

66837-4

66837-4

NO. 66837-4-1

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

STATE OF WASHINGTON

Respondent

v.

JEFFREY D. SANDVIG,

Appellant

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

THOMAS M. CURTIS
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 20 AM 10:41

TABLE OF CONTENTS

I. ISSUE.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT6

 A. STANDARD OF REVIEW.6

 B. ANY ERROR IN NOT REQUIRING JURY UNANIMITY AS TO WHICH ACT CONSTITUTED THIRD DEGREE RAPE OF A CHILD WAS HARMLESS.6

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009) .. 7, 8, 9
State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) 9
State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006) 9
State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) 6, 7
State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) 6

WASHINGTON STATUTES

RCW 9A.44.010(1) 7
RCW 9A.44.079 7

I. ISSUE

The victim testified to several incidents of sexual contact with the defendant, any one of which could have supported a count of third degree rape of a child. The State only charged the defendant with one count, but did not elect which act was the one charged. Neither party took exception to the court not giving a unanimity instruction on this count. Since there was no evidence that differentiated the acts, was any error in not giving a unanimity instruction harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

In 2005, the defendant started having a sexual relationship with his girlfriend's 12 year old daughter. During the first encounter, the defendant inserted his fingers into the victim's vagina, put his penis between her butt cheeks simulating intercourse, and ejaculated on her back. 2/8 RP 76-82, 2/9 RP 127.

About a week later, the defendant had the victim masturbate him until he ejaculated on her hands. 2/8 RP 85-87. On other occasions, the defendant had the victim perform fellatio on him. 2/8 RP 89-94. Still other times, the defendant put his penis between the victim's breasts and moved it back and forth until he ejaculated. 2/8 RP 97.

The victim estimated that the defendant had penetrated her vagina with his fingers at least five times while she was 12 or 13. 2/9 RP 127-28. She estimated that the defendant had sexual contact with her more than 50 times. 2/9 RP 190.

After the victim turned 14, the defendant continued to have her perform fellatio on him. 2/8 RP 92, 94, 103. He also tried to have vaginal and anal intercourse with her, achieving some slight penetration on both occasions. 2/8 RP 100-102.¹ As the victim described it, "Between the age thirteen and fourteen he pretty much did the same stuff." 2/8 RP 101-02.

The victim recalled one specific occasion after she turned 14. She testified that the defendant came into her bedroom and requested fallatio. The victim didn't want to get out of bed.

So he climbed on top of me and took my shirt off and stuck his penis between my boobs and pushed my boobs together and started moving back and forth, and his penis was in my mouth at the same time, and he ejaculated on my chest.

2/8 RP 102-03 (emphasis added).

¹ The victim initially said that the attempted intercourse occurred when she was 14. She later said she was 13 or 14. 2/8 RP 101. During cross-examination, the victim said she was 14 the only times the defendant tried to penetrate her anus or vagina with his penis. 2/9 RP 178.

On yet another occasion, during the summer when the victim was 15, the defendant again put his penis between her butt cheeks simulating intercourse, and ejaculated on her back. 2/9 RP 133-34.

On several occasions when the victim was 15, the defendant used a massager with her. One side of the massager had a ridge on it. The other side had a plate that got hot and cold. The defendant used the ridge to massage his penis. He then either handed the massager to the victim to use, or used the plate side of the massager on the victim's vagina. 2/8 RP 111-12.

The State charged the defendant with two counts of second degree rape of a child and one count of third degree rape of a child. CP 88. Before trial, the State added one count of second degree child molestation. CP 82.

At trial, the State presented the victim's description of the various sexual encounters with the defendant. In addition, the State presented evidence of the circumstances surrounding the victim's disclosure to her mother. The court admitted a photograph of the massager with the ridge on one side and a plate on the other. 2/8 RP 61, Exhibit 3.

The State also called the Child Protective Service employee who investigated the victim's allegations. As part of her

investigation, the investigator interviewed the defendant. The defendant told the investigator that he thought that the victim and her mother were making up the allegations out of revenge and spite. 2/10 RP 346-47. The defendant also told the investigator that he was “shocked” when he read the allegations against him. He claimed, “I don’t even have a libido.” 2/10 RP 348.

When the investigator asked the defendant for his response to the victim’s allegations, the defendant said, “I can’t believe she would do this to me. I did everything for her.” 2/10 RP 349.

The defendant told the investigator that on occasion, the victim had rubbed her butt on his crotch. During the interview, the defendant’s demeanor was calm. “He didn’t appear to be defensive. He was a bit flat affected.” 2/10 RP 352.

The defendant did not testify. 2/10 RP 397, 423. The defendant proposed several jury instructions. Specifically, he included two unanimity instructions, one for second degree rape of a child, and one for third degree rape of a child. CP 55, 56. The court discussed the wording of the unanimity instruction for second degree rape of a child with the defendant. 2/10 RP 419-20. The court did not mention the unanimity instruction for third degree rape of a child and did not include it in its proposed instructions. 2/10

RP 421-22. When asked, the defendant said he had no objections or exceptions to the court's instruction. 2/10 RP 422. The court did not give a unanimity instruction regarding the count of third degree rape of a child.

The court defined sexual intercourse:

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight, or

any penetration of the vagina or anus however slight, by an object, including a body part when committed on one person by another, whether such persons are of the same or opposite sex except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, or

any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 40.

In closing the State argued:

When she was fourteen years old, pick any of the counts that she testified to for you in which she either performed oral sex on him or when he stuck his fingers in her vagina when she was fourteen years old and less than sixteen years old.

2/10 RP 436.

The jury convicted the defendant as charged. 2/11 RP 468-69, CP 3. The court sentenced the defendant to a standard range sentence. CP 5, 7.

III. ARGUMENT

A. STANDARD OF REVIEW.

Thus, in multiple acts cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt.

State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

B. ANY ERROR IN NOT REQUIRING JURY UNANIMITY AS TO WHICH ACT CONSTITUTED THIRD DEGREE RAPE OF A CHILD WAS HARMLESS.

It is well settled that, to protect jury unanimity, where there is evidence of multiple distinct acts, but the defendant is only charged with one count of criminal conduct, the State must elect which act it will rely on for the conviction, or the court must instruct the jury that it must be unanimous on which act constituted the crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

Here, the victim testified that while she was at least 14, but younger than 16, on different occasions the defendant had her

perform fallatio on him, rubbed his penis between her butt cheeks, had his penis in her mouth when he was rubbing it between her breasts, slightly penetrated her vagina with his penis, and slightly penetrated her anus with his penis. Each one of these acts constituted third degree rape of a child.² RCW 9A.44.079, RCW 9A.44.010(1).³ Since the State did not elect which incident was the one charged, and the court did not give a unanimity instruction as to the third degree rape of a child, the court committed constitutional error. Kitchen, 110 Wn.2d at 411.

Whether reversal is required turns on whether this Court is satisfied beyond a reasonable doubt that the error was harmless. This Court's analysis should follow the legal reasoning in State v. Bobenhouse, 166 Wn.2d 881, 214 P.3d 907 (2009).

²The defendant asserts that there were two other acts that could have been the basis for a conviction of third degree rape of a child: the defendant putting his fingers into the victim's vagina, and the defendant using a massager on the victim's vagina. Brief of Appellant 8. The first incident occurred after the victim had intercourse with her boyfriend. She was certain that she was 16 when she first had intercourse with him. 2/9 RP 136. Since there was no penetration during the second incident, it was not intercourse, as defined in the instructions. It could not have been the basis for a conviction.

³A copy of RCW 9A.44.079 is at Appendix A. A copy of RCW 9A.44.010(1) is at Appendix B.

In Bobenhouse, the defendant was charged with one count of first degree rape of a child. The victim testified about multiple occasions of having to perform fellatio on his father, and his father inserting his finger into the victim's anus. Bobenhouse, 166 Wn.2d at 893-94. The defendant "offered only a general denial to these allegations, and consequently, the jury had no evidence on which it could rationally discriminate between the two incidents (i.e., fellatio and digital penetration of John's anus)." Bobenhouse, 166 Wn.2d at 895.

Here, the victim testified about several incidents that could have supported a count of third degree rape of a child: at least two instances of fellatio, the defendant rubbing his penis against the victim's anus, penile-vaginal penetration, and penile-anal penetration. The defendant offered only a general denial. 2/10 RRP 346, 348. As in Bobenhouse, the jury had no evidence on which it could rationally discriminate between the incidents.

The Supreme Court held that where there was sufficient evidence to prove each act occurred, there was no conflicting testimony, and the victim provided specific detailed testimony, "if the jury reasonably believed one incident occurred, all the incidents must have occurred." Under those facts, any error was harmless

beyond a reasonable doubt. Bobenhouse, 166 Wn.2d at 895, citing State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990).

The facts in this case are very similar to those in Bobenhouse. This Court should reach the same result. Any error was harmless beyond a reasonable doubt.

The defendant, using the incidents where he used a massager⁴ on the victim's vagina, argues that "a reasonable juror could have based a guilty verdict on an act that was not 'sexual intercourse.'" Brief of Appellant 10. This argument lacks merit.

An appellate court presumes the jury follows all the instructions. State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006). Here, to convict the defendant of third degree rape of a child, the jury had to find, inter alia, that the defendant had sexual intercourse with the victim. CP 46. Sexual intercourse requires the jury to find (1) the defendant's sex organ entered and penetrated the sex organ of the victim, (2) any penetration of the vagina by an object, or (3) sexual contact between the defendant and the victim involving the sex organs of one person and the mouth or anus of another. CP 40.

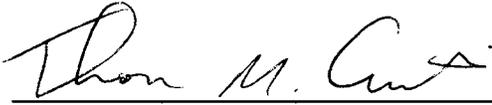
No rational juror could find that the defendant's use of his massager on the victim's vagina was intercourse. The victim did not describe any penetration of her vagina. 2/8 RP 110-11. Thus there is no direct evidence of penetration. The photograph of the massager does not show an object that could easily penetrate the vagina. Exhibit 3. Likewise, there is no circumstantial evidence that there was penetration. Accordingly, since the use of the massager on the victim's vagina was not intercourse, no rational juror who followed the instructions could so find.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on October 18, 2011.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
THOMAS M. CURTIS, WSBA #24549
Deputy Prosecuting Attorney
Attorney for Respondent

⁴ The defendant says, "According to T.W., [the defendant] also used a vibrator on her." Brief of Appellant 4. This misstates the evidence. The State moves to strike this sentence.

West's RCWA 9A.44.079

West's Revised Code of Washington Annotated Currentness

Title 9A. Washington Criminal Code (Refs & Annos)

 Chapter 9A.44. Sex Offenses (Refs & Annos)

➔9A.44.079. Rape of a child in the third degree

(1) A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

(2) Rape of a child in the third degree is a class C felony.

APPENDIX A

West's RCWA 9A.44.010

West's Revised Code of Washington Annotated CurrentnessTitle 9A. Washington Criminal Code (Refs & Annos)*Chapter 9A.44. Sex Offenses (Refs & Annos)➔**9A.44.010. Definitions**

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

APPENDIX B

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

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 OCT 20 AM 10:41

THE STATE OF WASHINGTON,

Respondent,

v.

JEFFREY D. SANDVIG,

Appellant.

No. 66837-4-1

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 19th day of October, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 19th day of October, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is cursive and extends to the right of the line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit