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Division III
State of Washington
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No. 36480-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
ARMANDO GOMEZ DIAZ,
Appellant.

AMENDED BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. The State failed to prove the victim was less than 12 years old at the time Diaz touched her breasts.
2. Trial counsel was ineffective for failing to object to committed misconduct by vouching for the victim witness.
3. The trial court erred when it imposed a condition of his supervision that restricted his visitation with his biological son.

RESPONSE TO ASSIGNMENT OF ERROR.

1. The State elicited evidence that the victim MG was 11 at the time Diaz touched her breasts. Diaz admitted this touching on the stand.
2. Trial counsel was not ineffective.
3. The condition was properly imposed.

II. STATEMENT OF THE CASE

Diaz began living with Alicia Chavez and her three children, M.G. who at the time of trial was 15, A.G. who at the time of trial was 13, S who was 9 at the time of trial between September and October 2013. RP 145. Diaz and Alicia Chavez were married on August 2, 2015. RP 145. The family lived in a home on Jerome Avenue and they later moved in December 2106 to an apartment with three bedrooms on Castlevale. RP 146. They later had a fourth child, a son, named E who was 4 at the time of trial. RP 145, 263.

On May 23, 2017 Ms. Chavez went out with her daughter M.G. and son E. When they arrived back at the apartment Ms. Chavez entered the room she shared with Diaz and when she went to the adjoining bathroom, she found her husband, Diaz, standing behind her daughter. Ms. Chavez called out “I am home, my love” and pushed open the door to the bathroom which was only open a crack. Diaz

turned towards her and the zipper on his pants was down and his penis was outside his pants. She saw that her daughter's pants and her underwear were below her bottom. She asked what was going on. RP 145-8, 162. She testified that Diaz's pants were still on, but the button was undone and the zipper was down. Ms. Chavez could not state whether Diaz's penis was erect or not. RP

148. She testified as follows:

Q. When you saw this, did you say anything? Did Armando say anything?

A. I asked, what's going on?

Q. Did Armando reply?

A. Yes.

Q. What did he say?

A. That it wasn't what I was seeing, that it wasn't what I thought it was.

Q. Go ahead.

A. And then I said, if it's not what I'm seeing, then you tell me what it is.

Q. Did he say anything else at that point?

A. That it was the first time, that it had not happened before ever.

Q. Who was saying that, that it was the first time and it had never happened before?

A. Armando.

Q. I guess, what was going through your mind at this point?

A. I thought it was a nightmare, that I was going crazy, if my eyes were seeing something and my ears were hearing something different. So, what was really happening then?

Q. Can you tell us what Alondra was doing during this discussion?

A. I sent her to her room.

Q. Any further discussion with Armando at that point?

A. Just that it was the first time, that he had never done this before, that he didn't know what had happened to him, that he didn't want to.

Q. What happened next?

A. I asked him to leave the house, that I wanted to talk to my daughter.

Q. How did Armando respond to that?

A. He didn't want to leave. He was asking for forgiveness.

Ms. Chavez called the police. And asked M.G. if anything similar had happened to her. After they arrived and had spoken to A.G. they also spoke to M.G. RP 153.

A.G. testified regarding the attempted rape. She testified that her birthday was March 22, 2005, that she was thirteen and in the eighth grade at the time she testified. And that she had three siblings. RP 172

A.G. testified that at the time her mother entered the bathroom that Diaz was "...was trying to put his private part into mine...in the back." RP 174, 180-82. She testified that it had happened before and that it started before Diaz and her mother had been married. RP 173-4. A.G. testified that he began living with the family before Diaz and Ms. Chavez were married. RP 175.

A.G. testified that she spoke to M.G. about whether Diaz was "...doing the same thing to her." RP 178. She testified that she and her sister did not tell their mother about the molestations because "...me and my sister didn't want to hurt my mom's feelings."

M.G. testified the same way as her Mother and her sister. October 11, 2017. She testified that she was 15 and in the tenth grade on that day. RP 185. She testified that after her sister had been touched and the police called, she too spoke to the police and told them she too had been touched sexually by Diaz. RP 186.

She testified that "[h]e would touch my boobs and my private spots...with his hands." RP 185 And that he had put his private in her private. RP 185-6. She testified that he started living with her mother when she "...was like 10." RP 186

She further testified:

Q. Okay. Can you remember the first time that Armando did something with you?

A. We were in his room watching a show. He asked if my boobs hurt and started touching them.

Q. He asked -- I'm sorry?

A. He asked if my boobs hurt and started touching them.

Q. Okay. What show were you watching?

A. El Chavo.

Q. What were you watching it on?

A. His phone.

Q. Can you tell us how he touched your boobs. Did you have a bra on?

A. Yeah.

Q. Did he touch over the bra or under the bra?

A. Under.

M.G. testified that she and her sister A.G. talked about what Diaz was doing to them, but she did not tell her mother “[b]ecause I didn’t know how.” RP 190.

On cross examination M.G. further testified:

Q. Monse, good afternoon. If I'm understanding correctly, Armando was doing something like this to you at least once or twice a week; is that right?

A. Yes.

Q. That went on since you were 11 years old?

A. Yes.

Q. How old were you when Armando was no longer in the house?

A. I was 14.

Q. Pardon?

A. I was 14.

Q. Armando was doing this to you once or twice a week for, what, three years?

A. Yes. RP 190.

Diaz took the stand and testified. He testified that he did not know that A.G. was home on the day that he tried to rape her. RP 269. He testified:

Q. Where was Alondra at this time?

A. In the bathroom.

Q. How many bathrooms does your residence -- did that residence have?

A. Two.
Q. Where was there one attached to your bedroom?
A. Yes.
Q. Was Alondra in that bathroom or the other one?
A. Yes, in this one.
Q. Did you see Alondra in the master bathroom?
A. Yes.
Q. So what happened next?
A. When she called me, I was like in shock when I saw her with her pants down.
...
A. When she called me, I found her in the bathroom. I found her there when I walked in.
Q. Where were her pants when you found her in the bathroom? A. She had them right here. They were not all the way down. They were just right here.
Q. When she was calling for you, what was she saying?
A. She just called my name.
Q. Have you ever seen Alondra with her pants down before?
A. No.
Q. Would you have expected her to have her pants down when you came into the bathroom?
A. No.
Q. Do you know why her pants were down?
A. No.
Q. Did she tell you why she had her pants down?
A. No.
Q. Did she tell you why she called you into the bathroom?
A. No.

When asked about his interactions with M.G. the following took place:

Q. Monse said that there were times when you would take your hands and rub her breasts underneath her bra. Did you ever do that?
A. Just one time.
Q. Can you explain.
A. I don't know why she came to me that time, just like playing. I mean, I had never had contact with them, mean like mingling like that.
Q. So was Monse playing?
A. Yes.
Q. When you ended up touching her, was that over her clothing or under her clothing?

A. It was like a type of an accident. When she hugged me and I took her away from me like this.

Q. So was it something you were doing for a while or was it just momentary?

A. Momentarily.

Q. When your hand touched her breast, was that something you were doing for your sexual interest?

A. No.

Q. We heard Monse say that you touched her on her breasts or on her vagina or on her anus maybe two or three times a week. Did that happen?

A. No. RP 279

The court charged the jury with the law it was to follow in this case. The very first instruction was read to the jury and copies were sent back with the jury during deliberations. That instruction reads in part:

Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial... Each party is entitled to the benefit of all the evidence whether or not that party introduced it. You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness... The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions. RP 294-6

Instruction 14 read as follows: "A person commits the crime of first degree child molestation as charged in Count 4 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."

The "to convict" instruction, No. 15, for Count 4 reads in part:

To convict the defendant of the crime of first degree child molestation as charged in Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on, about, during or between May 1, 2014, and August 31, 2014, the defendant had sexual contact with M.G.;

(2) That M.G. was less than 12 years old at the time of the sexual contact and was not married to the defendant;

(2) That M.G. was at least 36 months younger than the defendant;

RP 303

Defense counsel objected at least four times during the State's closing and on at least two occasions the court reinstructed the jury as to the law regarding the statements of the lawyers. RP 332, 335

The State's closing argument covers approximately twenty-three pages 308-23 and rebuttal 330-38. In closing the attorney for the State said:

There's three counts that involve Monserrat. This is Count 4. It's dated on May 1, 2014, through August 1, 2014. For this she testified that she was 11. It was before the wedding when the defendant married her mom. It was while she was in the sixth grade.

So, they were married on August 2, 2015. It took place before August 2, 2015. She was 11. She was in the sixth grade. So, it fits that date here of May 1, 2014, through August 31, 2014. They were married on August 2nd.

RP 318

There was no objection made after this statement.

III. ARGUMENT

1. The State proved count 4 Child Molestation in the First Degree beyond a reasonable doubt.

Diaz charged with one count of Child Molestation in the First degree. RCW 9A.44.083. Child molestation in the first degree

- (1) A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.
- (2) Child molestation in the first degree is a class A felony.

To determine whether sufficient evidence supports an adjudication, this court will view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the crime's elements beyond a reasonable doubt. State v. Tilton, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

Appellant challenges the sufficiency of the evidence to support his one conviction for Child Molestation in the First Degree as alleged in count 4.. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94

Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990). Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.

In this case the State was required to prove to the jury that M.G. was less than twelve years old at the time Diaz touched her breasts, that Diaz was at least eighteen years old at the time of the offense, was not married to M.G. and that M.G. was at least thirty-six months younger than Diaz.

The victim's testimony on direct and cross examination was she was 11

years old and that Diaz touched her “boobs” under her bra. That this was the first of many incidents. RP 185-87. Diaz admitted to touching M.G.’s breasts but his explanation was that it was some sort of accidental or incidental contact which was actually caused by her. RP 279

Ms. Chavez testified that Diaz was not married to M.G. and stated that his date of birth was “5-11-64” which based on the fact that M.G. was 15 in 2017 and 11 at the time of the touching in 2014 would mean Diaz, depending on the specific date of birth of the victim (which as indicated by Diaz was not testified to) was approximately 50 years old at the time he touched M.G.’s breasts. RP 145-6.

It is very important for this court to note the actual language of both the charging documents and the “to convict” jury instruction. Neither one of those documents are written such that the State is required to prove that this act took place between the specific months listed. The qualifying language is inserted in this type of case because rarely do child victims have the ability to state an exact date when the sexual contact occurred.

With emphasis on what was required to prove beyond a reasonable doubt the charge read as follows:

On, about, during or between May 1, 2014 and August 31, 2014, in the State of Washington, you engaged in sexual contact with and you were at least 36 months older than the victim, M.G., a person who was less than 12 years old and not married to you and was not in a state registered domestic partnership with you.

In State v. Yallup, 3 Wn. App.2d 546, 416 P.3d 1250, (Div. 3 2018) this court addressed a similar case involving counts of rape of a child:

The first principle is that the charging period is more flexible than the mere time frame alleged in the information. When charging using "on or about" or similar language, the proof is not limited to the delineated time period. Hayes distilled the general rule: "where time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi. Time is not an element of most sex offenses. (Citations and footnotes omitted.) Yallup, 416 P.3d, at 1254

This court then went on to address the;

"..." resident child molester:" a person who has regular access and frequently abuses his victim, leading to a lack of specificity of timing for each offense. In those cases, alibi or misidentification are not genuine defenses. Rather, the true issue is credibility. Hayes described the three factors that were needed to prove sex abuse based on "generic" testimony:

First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points. (Citations omitted.)

Yallup is dispositive of the sufficiency allegation raised by Diaz. The facts set out above satisfy the requirements this court addressed in Yallup. M.G. testified Diaz touched her "boobs" under her bra she testified this was the first incident and the touching started when she was 11 years old. Her mother, Diaz's former wife, testified as to Diaz's date of birth which allowed the jury to determine his age at the time of the molestation and Ms. Chavez confirmed that

M.G. was not married to Diaz. Clearly the jury was able to determine from the dates given what the ages were of M.G. and Diaz at the time of the molestation.

2. Ineffective assistance of counsel - Prosecutorial misconduct.

The Appellant has failed to meet his burden of establishing both improper conduct during the State's closing argument. Therefore, the fact trial counsel did not object cannot be error and cannot be ineffective assistance.

A defendant alleging prosecutorial misconduct bears the burden of first establishing "the prosecutor's improper conduct and, second, its prejudicial effect." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). This court will evaluate a prosecutor's challenged statements "within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Courts review allegations of prosecutorial misconduct during closing argument in light of the entire argument, the issues in the case, the evidence discussed during the argument, and the court's instructions. State v. Sakellis, 164 Wn. App. 170, 185, 269 P.3d 1029 (2011).

The prosecutor expressed reasonable inferences from the evidence. The State's attorney said M.G. testified she was 11, she did testify to this fact. He stated Ms. Chavez and Diaz were married on August 2, 2015, from the dates given and as to the age of M.G. at the time of trial, the date when she would have been 11 the jury was obviously able to deduce that M.G. was 11 before 2015 and that she was in the sixth grade. This would have been simple math. M.G. was 15 and in the tenth grade when she testified at trial, therefore four years earlier she

would have been 11 and in the sixth grade.

It is very important for this court to note this challenge is that the State introduced evidence that was not before the jury. But that is incorrect, the State did not say “M.G. testified she was born on XYZ date and that she was in the sixth grade.”

A defendant claiming insufficiency admits the truth of the State's evidence and **all reasonable inferences drawn in favor of the State**, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (Emphasis added.) The State in closing drew upon the facts before the jury and drew inferences from that evidence. Clearly Diaz’s attorney did not believe this was misconduct. He was not shy about objecting to other statements made during closing and yet he did not object to the statement Diaz now claims as an error of such significance that this conviction for fondling the breasts of his 11 year old step-daughter should be overturned.

Once again, there was never an objection lodged, there was no move to strike or to admonish the jury to disregard what was testified to or the form of the question. A defendant who fails to object to the State’s improper act at trial waives any error, unless the act was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. State v. Thorgerson, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). In making that determination, the courts “focus less on whether the prosecutor’s misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured.” Emery, 174

Wn.2d at 762.

This court recently affirmed this standard in State v. Barbarosh, Slip Opinion, COA #36010-5-III, (August 29, 2019):

To demonstrate prejudice, the defendant must show a substantial likelihood that the prosecutor's misconduct affected the jury's verdict. Thorgerson, 172 Wn.2d at 443. A failure to object to an improper remark waives review of the error unless the remark "is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *Id.* (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). In making that determination, the court "focus[es] less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012).

The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (citations omitted).

The evidence in this case was overwhelming. Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The purpose of the harmless error rule is to prevent setting aside convictions for small errors or defects that have little, if any, likelihood of changing the result of the trial.

3. Community Custody condition.

Diaz argues the condition infringes on his parental rights. As a condition of sentence, the trial court may impose crime-related prohibitions and prohibit conduct that relates directly to the circumstances of the crime for which the offender has been convicted. State v. Berg, 147 Wn.App. 923, 942, 198 P.3d 529 (2009). This court will review sentencing conditions for abuse of discretion, and such conditions are usually upheld if reasonably crime related. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008).

Parents have a fundamental right to raise their children without state interference, but parental rights are not absolute and may be regulated. State v. Corbett, 158 Wn.App. 576, 598, 242 P.3d 52 (2010). In criminal cases, a sentencing court may impose limitations on parenting rights when reasonably necessary to further the State's compelling interest in protecting children. Berg, 147 Wn.App. at 942; *see also* State v. Letourneau, 100 Wn.App. 424, 438, 997 P.2d 436 (2000) (limits on fundamental rights during community custody terms that help prevent the defendant from committing further criminal conduct during his sentence are constitutional).

Corbett is instructive here. Corbett was convicted of raping his six-year-old stepdaughter, and the sentencing conditions prohibited his contact with all minors, including his biological children. Corbett, 158 Wn.App. at 586. Corbett argued barring contact with his children was not a valid crime-related prohibition because the State had failed to show he was a danger to his sons. Corbett, 158

Wn.App. at 597. Division II rejected that argument, noting that his crimes were perpetrated against a minor he had parented:

Corbett's crime establishes that he abuses parental trust to satisfy his own prurient interests. The trial court's no-contact order prohibiting Corbett from having contact with his biological children is directly related to his crime because they fall within a class of persons he victimized. Corbett, 158 Wn.App. at 601.

As support, Division II relied in part on Berg, 147 Wn.App. at 942-43, where the defendant had molested his stepdaughter in their home. Consequently, an order restricting his contact with other female children in the home was reasonable to protect his biological daughter from the same type of harm. Berg, 147 Wn.App. at 943.

State v. Letourneau, 100 Wn.App. 424, 438, 997 P.2d 436 (2000) is cited by Diaz, however it is factually distinguishable. In Letourneau, 100 Wn.App. at 442, Division I struck a community custody condition barring the defendant from having unsupervised in-person contact with her minor children. Her offenses had not involved children in her home, and her evaluators agreed that she was not a pedophile. Letourneau, 100 Wn.App. at 441. Consequently, there was no evidence that she posed any danger to her children, and the condition restricting contact was not reasonably necessary to protect them from the harm of sexual molestation by their mother. Letourneau, 100 Wn.App. at 441-42.

Diaz also cited State v. Ancira, 107 Wn.App. 650, 27 P.3d 1246 (2001), Division I again struck down a no-contact condition barring the defendant from contacting his children. Ancira had been convicted of violating a domestic

violence no-contact order concerning his wife. Ancira, 107 Wn.App. at 652-53. Division I reasoned that because Ancira was already barred from contacting his wife, the provision barring contact with his children was not reasonably necessary to prevent them from the harm of witnessing further domestic violence. Ancira, 107 Wn.App. at 655.

Corbett is factually similar. There the court upheld an order that prohibited any contact between Corbett and any minor, including his own children. There, as here, there was parenting facet to the underlying charges. There was no abuse on the part of the court.

IV. CONCLUSION

For the foregoing reasons, the State asks this court to deny this appeal and affirm the conviction.

Dated this 8th day of December 2019,
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DECLARATION OF SERVICE

I, David B. Trefry, state that on December 8, 2019, I emailed a copy of the Respondent's Amended Brief to: Lisa Ellner at Liseellnerlaw@comcast.net

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2020 at Spokane, Washington.

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