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No. 37106-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
JUAN ACEVEDO-GIRON,
Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

1. The State failed to prove Giron committed Child Molestation beyond a reasonable doubt as charged in Count 4.
2. The State failed to prove Giron committed Child Molestation beyond a reasonable doubt as charged in Count 5.

RESPONSE TO ASSIGNMENT OF ERROR.

1. The State proved both Counts 4 and 5, First Degree Child Molestation, beyond a reasonable doubt. There was no error.

II. STATEMENT OF THE CASE

Giron was charged with 6 (six) counts; Count 1- Attempted Indecent Liberties, Count 2 - Second Degree Assault – Sexual Motivation, Count 3 – Felony Harassment of Another – Threats to Kill – Sexual Motivation, Count 4 – First Degree Child Molestation, Count 5 – First Degree Child Molestation, Count 6 – First Degree Rape of a Child. Giron moved to sever counts prior to trial. The State agreed to sever an unlawful possession of a firearm charge and a count of violation of a no contact order. RP 9-10. The defendant presented his motion to sever and filed briefing addressing this issue. RP 9-10, 17-22 CP 40-44, 343-44.

The charges against Giron alleged that his criminal acts “...were committed as part of an ongoing pattern of abuse of the victim.” CP 62-65

Giron’s motion to sever recognized and addressed the possibility and legal basis for the State’s actions. 17-18, CP 40-44. The State argued that the method of charging reflected the defendant’s actions. “What we're talking about is a common scheme or plan that starts with conduct from this girl's early childhood

and continued up to 2017.” RP 18-19.

The court read the defendant’s briefing and heard oral argument and then made a nearly three-page ruling:

As far as cross admissibility, I believe under some of the case law that I have reviewed in Tegland, and I haven't done so in depth, but in this kind of situation it's very likely the trial court, including myself, under these circumstances would allow the cross admissibility in each of the cases if the cases were severed from the standpoint of a common scheme, plan or continuity of behavior under 404(b). It is the same victim alleged in each of the counts.

For purposes of judicial economy, which I have to weigh against prejudice to the defendant, it makes more sense to try these all at once than to try them separately. There is certainly an opportunity for Mr. Doherty to challenge the recollection of the alleged victim in these cases on cross examination because time has passed.

I don't have any kind of declaration or anything to support the motion or to refute the motion one way or the other as far as the strength of this particular witness' testimony. It's hard for me to make that analysis at the last minute here in court.

For those reasons, I'm going to deny the request to sever at this point. This would be going forward on, I believe, Counts 1, 2 and 3. The state is seeking to amend their information and then go forward on 6, 7 and 8. It is my ruling at this point that these go forward together. It is the same defendant and the same victim in each of the counts. It makes more sense to me to go forward on it because the testimony regarding the events would be cross admissible in both cases. So, from those standpoints I'm going to deny the request at this point. RP 21-22

The State filed a Fourth Amended Information where it amended, after the testimony of the victim, count 1 to indicate an attempted crime. CP 62-65, 362

The jury was thereafter charged with determining guilt on the following counts: Attempted indecent liberties for an alleged event on February 9, 2017;

Count 2: Second degree assault sexual motivation for an alleged event of February 9, 2017; Count 3: Felony harassment of another- threat to kill - sexual motivation for an alleged event February 9, 2017; Count 4: First degree child molestation for an alleged event August 17, 2012; Count 5: First degree child molestation for an alleged event between October 1, 2013 and December 31, 2013; Count 6: First degree rape of a child for an event alleged between October 1, 2013 and December 31, 2013.

Each charge included an aggravating factor of an ongoing pattern of sexual abuse of the same victim under the age of eighteen manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g).

The defendant was a relationship with N.C, the mother of D.S. RP 289; 291. When N.C. was in the hospital giving birth to one of D.S.'s sisters, DS who was eight-years old and her siblings stayed at Appellant's sister's home. RP 239. Giron had been downstairs in his room. DS testified that she was asleep upstairs and awoke in the night to find Giron carrying her downstairs. RP 239. She was asked if she wanted to sleep next to her brothers or next to her sister. She chose to sleep next to her sister, the defendant chose to sleep next to 8 year-old DS. RP 239.

From the verbatim report: "So my two brothers slept on the ground and I slept between him and my sister, and he started touching on me. Q. Did he say anything to you? A. He told me to choose a spot for him and he would only touch that spot. He was trying to touch my private area. I told him no. He said

that I would like it when I was older.” When asked where Giron touched her DS stated “(i)t was like my back and he tried putting his hand down the front of my pants, I told him no...(h)e told me pick a spot...I told him, he told me, you can grab my back then...he tried kissing me...I said, no. Then I said I needed to go to the bathroom. So I went upstairs and I cried. RP 239-40

D.S. testified touching occurred other times. Once while her mother was in jail D.S. and her siblings again stayed at the Appellant’s sister’s home. RP 241. D.S.’s testimony was that when she got onto a shelf to get some breath mints “[she] felt him grab me from behind...I left and I was crying in the car...he grabbed my butt...[she] was (s)hocked, scared...I didn’t know how to react. RP 240-41.

When asked if she could remember the date of this molestation, DS testified “No. There was just times that they just followed after another. The dates weren't that important anymore.” RP 241

D.S. recounted another time at her grandmother’s home. She had placed a bag in front of the bedroom door in order to be able to hear the defendant if he tried to enter her room. Apparently, a cousin had left the room and moved that bag so she did not hear Giron enter then, “I felt a weight on top of me. I started breathing hard. Then I opened my eyes and I seen it was him. Then he turned me over and I was on my stomach. Then he pulled down my pants and then he put himself inside of me...I was just crying because he was holding my hands down. He told me not to cry, that he would give me money after. When it was over I

was crying. He opened my door and threw a bag of change at me and left.” RP 242

She testified that Giron had put his penis in her butt. When that occurred, she felt disgusted, scared, like I couldn’t move...I just cried. RP 242. DS was only nine years old the time of this rape. RP 243.

D.S. reported these incidents to a school counselor and the police. RP 243, 319. These crimes were not prosecuted at that time.

Later the Appellant once again was in her life. In February of 2107 she was sleeping and awoke when she heard her bedroom door rattle, she was scared and knew it was the defendant because nobody else would come to her room that early. She had a slide latch on the door and that was forced open and the defendant entered. D.S. told the defendant to leave, he told her to shut up and if she did not shut up and her mother woke up he would kill her then he would kill D.S. RP 245.

The defendant had a screwdriver in his hand, and he stuck her with it and then put his hands around her neck and choked her until DS almost passed out. She testified that he had his hands around her neck. Giron told her to take off her clothes, that he wanted to see her without them on. DS told Giron no so he punched her in the face which cut her lip and caused it to bleed. DS saw blood coming from her mouth after she was punched by the defendant. RP 246-47. The defendant later came back and told DS that he would leave her alone for good if she would “hook me up with your friend” who was 15 years old at that time. RP

248. During this assault Giron pulled out his penis. RP 251-52. After this assault DS fled her home, contacting an uncle who called her father. Her father took her to the police department where she reported this crime. RP 253-54. Pictures that were admitted and identified by DS of her condition from that day show her split lip. She testified that she had bruising on the side of her mouth and her lip was swollen. RP 260

Giron was found guilty of two counts of child molestation first degree, and one count of felony harassment with sexual motivation. CP 178-79. The jury found the charged aggravators, the court did not impose an exceptional sentence. CP 179-80. The court declared a mistrial on the remaining three counts. CP 180.

Instruction 1 states in part, “[i]n order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it. CP 66

Instruction 9 states “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 77 RP 33, 372. Instruction 23 defined the what the State was required to prove beyond a reasonable doubt on the two counts now before this court. “A person commits the crime of first degree child molestation as charged in Counts 4 and 5 when the person has sexual contact with a child who is less than twelve years old, who is not married to the person, and who is at least thirty-six months younger than the person.” CP 91

Giron again moved for the counts to be severed. The State's response "I think the court ruled previously that even if the counts were severed the information would be cross admissible." RP 343. The trial court again agreed with the State and denied the motion. RP 344

III. ARGUMENT

1. The State proved counts 4 and 5 - Child Molestation in the First Degree beyond a reasonable doubt.

Giron was charged with a 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 both of his convictions for Child Molestation in the First Degree as alleged in counts 4 and 5. 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 Wn.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 beyond a reasonable doubt to the jury that D.S. was less than twelve years old at the time Giron had sexual

contact with her, that Giron was at least eighteen years old at the time of the offense, he was not married to D.S. and, that D.S. was at least thirty-six months younger than Giron.

While the testimony regarding the allegation in count 4 is not extensive it must be taken in context and in conjunction with all of the testimony. Count 4 as recounted by D.S. was one of the first times this very young child was touched by this 23-year-old man, the boyfriend of her mother who was at a hospital giving birth to D.S.'s sister. Giron was not a family member, it might be expected that a family member would move a young child who has fallen asleep in a location that they should not have. But on this day there was no need or reason for the Appellant to carry this 8-year-old child, who was asleep, from the room she was sleeping in with other siblings to another room, especially since this was down into what D.S. described as his, Giron's room. This was not a normal act.

Nor was it a normal act for a 23-year-old adult male, who was not the child's father, to sleep with, and next too, this 8 year-old girl. RP 236, 239.

"We were sleeping upstairs. It was me, my brother Angel, my brother Daniel and my sister Esperanza. In the two rooms were, I think, his sisters. Then [Giron] was downstairs in his room. I woke up and I was being carried downstairs. Then I just remember asking why. Juan said that my mom said she wanted us to sleep downstairs. He asked me to choose who to lay with on the bed. I said my sister. So, my two brothers slept on the ground and I slept between him and my sister, **and he started touching on me.** Q. Did he say

anything to you? A. **He told me to choose a spot for him and he would only touch that spot. He was trying to touch my private area.** I told him no. **He said that I would like it when I was older.** When asked where Giron touched her DS stated “(i)t wsa like my back and he tried putting his hand down the front of my pant...he tried kissing me...I said, no. Then I said I needed to go to the bathroom. So I went upstairs and I cried. RP 239-40 (Emphasis added)

‘Sexual contact’ means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party or a third party.” RCW 9A.44.010(2).

There is literally no method that a grown man can “touch” an eight-year-old while trying to put his hand down the front of her pants which would not entail his touching parts of this eight-year old which are intimate.

DS confirmed that she had in fact been touched on cross-examination “Q...You said that Juan got into bed with you and he began touching you.

A. Yes.” When ask why she had not made noise or screamed DS stated “[b]ecause I was scared.” RP 266.

Again, not the reaction of a child who has just had some sort of consensual benign contact with a 23 year-old man.

This is not an equivocal statement. She says she is being touched and he is trying to touch her private area, clearly this was a continuous action, he was sleeping with an 8 year-old girl, touching her and as he was touching her he was attempting to touch her private area.

The defendant was asking her where he could touch her and trying to kiss this 8 year-old girl, clearly a kiss is intimate in this context RP 240, 266. This touching along with the attempt to kiss this eight-year-old and the fact the defendant told an 8 year old she “would like it when she got older” clearly indicates that Giron’s actions were to gratify his sexual desire. See, Harstad, infra. There is no innocent explanation for a grown man to put his hands down an eight-year-old girl's pants while in bed with her. Sufficient evidence supports "sexual contact."

The jury could clearly determine beyond a reasonable doubt all of the elements were satisfied by the actions of this non-family member taking a sleeping 8 year old to a second location where everyone was sleeping, touching her and while touching her attempting to touch her privates as well as trying to kiss her all the while next to D.S. in a bed and telling her she would like what he was doing to her when she was older. The State proved the elements of count 4 beyond a reasonable doubt.

COUNT 5.

This evidence must also be evaluated, and was considered by the jury, in context with the other information this victim testified about, the touching of her “butt” as alleged in count 5, if anyone on this planet in the year 2020 thinks grabbing a female’s “butt” at any time, let alone a ten year old non-family member, is not a sexualized action then they have not been listening to the females of this planet who have now stated unequivocally that it is NOT OK to

touch any female that way without consent. RP 241. DS's reaction to defendant touching her butt was not the reaction of a child who was touched in an "innocent" way. "I felt him grab me from behind. I turned around fast, and he was just like, go get my pipe from the car. So I left and I was crying in the car. I came back and brought it back to him...He grabbed my butt, [she was]...Shocked, scared. I didn't know how to react." RP 240-41.

This was not some innocent act by the defendant to help DS up onto the counter and get the item she was trying to retrieve. This was an intentional act of an adult male, who was not a family member, touching a very intimate part of this child's body.

"Offenses such as child molestation or indecent liberties reasonably require a showing of sexual gratification because the touching may be inadvertent." State v. Gurrola, 69 Wn.App. 152, 157, 848 P.2d 199 (1993). The jury may infer sexual gratification if an adult male with no caretaking function touches the intimate parts of a child, but additional evidence is needed if the male has a caretaking function. State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991).

State v. Price, 127 Wn.App. 193, 110 P.3d 1171 (Div. 2 2005) distinguishes State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992) cited by Giron;

"Price points out that Division Three of this court has stated, "[I]n those cases in which the evidence shows touching through clothing, or touching of

intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification." (citation omitted); but in that case, the sexual contact was "fleeting" and "susceptible of innocent explanation." Powell, 62 Wn.App. at 918, 816 P.2d 86.

Here the jury had the totality of the information before it to include the previously molestation. The additional information is that when Giron "grabbed [D.S.'s] butt" it was neither fleeting nor was there an innocent explanation.

Several cases have distinguished Powell, see State v. Harstad, 153 Wn.App. 10, 218 P.3d 624 (2009) citing Powell states:

Harstad argues that the State did not prove that B's and Sh's upper inner thighs were intimate parts and that the State did not prove his touching was done for the purposes of sexual gratification. " 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." ^[8] A jury may determine that " parts of the body in close proximity to the primary erogenous areas" are intimate parts. ^[9] " Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification," although we require additional proof of sexual purpose when clothes cover the intimate part touched.^[10]

^[8] State v. Jackson, 145 Wn.App. 814, 819, 187 P.3d 321 (2008).

^[9] In re Welfare of Adams, 24 Wn.App. 517, 521, 601 P.2d 995 (1979).

^[10] State v. Powell, 62 Wn.App. 914, 917, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992).

Such "intimate parts of a person" can be either clothed or unclothed. State v. Howe, 151 Wn.App. 338, 346, 212 P.3d 565 (2009) (citing State v. Jackson, 145 Wn.App. 814, 819, 187 P.3d 321 (2008)).

See In re Welfare of Adams, 24 Wn.App. 517, 520, 601 P.2d 995 (1979) buttocks, hips and lower abdomen may be intimate parts of the anatomy, his court held that "[a]s with the buttocks, we believe that the hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited, particularly if that touching is incidental to other activities which are intended to promote sexual gratification of the actor."

Sexual gratification is not an essential element of the crime of child molestation in the first degree. State v. Lorenz, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). Rather, it is a definitional term that clarifies the meaning of sexual contact. Lorenz, 152 Wn.2d at 36. In addition, the jury may infer sexual gratification from the circumstances of the touching itself, where those circumstances are unequivocal and not susceptible to innocent explanation. See State v. Whisenhunt, 96 Wn.App. 18, 24, 980 P.2d 232 (1999) (defendant's conduct was not susceptible to innocent explanation when he touched the victim's genital area over her clothes on three separate occasions). The fact-finder can infer sexual gratification from the "nature and circumstances of the act itself." State v. Tilton, 111 Wn.App. 423, 430, 45 P.3d 200, *review granted*, 147 Wn.2d 1007, 56 P.3d 565 (2002)

This court must remember even if a touching of intimate parts is over clothing, a sexual contact has occurred when the touching is not susceptible of innocent explanation. See Harstad, 153 Wn.App. at 22, there is no innocent explanation for the actions of Giron. .

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. Howe, 151 Wn.App. at 346 (quoting Jackson, 145 Wn.App. at 819 (footnotes omitted)) (emphasis added). See also In re Welfare of Adams, 24 Wn.App. 517, 519, 601 P.2d 995 (1979) (court may find direct contact with breasts and genitalia to be touching of a sexual or other intimate part as a matter of law).

This needs to be taken in conjunction with and in context with the escalating nature of the acts this defendant perpetrated on this young girl over the years he molested her. One of the final criminal actions being forced anal intercourse after which the defendant tossed money at this young girl. RP 242

Again, Powell is distinguishable from the instant case; see State v. Harstad, 153 Wn.App. 10, 21-22, 218 P.3d 624 (2009); State v. Price, 127 Wn.App. 193, 202, 110 P.3d 1171 (2005); State v. T.E.H., 91 Wn.App. 908, 916-17, 960 P.2d 441 (1998), where the jury was permitted to infer sexual gratification from the circumstances of the touching, in each of these cases the touching at

issue was either inside the clothing or was not susceptible of innocent explanation.

Viewed in a light most favorable to the State, the evidence presented by the State regarding both counts 4 and 5 was sufficient to support an inference that the touching occurred, and it was done by Giron for sexual gratification. *See State v. Whisenhunt*, 96 Wn.App. 18, 23, 980 P.2d 232 (1999) (repeated touching of clothing over vaginal area by person without a caretaking role supported inference of sexual gratification); *State v. Wilson*, 56 Wn.App. 63, 68-69, 782 P.2d 224 (1989) (touching occurred in a place where defendant and victims would not be easily observed and defendant was only partially clothed).

IV. CONCLUSION

This court takes the facts as they are given in the trial court and because of Giron's claiming insufficiency he then must admit the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State. This court will not determine the credibility of witnesses, credibility determinations are for the trier of fact and are not subject to review. The testimony of D.S., while not containing graphic detail of these two molestations, was more than sufficient to find that Giron had molested her on two separate occasions. Clearly this jury took their duty to heart, they found the evidence here to be sufficient but were not able to come to the same determination on other counts, they did their job and this court should not disturb those verdicts.

The State asks this court to deny this appeal and affirm the convictions.

Dated this 17th day of August 2020,

s/ David B. Trefry

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DECLARATION OF SERVICE

I, David B. Trefry, state that on August 17, 2020, I emailed a copy of the Respondent's Brief to: Marie J. Trombley at marietrombley@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 17th day of August, 2020 at Spokane, Washington.

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