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No. 62529-2-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GEORGE SANDRU,

Appellant.

REC'D

JUN 11 2009

King County Prosecutor
Appellate Unit

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY
THE HONORABLE STEVEN GONZALEZ, JUDGE

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to give appellant's proposed instruction allowing the jury to consider the lesser crime of 4^o Assault;
2. The trial court erred in refusing to give appellant's proposed instruction defining 4^o Assault; and
3. The court erred in advising the jury that their notes were evidence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the facts of the case entitled the appellant to have the jury consider a lesser crime; and
2. Whether the jury's consideration of extrinsic evidence entitles the appellant to a new trial.

STATEMENT OF THE CASE

A. LEGAL BACKGROUND

The appellant, George Sandru, was charged by Amended Information (CP 1-2) with three counts of child molestation in the First Degree – Domestic Violence. Count I read as follows:

That the defendant GEORGE SANDRU in King County, Washington, during a period of time intervening between January 2, 2002 through February 29, 2008, being at least 36 months older than J.S., had sexual contact for the purpose of sexual gratification with J.S., who was less than 12 years old and was not married to the defendant;

Counts II and III utilized precisely the same language.

To these charges Sandru pled “Not Guilty” and, accordingly, was brought to trial in the Superior Court of King County on July 1, 2008, before the Honorable Steven Gonzalez, sitting with a jury (CP3).

The trial proceeded until July 16, 2008, on which date Sandru was found “Guilty” as charged in Count I (CP 49) with the jury neither returning a verdict nor declaring itself to be “hung” as to Counts II and III (CP 50-51).

On October 3, 2008, Sandru was sentenced, inter alia, to 66 months incarceration (CP 69-78).

Notice of Appeal followed.

B. FACTUAL BACKGROUND

The alleged victim in the case was Jonathan Sandru whose birth date is October 6, 1997. He is the son of Sandru (RP 7/9/08, pgs. 12-13).

He was never married to his father whose birth date is March 8, 1959 (RP 7/10/08, pgs. 24, 35). Jonathan was 10 years old and was going into the 5th grade when he testified (RP 7/9/08, pg. 8).

Jonathan stated that when he was eight he began living with his father (after his parents had separated) in a two bedroom apartment in Kirkland, Washington. Initially the apartment was shared by Sandru's two older sons who had emigrated from Romania to the United States in November of 2002, Nicolae and Mihai Sandru (RP 7/9/08, pgs. 12, 130-132).

During the ensuing period from November of 2002 to March 2, 2008, the date of Sandru's arrest (RP 7/9/08, pgs. 68-69), Jonathan lived, for the most part, with Sandru. It was during this period that Sandru allegedly molested him. [This, of course, would place the beginning of the supposed molestation at a time when Jonathan was 5.]

Jonathan stated that the molestations took three forms. [The prosecutor in final argument (RP 7/14/08, pgs. 15-26] utilized these three forms in support of Counts I, II and III). They were:

1. When he and Sandru shared the same bed, his older stepbrothers sleeping in the second bedroom, Sandru would pull him close so that Jonathan felt Sandru's private part and genitals with his legs (RP 7/9/08, pgs. 22-23). [The prosecutor argued to the jury that this testimony was proof of Count I. (RP 7/14/08, pg. 15)];
2. When Sandru and Jonathan slept in the same bed together Sandru would move his hand in a roundabout motion over Jonathan's

- private part (RP 7/9/08, pg. 17). [The prosecutor argued to the jury that this testimony was proof of Count II (RP 7/14/08, pg. 16)]; and
3. When sitting on the couch watching movies Sandru would touch Jonathan's private part and move his hand roundabout (RP 7/9/08, pgs. 18-20). [The prosecutor argued that this testimony was proof of Count III (RP 7/14/08, pg. 16)].

All of the above touching is alleged to have been done over Jonathan's clothing (RP 7/9/08, pg. 17).

Jonathan was supported in his testimony by his half-sister Ligia Hamilton (RP 7/7/08, pgs. 33-60 and RP 7/8/08 pgs. 8-56). Ligia was permitted to testify that after Sandru married her mother, Elvira Stanus-Ghib, on 1/2/97 (RP 7/8/08, pg. 91) she and others of her mother's children lived with Sandru in Kirkland, WA (RP 7/8/08, pg. 39).

Ligia stated that from the time right after Sandru and her mother got married (Ligia was 10) until Sandru moved out four years later he

* . . .

continually sexually molested her (RP 7/7/08, pgs. 39-58). This resulted in a previous prosecution of Sandru at which time he was found “Not Guilty” (RP 7/8/08. Pgs 12-13).

Jonathan’s testimony was further supported by that of another of his half-sisters, one Estera Stanus-Ghib (RP 7/8/08, pgs. 61-87). Estera testified that while Sandru lived with her family after marriage to her mother, Elvira Stanus-Ghib, that Sandru improperly touched her until her mother made him stop. Elvira was 7 or 8 then. (RP 7/8/08, pgs. 67-72).

Sandru testified in his own behalf and categorically denied any improper touching or conduct toward Jonathan, Ligia and Estera (RP 7/10/08, pgs. 64-79).

In addition Sandru called as defense witnesses his two older sons Mihai Sandru (RP 7/9/08, pgs. 156-172) and Nicolae Sandru (RP 7/9/08, pgs. 128-155), one Gabriella Timis (RP 7/9/08, pgs. 100-126), a woman with whom he had begun an affair in August of 2007 and who spent a

considerable amount of time with him and Jonathan, one Qhoua T. Newton (RP 7/10/08, pgs. 11-21), a former neighbor and babysitter for Jonathan and one Vasili Antimeti, the pastor of the First Romanian Pentecostal Church in Kenmore Wa. (RP 7/10/08, pgs. 7-10).

The testimony of all of the above was to the effect that from November of 2002 to March of 2008, they had lived with or been closely associated with Sandru and Jonathan and had seen nothing that would suggest that an improper or illegal relationship was involved between the two of them.

**ARGUMENT ON APPELLANT'S FIRST AND SECOND
ASSIGNMENTS OF ERRORS**

1. The trial court erred in refusing to give appellant's proposed instruction allowing the jury to consider the lesser crime of 4° Assault; and
2. The trial court erred in refusing to give appellant's proposed instruction defining 4° Assault.

Both assignments of error will be argued together inasmuch as they involve the same issue.

Appellant proposed the following instruction regarding the lesser crime of 4° Assault

The defendant is charged in Counts I, II and III with Child Molestation in the First Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the Fourth Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

(CP31).

This instruction was adopted verbatim from WPIC 4.11.

Appellant proposed the following instruction defining 4° Assault.

A person commits the crime of assault in the fourth degree when he or she commits an assault. (CP32).

This instruction was adopted verbatim from WPIC 35.25.

The trial court, after hearing argument (RP) 7/10/08, pgs. 96-109), determined not to give instructions on the lesser included crime of 4° Assault (RP 7/14/08, pgs. 2-5).

It is submitted that this was an error.

State v. Stevens, 158 Wn. 2d 304, 310-311 §12, 143 P. 3d 817 (2006) clearly rules that 4° Assault is legally a lesser included crime of child molestation.

The remaining issue here is whether 4° Assault is factually a lesser included crime in the instant case. The Supreme Court's analysis in Stevens, *supra*, was as follows:

¶14 H.G. testified Stevens grabbed her breast and later made a joke

about it. A reasonable juror could infer the touch was intentional. H.G. also testified the touch made her feel violated. As the Court of Appeals concluded, a reasonable juror could infer from her testimony that H.G. did not consent to the touching. The evidence supports an inference that Stevens touched H.G. without privilege or consent, the touch was offensive, and therefore the touch was arguably unlawful. The factual prong of the inquiry is satisfied. We find the trial court erred by not instructing the jury on fourth degree assault as a lesser included offense. (State v. Stevens. 158 Wn 2d 304, 312 §14, 143 P. 3d 817 (2006)).

To paraphrase, Jonathan testified that while in bed his father held him in such a position that the father's genitals were pressed against him.

A reasonable juror could infer the father's actions were intentional.

Jonathan was upset by this. A reasonable juror could infer that Jonathan did not consent. The evidence supports an inference that the father held his son in this fashion without privilege or consent. The holding was offensive and therefore it was arguably unlawful. The factual prong of the inquiry is satisfied. The trial court erred by not instructing the jury on fourth degree assault as a lesser included offense.

**ARGUMENT ON APPELLANT'S THIRD ASSIGNMENT OF
ERROR**

3. The court erred in advising the jury that their notes were evidence.

During the course of the trial the jury was allowed to listen to a portion of a CD which contained a recorded interview of one Beth Graham. Beth Graham was a defense witness who was a former teacher of Jonathan (RP 7/1008, pg. 85). The interview was recorded by one Dylan Kilpatric, an investigator for the Northwest Defender's Association. The CD was partially played because at the time of trial, Ms. Graham was on vacation and could not be present (RP 7/10/08, pgs. 84-88). The prosecutor stipulated to the admissibility of the portion of the CD that was played (RP 7/10/08 pg. 82). As an aid to the jury a 16 page transcript was prepared of the portion of the CD listened to. This transcript was marked as Ex. 26 and the CD was marked as Ex. 27 (RP 7/10/08, pgs. 86-88). The CD was to be played as the jury read the transcript. The court advised the

jury that the CD was evidence, the transcript a tool to assist them in listening. The CD was played and the transcripts were collected. However neither the CD nor the transcript were offered or admitted in evidence (RP 7/20/08, pgs. 86-88).

Later on July 14, 2008, it developed that some of the jurors had made notes on their individual copies of the transcripts. Without objection the transcripts were redistributed, sorted out and the jurors made copies of their individual notes. (RP 7/14/08, pg. 5-6).

The court then instructed the jury.

“The transcripts are not evidence, but your notes are”
(emphasis supplied)

It is submitted that this was error.

In State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004), two documents not in the evidentiary record were inadvertently sent to the jury room. In granting the appellant a new trial the Supreme Court ruled

Generally, we are reluctant to inquire into how a jury arrives at its verdict. State v. Balisok, 123 Wn.2d 114, 117,866 P.2d 631,

(1994). There must be a strong, affirmative showing of misconduct in order to overcome the long-standing policy in favor of “stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.” *Id.* at 118. It is, however, misconduct for a jury to consider extrinsic evidence and if it does, that may be a basis for a new trial. *Id.* “Novel or extrinsic evidence is defined as information that is *outside all the evidence* admitted at trial, either orally or by document.” *Id.* (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn.App.266, 270, 796 p.2d 737 (1990)). This type of “evidence is improper because it is not subject to objection, cross-examination, explanation or rebuttal.” *Id.* (*State v. Pete*, 152 Wn. 2d 546, 552-3, 98 P 3d 803 (2004))
Clearly the notes of individual jurors were extrinsic evidence.

Appellant concedes that a critical question remains and that is whether Sandru was prejudiced by the jury considering its notes as evidence. Appellant does not know. The notes were either taken home by the jurors or destroyed per the trial court’s instructions (RP 7/7/08, pg. 5).

As noted in *State v. Boling* 131 Wn. App. 329, 332-333, 127 P.2d 740 (2006), rev. den. 158 Wn 2d 1011 (2006), however,

¶11 Juror use of extraneous evidence is misconduct and entitles a defendant to a new trial, if the defendant has been prejudiced. *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989). The court’s inquiry is an objective one. The question is whether the

extrinsic evidence could have affected the jury's determinations. State v. Caliguri, 99 Wn.2d 501,509, 664 P.2d 466 (1983). The court need not delve into the actual effect of the evidence. State v. Jackman, 113 Wn. 2d 772, 777-78, 783 P.2d 580 (1989). But any doubts must be resolved against the verdict. Briggs, 55 Wn. App. at 55. The subjective thought process of the jurors inheres in the verdict. Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962).

An erroneous entry or entries into the notes of one or more jurors could have affected the jury's determination. The trial court's statement that the notes were evidence was not limited to just the jury's consideration of what was recorded on the CD. Any doubts must be resolved against the verdict.

CONCLUSION

Because of the trial court's refusal to instruct the jury on a lesser included crime and the jury's consideration of extrinsic evidence, the judgment and sentence of the trial court should be reversed and the matter remanded for a new trial.

Respectfully submitted,



A handwritten signature in cursive script that reads "Anthony Savage". The signature is written in black ink and is positioned above a horizontal line.

ANTHONY SAVAGE, WSBA #2208