

Court of Appeal No. 35070-3-III

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

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STATE OF WASHINGTON,

Respondent,

v.

KEVIN JOHN HUBBARD

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR BENTON COUNTY  
Cause No. 15-1-00918-8

The Honorable Judge Vic Vanderschoor

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REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ..... ii

I. Reply to Respondent’s Statement of the case ..... 1

II. Argument..... 1

    1. There is insufficient evidence to prove that defendant had intercourse with S.A.L. before her 14<sup>th</sup> birthday..... 1

        a. The State relied on one specific incident to support the charges of second degree rape and second degree child molestation..... 2

        b. The date the parties moved to Washington does not automatically equate to the date Mr. Hubbard began sexually abusing S.A.L. .... 2

        c. S.A.L. identified the table as being in the room when Mr. Hubbard first had sex with her..... 3

        d. Jury cannot reasonably infer from Ms. Guerrero’s testimony that the table identified by S.A.L. was purchased in 2012. .... 4

        e. S.A.L.’s recollection of specific dates was proven to be faulty. .... 6

    2. The State did not prove every element of the crime of giving S.A.L. drugs for his sexual gratification. .... 6

    3. There was prosecutorial misconduct in closing argument..... 7

        a. The full context of the prosecutor’s “dog and pony show” reference is the prosecutor’s entire closing argument..... 7

        b. Calling Mr. Hubbard’s defense a “sales pitch” is just as inappropriate as calling it a “dog and pony show.” ..... 9

III. Conclusion..... 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Dhaliwal, 150 Wn.2d 559, 79 P.3d 432 (2003)----- 7

OTHER AUTHORITIES

Online Slang Dictionary----- 8

Webster's Third New International Dictionary, pg. 81a (2002)----- 9

## I. REPLY TO RESPONDENT’S STATEMENT OF THE CASE

The State mistakenly asserts that Ms. Guerrero and the defendant, Mr. Hubbard, had an on-again, off-again relationship beginning in 2001. In answer to the question, “Did you guys date and break up and date and break up?” Ms. Guerrero said “No, we stayed together.” She noted that Mr. Hubbard went to prison a few times, but the only actual split she notes is when she got pregnant with her child born in May 2007. (RP 51)

The State indicates that Mr. Hubbard suggested S.A.L. get on birth control in early 2013. However, there is no indication in the testimony as to when, exactly, this suggestion was made. S.A.L. was 15 years old when she began birth control with a nexplanon implant on November 12, 2013. (RP 80)

S.A.L. described the first incident of sexual abuse in Washington as occurring sometime in the summer between 7<sup>th</sup> and 8<sup>th</sup> grade. (RP 189)

## II. ARGUMENT

### **1. There is insufficient evidence to prove that defendant had intercourse with S.A.L. before her 14<sup>th</sup> birthday.**

The jury was instructed that in order to convict Mr. Hubbard of second degree child rape and second degree child molestation, the each element of the crime had to be proven beyond a reasonable doubt, including the element that “between the 1st day of March, 2012, and the 7th day of

August, 2012, the defendant had sexual contact with [S.A.L.].” (CP 125, 126)

**a. The State relied on one specific incident to support the charges of second degree rape and second degree child molestation**

The State claims that Mr. Hubbard’s argument “overlooks the testimony that the defendant had sexual intercourse and sexual contact with S.A.L. in her bedroom, in the smoke room, in the warehouse, on the floor of her mother’s bedroom, and in a vehicle.” (Brief of Respondent at 9) This is incorrect. While S.A.L. does give testimony regarding multiple instances of sexual intercourse and sexual contact, S.A.L. only testified about one specific incident that allegedly occurred in Washington prior to August 7, 2012. Mr. Hubbard admitted to sexually abusing S.A.L. when she was 15 and 16 years old, but denies doing so before her 14<sup>th</sup> birthday. Other incidents around the residence, for which no specific timeframe was given, do not prove Count I.

**b. The date the parties moved to Washington does not automatically equate to the date Mr. Hubbard began sexually abusing S.A.L.**

As the State correctly states, S.A.L., her mother, and the defendant moved to Washington State in March 2012. The State claims that there is sufficient evidence for a conviction of second degree child rape and second degree child molestation, and notes the date of the move to

Washington. (Brief of Respondent at 1) It appears that the State is indirectly and incorrectly transposing the date of the move to Washington with the date Mr. Hubbard began sexually abusing S.A.L. However, S.A.L. testified that from the time she moved to Washington until a summer after she finished 7<sup>th</sup> grade, Mr. Hubbard did not touch her. (RP 189, 232-233)

**c. S.A.L. identified the table as being in the room when Mr. Hubbard first had sex with her.**

As previously noted, the State relied on one specific incident to support the charges of second degree rape and second degree child molestation, which occurred the first time S.A.L. and Mr. Hubbard had sex and after she moved to Washington. (RP 193, 308) The State is incorrect in claiming that S.A.L. did not give a recorded answer as to whether the table was in the room during this incident on cross-examination:

**Q.** The table was there?

**A. Yeah.** That's the way my mom always had it set up.

(RP 234, lines 23-24) (emphasis added)

In addition, S.A.L. specifically noted the kitchen table being in the room during the direct by prosecution earlier in her testimony, when she described this first instance of sexual abuse in Washington, which she noted as beginning in the park, followed by touching in the car after

leaving the park, and ending at the house:

**Q.** And what happened when you got to the house?

**A.** How I remember, because I was tripping, I was high. I just came in, and I flopped onto the couch, and the kids were **eating at the kitchen table**, and I had been laying on my stomach with -- my legs were kind of over the end of the chair. It was a small, black leather chair in our living room, and **the dining room table was right behind the couch.**

(RP 191, lines 10-16) (emphasis added)

S.A.L. identified the table as being present during the first instance of sexual abuse on cross-examination as well:

**Q.** And you said -- you previously testified that during the first time you and Kevin had sex, you had sex in the kitchen -- or on a couch? I'm sorry.

**A.** On a couch. On the small black couch. That's the one in the picture.

**Q.** That's the couch in this picture?

**A.** Yes.

MR. HANSON: Just pointing to that for the jury, your Honor.

**Q.** You said your brothers were also in the kitchen?

**A.** Yes, **they were sitting at the kitchen table.**

(RP 233, lines 13-23) (emphasis added)

When shown a picture of the room, which picture included the table in question, and asked if it was an accurate depiction of the furniture in the house that day, S.A.L. only identified a carpet shampooer as being out of place. (RP 234)

**d. Jury cannot reasonably infer from Ms. Guerrero's testimony that the table identified by S.A.L. was purchased in 2012.**

Ms. Guerrero's testimony about when the table was purchased was not

an “offhand comment,” as the State indicates. (Brief of Respondent at 7) Ms. Guerrero was specifically questioned as to when the table was purchased. She answered that she “bought that with [her] tax returns...[a] couple of years ago.” (RP 73) At the time of the trial in 2016, defense counsel took “a couple of years ago” to mean 2014. (RP 73) Ms. Guerrero agreed that it was probably 2014 and estimated what month the table was purchased in based on when she normally gets her tax return. (RP 73)

From the evidence presented, interpreting the estimated time of this purchase as being off by two years, and assuming that the table was actually purchased in early 2012, cannot be reasonably inferred. Mr. Hubbard, Ms. Guerrero, and Ms. Guerrero’s children moved from Montana to Washington in March 2012, so even if Ms. Guerrero could not specifically recall the year the table was purchased, the only years this could have happened in Washington were 2012, 2013, 2014, 2015, or 2016. Ms. Guerrero testified that the table was purchased using a tax return “a couple of years” before the trial in late November 2016. A reasonable mind would thus infer that it was unlikely that Ms. Guerrero had purchased the table four and one half years prior to the trial. It could also be reasonably assumed that Ms. Guerrero would be as likely to associate the purchase of the table with the move to Washington and settling into a new residence as she was to associate the purchase with

receiving her tax return.

**e. S.A.L.'s recollection of specific dates was proven to be faulty.**

The State notes that S.A.L.'s "testimony was not discredited on cross-examination." (Brief of Respondent at 12) However, during cross-examination, S.A.L. admitted that she often gets her timelines of events a little bit confused. (RP 231)

S.A.L. specifically remembered that the kitchen table was in the room and that it was where her brothers were sitting when the first incident occurred. A reasonable conclusion, given S.A.L.'s own admission of confusing her timeline of events, is that there is insufficient evidence for a conviction of second degree rape and second degree child molestation.

**2. The State did not prove every element of the crime of giving S.A.L. drugs for his sexual gratification.**

The State notes that "[t]here was much evidence about the defendant and S.A.L. using drugs." (Brief of Respondent at 5) Evidence of drug use is not sufficient to establish that there was *sexual motivation* for defendant giving LSD to S.A.L. There were two adults in the home using LSD and growing and using marijuana. Sexual motivation is not the only reasonable explanation for giving S.A.L. LSD.

Both Ms. Guerrero and Mr. Hubbard admitted to using marijuana. (RP 71, 278) Both Ms. Guerrero and Mr. Hubbard admitted to doing LSD. (RP

69-70, 279). Ms. Guerrero and Mr. Hubbard had a marijuana grow operation. (RP 59, 71, 116-22, 125, 132, 218) Ms. Guerrero testified that both Mr. Hubbard and she had cards for growing marijuana, and that getting S.A.L. a medical marijuana card to allow them to grow more. (RP 60, 71) S.A.L. testified that she would trim the marijuana. (RP 215-16, 218, 227-28)

These facts establish that drugs were used in the home and that S.A.L. was well aware of this.

As to how S.A.L. ended up taking LSD the first time, S.A.L. testified that “it was talked about, and I honestly I wanted to try it.” (RP 205) However, Mr. Hubbard denied ever giving LSD to S.A.L. (RP 279)

The prosecutor asked S.A.L. if there were times that Mr. Hubbard gave her LSD just for herself. (RP 206) Though S.A.L. only describes one incident in answer to this question, S.A.L. later noted at least one other time, in Seattle, where she was given LSD that did not involve sex. (RP 225)

**3. There was prosecutorial misconduct in closing argument.**

**a. The full context of the prosecutor’s “dog and pony show” reference is the prosecutor’s entire closing argument.**

A prosecutor’s allegedly improper comments are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *State v.*

*Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Because Mr. Hubbard admitted to Count III, Rape of a Child in the Third Degree, there was no “sales pitch” involved in that charge; this indicates that the prosecutor’s “dog and pony show” comment was actually directed toward the charges Mr. Hubbard was denying, and not Count III, as the State argues (Brief of Respondent at 10).

The State also contends that other improper arguments in prosecution’s closing should not be raised on appeal because they were not objected to at trial. (Brief of Respondent at 11). Mr. Hubbard’s counsel objected to the “dog and pony show” comment of the prosecutor, Ms. Petra, to which Ms. Petra replied, “Anybody buying it?” before the Court ruled that “It’s closing. Go ahead.” (RP 309) The theme of the prosecutor’s closing argument continues in this same “dog and pony show” theme—or “sales pitch”, as the State has defined it—to which defense counsel had already objected. The Court allowed this testimony specifically because it was closing. Defense counsel’s objection to this line of attack was proper and remained for the duration of closing.

Ms. Petra asking “Anybody buying it?” two more times before moving on with her closing statement directly after her “dog and pony show” comment. (RP 309) She then reminds the jury of the “dog and pony show”—or “sales pitch”—by asking variations on this question twice

more: “Were you buying what he was selling?” and “Are you buying what he’s selling?” (RP 318, 324) Because the Court had already overruled defense counsel’s objection once, further objections would have been futile. These are derogatory, inflammatory, remarks that prejudiced Mr. Hubbard.

**b. Calling Mr. Hubbard’s defense a “sales pitch” is just as inappropriate as calling it a “dog and pony show.”**

The State cites to the Online Slang Dictionary, stating that a “dog and pony show” means a “sales pitch.” (Brief of Respondent at 10). Unlike the Cassell’s Dictionary of Slang and Webster’s Dictionary referenced in Appellant’s Opening Brief, the Online Slang Dictionary “is a dictionary of slang words, neologisms, idioms, aphorisms, jargon, informal speech, and figurative usages...” to which “logged-in users can submit terms [and] add definitions to terms” and “[n]ew content appears on the website immediately, without requiring editor or community permission.” See *App. A*. The Online Slang Dictionary, which can be easily changed by the public, is not an acceptable source.

Regardless, defining the prosecution calling defense counsel’s presentation a “dog and pony show” as a “sales pitch” is no better than defining it as an “elaborate or overblown affair or event” (Webster’s Third New International Dictionary, pg. 81a (2002)) or as creating an image of

“an event which boasts much presentation but little substance” (Cassell’s Dictionary of Slang, 2nd Edition (2005)). Mr. Hubbard did not make a sales pitch; he exercised his constitutional right to challenge the charges laid against him. Especially Count I (second degree rape and second degree child molestation), which he adamantly contends did not occur. Calling it a sales pitch, much less a dog and pony show, switches the burden from the State having to prove guilt to Mr. Hubbard having to prove innocence and impugns defense counsel. Mr. Hubbard should not have to “sell” his innocence to the jury—innocence is presumed until he is proven guilty.

### III. CONCLUSION

The evidence is insufficient to support the convictions for second degree child molestation and second degree child rape. Direct evidence shows that the sexual abuse did not occur between March 1, 2012 and August 7, 2012, given S.A.L.’s own admission of confusing her timeline of events. These convictions should be reversed. The evidence is also insufficient to support the sexual motivation enhancement attached to Count VI, because the evidence does not show a sexual motivation for the distribution of LSD. The jury finding of sexual motivation should be reversed. Finally, even if the evidence is found to be sufficient,

prosecutorial misconduct prejudiced the jury's verdict. Mr. Hubbard should be entitled to a new, fair trial.

Respectfully submitted this 30<sup>th</sup> day of August, 2017.

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CERTIFICATE OF SERVICE

The undersigned states the following under penalty of perjury under the laws of the State of Washington. On the date below, I personally e-filed and/or placed in the United States Mail the foregoing Reply Brief of Appellant with postage paid to the indicated parties:

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## **Appendix A**

## About

The Online Slang Dictionary is a dictionary of slang words, neologisms, idioms, aphorisms, jargon, informal speech, and figurative usages. It has been edited and maintained by [Walter Rader](#) ([editor@onlineslangdictionary.com](mailto:editor@onlineslangdictionary.com)) since its creation in December 1996.

## Highlights

Here are some of the things that make The Online Slang Dictionary unique.

- Started in 1996, we are the eldest slang dictionary on the web.
- A dictionary of only real slang, we're suitable for ESL students and native speakers looking to expand their vocabulary.
- ~~5,300 real world citations from TV programs, movies, news publications, and other sources demonstrate usage and prove accuracy.~~
- (Citations have been removed due to [Google's penalty against this site.](#))
- The website is a wiki: logged-in users can submit terms, add definitions to terms, and ~~edit existing definitions.~~
- New content appears on the website immediately, without requiring editor or community permission.
- We offer the most comprehensive free slang thesaurus on the web.
- The thesaurus is organized into hierarchical topics, letting you drill down for specific meanings, or take a step back for a broader perspective.
- Definitions are organized by part of speech, letting you quickly locate the desired meaning.
- SlangMaps show you where in the world you're more likely to hear each slang word.
- Usage voting lets users declare whether they use a word, no longer use a word, have heard the word but don't use it, or have never heard it.
- Usage votes are tabulated and displayed with each definition, letting you see at a glance whether a term is current our outdated; common or obscure.
- Vulgarity voting lets users vote on how vulgar each term is. Using a newly learned term no longer carries the risk of accidentally offending.
- The vulgarity votes comprise the largest-scale study of word offensiveness ever conducted. It opens the possibility for vulgarity analysis of text, such as [this analysis of the Gutenberg Project corpus.](#)
- If you have a strong stomach, be sure to check out [the 100 most vulgar slang words.](#)
- Unified search - accessible from every page - lets you search both the dictionary and thesaurus.

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**BURKE LAW GROUP, PLLC**

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