.

exceptional factor of the abuse of grandfatherly trust.¹⁷ While the prosecutor's statements created a possibility of confusion (which could have been remedied with a curative instruction), it did not introduce any inflammatory concepts to the jury which were not already properly there. Had the trial court told the jury to disregard the prosecutor's argument because it is not supported by the evidence, the jurors would have ignored the unsupported evidence, and that would have been that. Jurors are presumed to follow the court's curative instructions. *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015). The prosecutor's unobjected-to misstatement of fact was not "so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective." *State v. Gregory*, 158 Wn.2d at 843.

C. Appendix H, paragraph 17 was not a valid crime related prohibition.

Pictures of children do not have a "reasonable relationship" to this case sufficient to warrant barring defendant from their possession pursuant to RCW 9.94A.030(19). *State v. Nguyen*, 191 Wn.2d 671, 684, 425 P.3d 847 (2018). The State could find no indication that "pictures" of minors played any role in defendant's crimes. The State agrees with petitioner that the language "nor pictures of any minors of all" should be deleted from

¹⁷ CP 96-97, (amended information), 12/3/2018 VRP 383; CP 133, 136, 139 (special verdict forms); RCW 9.94A.535(3)(n).

paragraph 17 of the judgment and sentence, and asks this court to impose that directory remedy. Appendix H.

D. The substance abuse evaluation requirement and stay out of drug areas prohibition are not valid crime related prohibitions.

Paragraph 21 of Appendix H stated “21 [x] Do not enter drug areas as defined by court or CCO.” CP 157 Paragraph 23 of Appendix H stated “23[x] Obtain [x] alcohol [x] chemical dependency evaluation upon referral and follow through with all recommendations of the evaluator. Should chemical dependency treatment be recommended, enter treatment and abide by all program rules, regulations and requirements. Sign all necessary releases of information and complete the recommended programming.” CP 157. Respondent agrees with defendant that these conditions bear no reasonable relationship to this case because the record shows no indication that alcohol or drugs played a role in petitioner’s crimes. The State asks that this court impose the directory remedy of ordering the trial court to delete the quoted provisions of paragraph 21 and paragraph 23 of Appendix H.

E. The mental health evaluation imposed in this case should be deleted.

Paragraph 26 of Appendix H states:

26. [x] Obtain a mental health evaluation,, and follow through with all recommendations of the provider, including taking medication as prescribed. Should mental health treatment be currently in progress, remain in treatment and

abide by all program rules, regulations and requirements.
Sign all necessary releases of information and complete the
recommended programming.

CP 157. The record contains no indication that the trial court found reasonable grounds to exist to believe that petitioner was a mentally ill person as defined in RCW 71.24.025. 2/8/19 VRP 586-594; CP 140-157. Respondent agrees with petitioner that paragraph 26 of Appendix H should be deleted. The State asks this court to impose the directory remedy of ordering the trial to delete paragraph 26 of Appendix H from petitioner's judgment and sentence.

IV. CONCLUSION

Sufficient evidence of sexual conduct was presented on Count III. The prosecutor's closing argument included a misstatement, but that misstatement was not prosecutorial misconduct.

Defendant's claims related to sentencing are well taken. The State agrees with defendant that striking the erroneously imposed conditions (rather than resentencing) is the appropriate remedy for these sentencing errors.

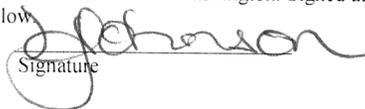
RESPECTFULLY SUBMITTED this 14th day of November, 2019.

MARY E. ROBNETT
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Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

11/14/19
Date

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PIERCE COUNTY PROSECUTING ATTORNEY

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