

Court of Appeal No. 35070-3-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

KEVIN JOHN HUBBARD

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF THE ARGUMENT

Kevin Hubbard appeals his convictions for second degree child rape, second degree child molestation, third degree rape, distribution of a controlled substance to a person under the age of 18, and aggravating factors. First, the evidence is not sufficient to support jury's verdict that Mr. Hubbard committed second degree child rape and second degree child molestation. The State failed to prove the crimes occurred between March 1, 2012 and August 7, 2012, as stated in the to-convict instructions. According to S.A.L.'s own testimony, the one instance of molestation and of rape could not have happened between the dates alleged. S.A.L. identified a kitchen table that was in the home when the alleged molestation and rape occurred, but that table was not purchased until 2014.

Furthermore, even if the evidence is deemed sufficient, misconduct by the prosecutor requires reversal and a new trial. The prosecutor disparaged defense counsel by calling defense's presentation a "dog and pony show" and bolstered S.A.L.'s credibility by role-playing Mr. Hubbard intentionally choosing to be dishonest.

Last, there is insufficient evidence to support the sentence enhancement for sexual motivation. The State presented no evidence that Mr. Hubbard provided LSD for the purpose of his sexual gratification. To the contrary, S.A.L. testified that LSD and sex happened independently of each other more than the two times they occurred together. The jury's finding on the sentence enhancement should be reversed.

B. ASSIGNMENTS OF ERROR

1. The defendant's conviction for second degree child rape and second degree child molestation is not supported by the evidence.
2. The prosecutor committed misconduct during closing argument by disparaging defense counsel and by suggesting to the jury that the defendant is not entitled to the benefit of reasonable doubt.
3. The defendant's sentence enhancement for sexual motivation is not supported by the evidence

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Whether any rational trier of fact could have found beyond a reasonable doubt that the defendant committed the crimes of second degree child rape and second degree child molestation between March 1, 2012 and August 7, 2012 when undisputed evidence shows that the events occurred later than the time period charged.
2. Whether the prosecutor committed misconduct by calling the defendant's case a "dog and pony show" and pretending to be the defendant giving dishonest testimony, thus implying wrongful deception on the part of defense counsel and bolstering the victim's credibility by discrediting the defendant
3. Whether the evidence supports the finding that the defendant provided LSD to the victim for sexual motivation when there was no evidence presented that the defendant committed the act for the purpose of his sexual gratification.

C. STATEMENT OF THE CASE

In August 2015, S.A.L. reported to her mother, Elena Guerrero, that she was being sexually abused by her mother's long term boyfriend, Kevin Hubbard. (RP 51, 66) After an investigation and trial, Mr. Hubbard was found guilty in Benton County Superior Court of second degree child rape, second degree child molestation, third degree child rape, and distribution

of a controlled substance to a person under 18 years of age, all with aggravating factors. (CP 179-191)

S.A.L. was born August 8, 1998. (RP 50) S.A.L.'s mother, Elena Guerrero, met Kevin Hubbard in 2001. The two began a long term relationship in 2007. (RP 51) Mr. Hubbard, Ms. Guerrero, S.A.L., and the couple's children lived in Montana until March 2012. (RP 51-53) That month the family moved to Richland, Washington. (RP 51-53, 57)

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) S.A.L. reported that she and Mr. Hubbard were at a park near her home watching her brothers play. (RP 189-90) S.A.L. was "really stoned." (RP 190) On the drive home, S.A.L. stated that Mr. Hubbard touched her on the leg and vagina outside her pants. (RP 190-19) When they got to the house, Mr. Hubbard had sex with S.A.L.. (RP 191) S.A.L. remembered that the act occurred after her 7th grade year, but before her 14th birthday. (RP 192) S.A.L.'s 14th birthday would have been August 8, 2012, the summer that she moved to Washington.

However, S.A.L. admitted that she gets her timelines and events confused and that this happened quite a few times. (RP 231) She initially said that she couldn't remember when she moved to Washington and it was either 2012 or 2013. (RP 188) She told other individuals prior to trial that she moved to Washington in 2011. However, at trial, she testified that she decided it was 2012 only after she spoke with her mother and her mother's friend. (RP 232) Even the State got the time line confused in closing, telling the jury in closing that S.A.L. and her family moved here in 2011, not 2012. (RP 329)

At the time of this incident, S.A.L. remembered that her young siblings were eating at the kitchen table in the room where Mr. Hubbard first had sex with her after the park. (RP 191) S.A.L. identified a picture of her living room and kitchen where the incident took place. She testified that the picture was an accurate depiction of all the furniture that was in the room that day, except for a carpet shampooer in the corner. The room looked how she remembered it. Specifically, she said her brothers were sitting at the kitchen table in the picture. She pointed out the different chairs where her brothers were sitting while at the table. (RP 233-35) Contrary to S.A.L.'s timeline that this incident occurred in 2012, S.A.L.'s mother testified that she purchased the kitchen table with her tax returns in 2014, most likely in March. (RP 72-73) Based on S.A.L.'s date of birth, she would have been over 14 years old when the table first appeared in the house, which is the earliest the act could have occurred.

S.A.L. also gave other inconsistent testimony at trial. For instance, she stated that she was eight years old when she was in 6th grade. (RP 184-185, 231) She also testified that Mr. Hubbard didn't touch her once they moved, but then proceeded to tell how he touched her the summer after 7th grade, the same year she moved to Washington. (RP 189, 233)

Mr. Hubbard admitted at trial that he had sex with S.A.L., but not before she was 15 years old. (RP 274) Mr. Hubbard admitted that he had sex with S.A.L. multiple times when she was 16 years old. (RP 279-80) Mr. Hubbard testified that between March 2012 and the summer of 2012, he did not touch S.A.L.. (RP 274)

The State's charge for distribution of a controlled substance to a person under 18 years old specifically identified LSD at the substance being distributed. However, the State primarily focused on Mr. Hubbard's marijuana operation. The State's witnesses were mostly law enforcement

personnel who participated in the search and investigation of Mr. Hubbard's home for marijuana and experts on how marijuana is processed into THC oil. (See RP 18-45, 71-178)¹

S.A.L. gave inconsistent testimony regarding LSD as well. She stated that LSD and sex always went hand and hand, but then immediately testified that he also gave her LSD for herself when it didn't involve sex. She said that Mr. Hubbard gave her LSD for herself once, and her mother was present. (RP 205) Still, she later she testified to another incident where she was on LSD in Seattle that didn't involve sex. (RP 225) Mr. Hubbard denied that he ever gave S.A.L. LSD. (RP 279)

When asked about the times when she took LSD prior to sex in Washington, she testified that this only happened twice. (RP 207, 226-227) One incident happened when S.A.L. was 15. Early in the evening, S.A.L. took LSD, allegedly provided by Mr. Hubbard, and was left alone. While S.A.L. was high, Ms. Guerrero and Mr. Hubbard left and went to a rave. (RP 207) Later, when they arrived home, Ms. Guerrero initially went to sleep. She woke up and found Mr. Hubbard having sex with S.A.L. (RP 207) Ms. Guerrero did not report the incident to the police. (RP 63)

When the State asked if S.A.L. remembered another time where she was on LSD and had sex, S.A.L. responded, "It was one other time." She recounted a second incident, which happened in her bedroom, but she couldn't remember much because it was all a blur. (RP 227) She never testified that Mr. Hubbard gave her the LSD on either instance when sex was involved, much less say that his purpose in giving her LSD was to have sex. S.A.L. also testified to numerous incidents where she alleged

¹ After the State rested, the charges associated with marijuana were dismissed due to the decision in *State v. Crowder*, 196 Wn. App. 861, 385 P.3d 275 (2016). (RP 266-67)

Mr. Hubbard has sex with her without having to give her LSD. The Police found no LSD at Mr. Hubbard's house during the search.

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 must be proved 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) The jury was also instructed that sexual motivation means that "one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification." (CP 137)

In closing, the prosecutor stressed to the jury that that credibility of S.A.L. and Mr. Hubbard was at issue and it was up to them to decide who to believe. (RP 317-18) The prosecutor referred to defense's presentation of the case as a "dog and pony show" and asked the jury "Anybody buying it?" (RP 309) Defense counsel objected, but was overruled. (RP 309) The prosecution furthered this circus theme when she pretended to be the defendant testifying and then by asking if the jury if they were "buying what he was selling." (RP 324)

"Who is the only person in this courtroom that has a personal interest in this case? Ding ding ding. He's the only one. Do you think he has motive to be dishonest with you when he got up there? Do you think he's got a motive to be dishonest with you? He listened to all the evidence. "Ooh, boy. That DNA. This is looking bad. I'm going to have to admit to that rape III. Oh, wait. My wife came and testified and said, 'I watched you --' oh, I -- that's looking bad. I'm -- oh. Oh, but I didn't do that. I didn't touch her when she was 13. Oh, no, no, no." Are you buying what he's selling? Don't give in to that. The fact that he has a motive to be dishonest with you is something you can take into consideration regarding his credibility, regarding whether you believe him."

(RP 324)

The jury found Mr. Hubbard guilty of all charges- Count 1: second degree child rape with the aggravating circumstances of using position of trust and a pattern of sexual abuse; count 2: second degree child molestation with the aggravating circumstances of using position of trust and a pattern of sexual abuse; Count 3: third degree rape of a child with the aggravating circumstances of using position of trust and a pattern of sexual abuse; and Count 4: distribution of a controlled substance to a person under the age of 18, with a sentence enhancement of sexual motivation.

D. ARGUMENT

1. There was insufficient evidence to support the jury's verdict of second degree rape and second degree child molestation

In a criminal prosecution, due process requires the State to prove each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Cr. 1068, 25 L.Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 821, 874-75, 83 P.3d 970 (2004). A claim of insufficiency of the evidence admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* Thus, the pertinent question on appeal is whether any rational trier of fact could have found the essential elements of the crime after viewing the evidence in the light most favorable to the State. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d 114 (2006). When there is substantial evidence,

and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and decide the questions of fact. *Id.* If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. *State v. Lee*, 128 Wn.2d 151, 164, 904 P.2d 1143

Second degree rape and second degree molestation both contain the element that the victim must be at least twelve years old but less than fourteen years old. RCW 9A.44.076(1); RCW 9A.44.086(1).

The State failed to present sufficient evidence to support the convictions for second degree child rape and second degree child molestation. According to the jury instructions, as an element of the crime, the State needed to prove beyond a reasonable doubt that the crimes occurred between March 1, 2012 and August 7, 2012.² This element was not met for either crime. The undisputed evidence shows that the alleged molestation incident in the park that continued to sex at S.A.L.'s home could not have happened earlier than 2014. The kitchen table that S.A.L. insisted and specifically remembered was in the room was not purchased until March 2014. S.A.L. remembered her brothers sitting at this table. S.A.L.'s mother testified that she purchased the table with her 2014 tax return. The incidents could not have happened between March 1, 2012, and August 7, 2012.

S.A.L.'s inconsistent testimony at trial shows that she did not have a good grasp on dates, making her statement that the incident occurred before her 14th birthday unreliable. This statement does not establish the

² In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction. *State v. Lee*, 128 Wash.2d 151, 159, 904 P.2d 1143 (1995)

time and date elements of the crimes beyond a reasonable doubt. S.A.L. testified that she was often confused on dates. She gave inconsistent statements about when she moved to Washington until her mother told her the date that she gave at trial. And, she testified that she was eight years old in the sixth grade. Her past inconsistent statements on dates establish her testimony alone is not sufficient to establish her age or when the incidents occurred. She negated the 2012 date she alleged with her own testimony. Further, Mr. Hubbard's testimony supports this timeline, as he admits the incident occurred, but not when S.A.L. was 13.

The evidence is clear. The undisputed date of when the table was purchased establishes that the crimes could not have taken place within the timeframe included in the jury instructions for second degree molestation and second degree rape. Furthermore, considering the inconsistent testimony from S.A.L. and the testimony from Mr. Hubbard that supports a timeline different than charged, the evidence is insufficient to support the convictions for these two crimes. In viewing the evidence in the light most favorable to the State, no rational trier of fact could have found that the incident at the park that continued to S.A.L.'s home happened between March 1, 2012 and to August 7, 2012, and that S.A.L. was less than 14 years old at the time. The convictions for Count I and Count II must be reversed.

2. The State committed prosecutorial misconduct by referring to Defense's case as a "dog and pony show"

Even if the evidence is found to be sufficient to support second degree rape and second degree molestation, the contradiction in testimony combined with prosecutorial misconduct is enough to warrant reversal of all of Mr. Hubbard's convictions.

A claim of prosecutorial misconduct requires a showing that the prosecutor's comments were improper and that the comments were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008). In determining whether prosecutorial misconduct occurred, we first evaluate whether the prosecuting attorney's comments were improper. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the prosecuting attorney's statements were improper, and the defendant made a proper objection to the statements, then we consider whether the statements prejudiced the jury. *Id.* at 145. Prejudice is established only where “there is a substantial likelihood the instances of misconduct affected the jury's verdict.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). 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. *Dhaliwal*, 150 Wn.2d at 578.

It is improper for the State to suggest to the jury that the defendant is not entitled to the benefit of reasonable doubt. *Id.* at 26-27. Also, “It is improper for the prosecutor to disparagingly comment on defense counsel's role or impugn the defense lawyer's credibility.” *State v. Thorgerson*, 172 Wn.2d 436, 451, 258 P.3d 43 (2011). For instance, commenting that the accused's defense engaged in “sleight of hand” tactics has been found to be impermissible and implies wrongful deception or even dishonesty in the context of the court proceeding. *Id.* at 452. Also, describing that defense counsel's argument as a “classic example of taking these facts and completely twisting them to their own benefit, and hoping that you are not smart enough to figure out what in fact they are doing” is also an improper comment on defense counsel's role. *Warren*, 165 Wn.2d at 29-30.

According to Webster's Dictionary, a dog and pony show is defined as an "elaborate or overblown affair or event." (Webster's Third New International Dictionary, pg. 81a (2002)). Cassell's Dictionary of Slang states the phrase "dog and pony show" originated from small circuses, where these animals were the sole performers, thus creating an image of "an event which boasts much presentation but little substance." (Cassell's Dictionary of Slang, 2nd Edition (2005)).

Here, the prosecutor made similar improper comments about defense counsel's presentation of the case as in *Thorgerson and Warren*. The prosecutor called defense counsel's presentation a "dog and pony show" and repeatedly asked the jury if they were "buying it." (RP 309) Although defense counsel properly objected to this comment, the court allowed it. (RP 309) Later, the prosecutor pretended to be Mr. Hubbard acting dishonestly. She spoke as if she was Mr. Hubbard thinking out loud and planning his lies. She essentially testified for him and told the jury he was lying. (RP 324) By using this derogatory term and asking the jury if they believed it, and by mimicking the defendant acting dishonestly, the prosecutor insinuated that defense counsel's presentation was an overblown, elaborate lie with little substance and that Mr. Hubbard was dishonest and guilty.

These improper comments prejudiced the jury. When taken in context of the trial and ultimate question of credibility, the comments had a substantial likelihood of altering the outcome of the case. The prosecutor stressed that credibility was an issue. S.A.L. gave inconsistent testimony, and her statement was the only evidence that the alleged second degree child rape and second degree child molestation happened within the timeline charged. Thus, discrediting defense counsel's argument and Mr. Hubbard's character was crucial. The prosecutor's disparaging remarks

essentially told the jury to disregard defense counsel's case because it was an overblown affair that could not be believed.

When the prosecutor's improper closing remarks and other cumulative errors at trial prevent a defendant from having a fair trial, the remedy is to reverse the judgement and remand for a new trial. *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992). In *Alexander*, a jury convicted the defendant of two counts of first degree child rape. *Id.* at 149. The credibility of the parties was at issue during at the trial because the testimony of the child victim and the defendant directly conflicted. *Id.* at 154. The child victim gave inconsistent testimony regarding when the abuse occurred. *Id.* at 149. Additionally, a counselor at trial improperly vouched for the child victim's credibility and the prosecutor made improper remarks at trial in an attempt to bolster the victim's trial testimony and credibility. *Id.* at 154-55. *Id.* 149. On appeal, the court reversed the judgement and remanded for a new trial. *Id.* at 158. Based on the circumstances, the court could not conclude that a rational jury would have returned the same verdict had the bolstering testimony and the prosecutor's improper remarks been properly excluded. *Id.*

Here, if the evidence is found to be sufficient to support counts one and two, and no or little weight is given to the evidence that the alleged crimes had to occur after 2014, the credibility of the S.A.L. and Mr. Hubbard becomes an issue. Like in *Alexander*, the testimony of S.A.L. and Mr. Hubbard directly conflicted. Also like *Alexander*, S.A.L. gave inconsistent testimony and the prosecutor made improper comments to bolster credibility.

Viewing the prosecutor's improper comments in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given, there is a substantial likelihood

the instances of misconduct affected the jury's verdict. The remedy is to reverse Mr. Hubbard's convictions and remand for a new trial.

3. There is insufficient evidence to support the jury's finding that the defendant provided LSD to the victim for sexual motivation.

The evidence is insufficient to support the special verdict that Mr. Hubbard committed Distribution of a Controlled Substance to a person under the age of 18, as charged in Count IV, with sexual motivation. (CP 161) "Sexual motivation" means that one of the purposes for which the defendant committed the crime was for the purpose of his or her sexual gratification. (CP 137). Count IV alleged distribution of LSD. (CP 127)

"[T]he State must prove beyond a reasonable doubt that the defendant committed the crime for the purposes of sexual gratification. It must do so with evidence of identifiable conduct by the defendant while committing the offense." *State v. Vars*, 157 Wn. App. 482, 494, 237 P.3d 378 (2010).

"Purpose" and "sexual gratification" are the two key terms in the definition of sexual motivation. *State v. Halstien*, 122 Wn.2d 109, 118-19, 857 P.2d 20 (1993). Sexual motivation requires "evidence of identifiable conduct by the defendant while committing the offense which proves beyond a reasonable doubt the offense was committed for the purpose of sexual gratification." *Id.* at 120.

Here, there is insufficient evidence that Mr. Hubbard gave S.A.L. LSD for the purpose of sexual gratification. S.A.L. identified only two incidents where she alleged she was on LSD when she had sex with Mr. Hubbard. In neither of these instances does she say that Mr. Hubbard gave her LSD for the purpose of having sex. While S.A.L. said that she would smoke THC oil to loosen her up, she never testified that LSD was used for this

purpose. The distribution of marijuana count was not submitted to the jury and cannot be the basis for the sexual motivation enhancement.

Nor can sexual motivation be inferred. There was no link to the sex and the LSD. According to S.A.L., sex occurred with or without LSD. Likewise, there were times that she alleged Mr. Hubbard gave her LSD without having sex. Simply having sex with the victim after taking LSD, without more, does not establish that the purpose was to gratify sexual desire. Sex and LSD use occurred independently from each other many more times as compared to the two times they overlapped.

Additionally, the facts do not support a connection. In one incident, there was too long a period of time between when S.A.L. took LSD and the sexual activity to support an inference that Mr. Hubbard's purpose was sexual gratification. S.A.L. spent the majority of the time high alone. Moreover, the extended period was long enough for Mr. Hubbard and his wife to attend a rave. It was only after Mr. Hubbard came home and S.A.L. was sleeping that sex allegedly occurred. This extended time frame does not support a finding that Mr. Hubbard gave S.A.L. LSD for the purpose of his sexual gratification.

The evidence is insufficient to support the conclusion that the purpose of giving S.A.L. the LSD was for Mr. Hubbard's sexual gratification. No testimony was given that the LSD was provided for this purpose and there is no connection between the distribution of LSD and sex. The jury finding of sexual motivation should be reversed.

E. CONCLUSION

The evidence is insufficient to support the convictions for second degree child molestation and second degree child rape. Direct evidence shows that the events did not occur between March 1, 2012 and August 7,

2012. 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 connection between the distribution of LSD and sexual gratification. No testimony was given that LSD was provided for this purpose. 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 15th day of May, 2017.

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