

FILED

MAY 4, 2015

No. 30916-9-III

Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

LUCKY JOE GUZMAN, SR., Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

1. The court erred by not entering findings of fact and conclusions of law supporting the exceptional sentence.

Issue Pertaining to Assignment of Error

A. Did the court err by not entering findings of fact and conclusions of law supporting the exceptional sentence?

(Assignment of Error 1).

II. STATEMENT OF THE CASE

Lucky Joe Guzman, Sr., was charged by information with one count of first degree child molestation and one count of attempted first degree rape of a child. (CP 10). The State also charged the aggravating factors of a particularly vulnerable victim and violation of a position of trust. (*Id.*). Mr. Guzman waived jury trial. (CP 111).

The facts, when viewed in a light most favorable to the State as they must be, are reflected in the court's Findings of Fact and Conclusions of Law – Trial. (CP 140). In pertinent part, these facts were found by the court:

2. On June 18, 2010, KJH (DOB 8.23.01) arrived at defendant's home located at 2622 East Sharp, Spokane, WA.

3. KJH was sick that day and unable to attend daycare. She was feeling nauseous, tired and lethargic. Her parents were not available to care for her. The defendant agreed to care for her that day.
4. At the end of the day, KJH's mother, Elizabeth Henning-Guzman picked up KJH at the defendant's home.
5. Later the same day, KJH disclosed to her mother that she "Had to tell on her Grandpa Lucky." KJH disclosed that the defendant had licked and bitten her nipples on her bare skin. He had touched her skin under her shirt, and had placed his hand against her bare skin near her "privacy." She later defined that area to her butt and where she goes to the bathroom. She said she squirmed and rolled over to try to keep the defendant from putting his finger inside her.
6. Elizabeth Henning took KJH to Holy Family Hospital where she was examined by the ER doctor and by a nurse who performed a rape kit including the taking of DNA samples from KJH's skin. While at the hospital, KJH made disclosures to the doctor and nurse consistent with what she had told her mother.
7. At the hospital, the nurse took photographs of KJH's chest. Visible in the photos, and as observed by the nurse and doctor, were marks on and around the nipples consistent with suction contusions known as hickies.
8. While at the hospital, KJH was also diagnosed with scarlet fever and strep throat. She had other, lighter blotches on her skin consistent with scarlet fever.

9. Detective Brian Estes interviewed KJH. She made disclosures substantially similar to those made to medical personnel and to her mother.

10. A forensic scientist from the Washington State Patrol crime lab testified about the DNA samples taken and tested. The State called witnesses to establish the chain of custody of the samples. The sample was also determined to be consistent with saliva.

11. During trial, KJH testified regarding general matters such as school and her life, and specifically regarding her current recollection of the incident with the defendant in 2010.

12. KJH had difficulty with the time regarding this incident. She thought the incident happened about a year ago, when in fact it was closer to two years. She thought it happened most likely during the winter, when in fact it happened in June. She thought she waited three weeks to make the disclosure to her mother, when in fact it was the same day. She thought she went to the hospital the day after disclosure when in fact it was the same day as the incident.

13. KJH made consistent disclosures near the time of the incident. Her disclosures to her mother, the medical staff at Holy Family, and to Detective Estes were consistent in the nature of the details surrounding her grandfather touching her nipples and her private area. Her visual description of pulling the skin on her hand to show the type of biting/sucking that her grandfather did to her nipples was persuasive.

14. The physical evidence supporting molestation was impressive. The photos showing hickies, and the medical testimony confirming the marks as consistent

with hickies provided persuasive corroboration of KJH's disclosures.

15. The DNA evidence provided strong corroboration of KJH's disclosure that the defendant had molested her. Although the quantity of genetic material found on KJH's nipples was small, it was sufficient to provide a match consistent with the kind of touching described initially by KJH.

16. The testimony of Elizabeth Henning-Guzman was hard to follow, but was generally consistent with the initial disclosure of KJH. Ms. Henning-Guzman engaged in an unusual amount of warnings to her daughter regarding "bad-touch," but such warnings did not discount the credibility of KJH's disclosures. This witness confirmed that KJH was eight years old at the time of the incident and that the defendant, being the grandfather of KJH, was not married to KJH and was more than 36 months older than KJH.

17. The Court considered the testimony of defense witnesses, including Paula Walker. The Court did not find the testimony of Paula Walker to be persuasive or credible. It appeared that Paula Walker was not paying particular attention to the interaction between the defendant and KJH.

18. The Court finds beyond a reasonable doubt that the incident occurred in the State of Washington.

19. The Court finds beyond a reasonable doubt that the defendant is more than 36 months older than KJH and not married to KJH.

20. The Court finds beyond a reasonable doubt that the defendant engaged in sexual contact with KJH.

21. The Court finds beyond a reasonable doubt that

KJH was eight years old at the time of this incident.

22. In contrast to the evidence supporting the charge of First Degree Child Molestation, the evidence supporting the claim of Attempted First Degree Rape of a Child was less compelling. There was no physical evidence to corroborate the claim of attempted penetration. Despite the testimony of Elizabeth Henning-Guzman that KJH had some red discoloration at the top of her vaginal area, no photographs were available to confirm this claim, nor was there any indication of discoloration noted by medical staff. Nor did the evidence presented show any DNA corroboration of the claim of attempted penetration.

23. The Court finds that the evidence presented suggests more probably than not that the defendant attempted to penetrate KJH with his fingers, however, the proof does not rise to the level of proof beyond a reasonable doubt. (CP 140-44).

From these findings, the court concluded that, based on its finding the State had proven the elements of first degree child molestation beyond a reasonable doubt, Mr. Guzman was guilty of the charge. It also concluded he committed the offense against a particularly vulnerable victim and abused a position of trust to facilitate the crime, both aggravating factors being proven beyond a reasonable doubt. (CP 145).

The court sentenced Mr. Guzman to a minimum exceptional sentence of 135 months and a maximum of life under RCW 9.94A.507. (CP 159). This appeal follows. (CP 174).

III. ARGUMENT

A. The court erred by not entering findings of fact and conclusions of law supporting the exceptional sentence.

In the judgment and sentence, Paragraph 2.4 stated the court found substantial and compelling reasons to justify an exceptional sentence above the standard range. It also indicated “[f]indings of fact and conclusions of law are attached in Appendix 2.4.” There is neither any such attachment nor an appendix 2.4. Although the court found the aggravating factors of a particularly vulnerable victim and abuse of a position of trust, it did not make the required findings of fact or conclusions of law supporting the exceptional sentence as contemplated in Appendix 2.4. This is error requiring remand. *State v. Friedlund*, 182 Wn.2d 388, 341 P.3d 280 (2015).

The court did enter written trial findings and conclusions that stated it found beyond a reasonable doubt that KJH was particularly vulnerable at the time of the offense and Mr. Guzman acted in a

position of trust and used that trust to facilitate commission of the crime. (FF 24, 25; CP 144). The court also entered this trial conclusion of law:

The defendant committed the offense against a particularly vulnerable victim and abused a position of trust to facilitate the crime. Each of the two aggravating factors have been proven beyond a reasonable doubt. (CP 145).

These findings and conclusion on the aggravating factors mirror each other and reflect the court's oral decision, but they certainly do not meet the requirements for a written conclusion as to why those factors were substantial and compelling enough to justify an exceptional sentence under RCW 9.94A.535. The statute provides:

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.

This was not done by the trial court here. Indeed, its written findings and conclusions were entered under CrR 6.1(d), not under RCW 9.94A.535. The difference is not harmless under the statutory procedure explained by the court in *Friedlund*:

The SRA permits a court to impose sentences that deviate from the standard sentence range "if it finds,

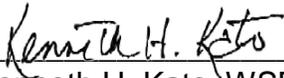
considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence.” RCW 9.94A.535. When a trial court imposes an exceptional sentence, the SRA requires the court to “set forth its decision in *written findings of fact and conclusions of law.*” *Id.* (emphasis added). This requirement, word for word, has been part of the SRA from its inception. See LAWS OF 1981, ch. 137, § 12(3). The written findings must then be sent to the Washington State Sentencing Guidelines Commission along with the trial court’s judgment and sentence. *CrR 7.2(d)* (“If the sentence imposed departs from the applicable standard sentence range, the court’s written findings of fact and conclusions of law shall be supplied to the Commission.”). 182 Wn.2d at 394.

CrR 6.1(d) findings and conclusions do not substitute for those required by RCW 9.94A.535 as the former do not go to the Commission. Moreover, the trial findings and conclusions did not articulate why the aggravating factors were substantial and compelling reasons justifying an exceptional sentence. They merely stated they were found by the trial court, with nothing more. In these circumstances, *Friedlund* requires remand for entry of written findings and conclusions comporting with RCW 9.94A.535.

IV. CONCLUSION

Mr. Guzman respectfully asks this court to reverse his exceptional sentence and remand for further proceedings.

DATED this 3rd day of May, 2015.



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CERTIFICATE OF SERVICE

I certify that on May 3, 2015, I served a copy of the brief of appellant by first class mail, postage prepaid, on Lucky Joe Guzman, Sr., # 809575, PO Box 2049, Airway Heights, WA 99001; and Brian O'Brien at SCPAappeals@spokanecounty.org.

