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67174-0

No. 67174-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JONAS I. HERNANDEZ,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable George N. Bowden

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. **ARGUMENT** 1

 1. MR. HERNANDEZ’S CONVICTION MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE TO ESTABLISH THE TOUCHING OVER CLOTHING WAS FOR THE PURPOSE OF SEXUAL GRATIFICATION. 1

 2. MR. HERNANDEZ’S CONVICTION MUST BE REVERSED DUE TO REPEATED, FLAGRANT, ILL-INTENTIONED, AND PREJUDICIAL PROSECUTORIAL MISCONDUCT. 3

B. **CONCLUSION** 7

TABLE OF AUTHORITIES

United States Constitution

Amend. V 6

Amend. XIV 6

Washington Constitution

Art. I, sec. 3 6

Washington Supreme Court Decisions

State v. Monday, 171 Wn.2d 667, 257 P.3d 551 (2011) 6

State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984) 3

Washington Court of Appeals Decisions

State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009) 3

State v. Curtiss, 161 Wn. App. 673, 250 P.3d 1012 (2011) 5

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) 3

State v. Guizzotti, 60 Wn. App. 289, 803 P.2d 808 (1991) 3

State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1992) 1

State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005) 1

State v. Riley, 69 Wn. App. 349, 354, 848 P.2d 1288 (1993) 4

State v. Sargent, 40 Wn. App. 340, 698 P.2d 598 (1985) 3

State v. Veliz, 76 Wn. App. 775, 888 P.2d 189 (1995) 1

State v. Walker, 164 Wn. App. 724, 265 P.3d 191 (2011) 5

State v. Whisenhunt, 96 Wn. App. 18, 980 P.2d 232 (1999) 2

Statutes

RCW 9A.44.010 1
RCW 9A.44.083 1

Other Authority

United States v. Harper, 662 F.3d 958 (7th Cir. 2011) 5

A. ARGUMENT

1. MR. HERNANDEZ'S CONVICTION MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE TO ESTABLISH THE TOUCHING OVER CLOTHING WAS FOR THE PURPOSE OF SEXUAL GRATIFICATION.

A charge of child molestation in the first degree by sexual contact over a person's clothing requires the State to present evidence to prove beyond a reasonable doubt that the contact was for the purpose of sexual gratification. RCW 9A.44.010(2); RCW 9A.44.083(1); State v. Veliz, 76 Wn. App. 775, 778, 888 P.2d 189 (1995); State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991). Where, as here, the contact occurred while a related adult was performing a caretaking function, the evidence of sexual gratification is equivocal, or the touching was fleeting, inadvertent, or subject to an innocent explanation, the State cannot meet its burden of proof. State v. Price, 127 Wn. App. 193, 196, 110 P.3d 1171 (2005); Powell, 62 Wn. App. at 917.

The evidence established that Mr. Hernandez touched J.R. while he was performing the caretaking function of straightening the tangled covers, it was inadvertent, equivocal, and innocently and reasonably explained. As the State correctly notes, J.R. was "pretty sure" she had kicked off the blankets. 3/15/11 42, 50-51,

61. Certainly the most logical explanation was that Mr. Hernandez, a young man unaccustomed to drinking alcohol, merely fumbled in the dark while standing on a ladder to a bunk bed to rearrange the covers over his niece and her girlfriend.

The State incorrectly relies on State v. Whisenhunt, 98 Wn. App. 18, 20, 980 P.2d 232 (1999), which is easily distinguishable. In Whisenhunt, the defendant sat in a school bus seat one row in front of a five year-old girl, and, on three separate occasions, he reached his arm over the back of his seat and touched the girl's "privates" under her skirt. 98 Wn. App. at 24. By contrast, in the present case, there was a single incident during which Mr. Hernandez fumbled in the dark to straighten the covers while standing on a bunk bed ladder. The evidence in the present case bears no similarity to Whisenhunt.

Mr. Hernandez's conviction based on insufficient evidence to establish the contact was for the purpose of sexual gratification must be reversed.

2. MR. HERNANDEZ'S CONVICTION MUST BE REVERSED DUE TO REPEATED, FLAGRANT, ILL-INTENTIONED, AND PREJUDICIAL PROSECUTORIAL MISCONDUCT.

The prosecutor committed misconduct when he shifted the burden of proof, implied that an acquittal required a finding that the State witnesses lied, argued the jury needed to determine the truth, misstated the evidence, vouched for the credibility of witnesses, and disparaged the role of counsel. See State v. Reed, 102 Wn.2d 140, 145-47, 684 P.2d 699 (1984); State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009); State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996); State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808 (1991); State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985). The misconduct was flagrant and ill-intentioned because the arguments previously have been found improper. See Fleming, 83 Wn. App. at 214.

Here, the defense theory was that J.R. misinterpreted the touching that occurred as Mr. Hernandez straightened the covers and that the investigation was flawed because the investigating detective failed to interview two potential eye witnesses. 3/21/11 RP 87-88, 96-97, 106-07. The prosecutor mischaracterized this defense theory and improperly shifted the burden of proof when he

stated, inter alia, in rebuttal argument, “Their entire case rests on you accepting their version of the events, not the State’s version of events.” 3/21/11 RP 109.

The State defends the above argument on the grounds the prosecutor never used the word “acquit” and he was merely stating that to accept the defense version of events, the jury had to believe the defense witnesses. Br. of Resp. at 12. This argument is doubly flawed. First, this argument does not actually address the above statement, but, rather, refers to a separate statement, in which the prosecutor argued, “[I]n order for you to accept Defense’s version, you have to accept their witnesses’ testimony, and the problem is their witnesses’ testimony is not credible.” 3/21/11 RP 117.

Second, the argument ignores the prosecutor’s implication that the jury needed to base its verdict on whether it believed the State’s evidence or the defense evidence, not on whether the State met its burden of proof. This was the precise argument condemned in State v. Riley, 69 Wn. App. 349, 352, 354, 848 P.2d 1288 (1993), where “[i]n closing argument, the prosecutors stated that in order to believe Riley’s story, the jury would have to disbelieve the testimony of the officers and the [state’s witnesses].”

The prosecutor also implied the jury needed to determine the “truth,” rather than determine whether he met his burden of proof, when he argued in closing argument, “[W]hen you hear everything that went in and all of the evidence in this case, there’s only one version of it that’s true, and that version is [J.R.]’s.” 3/21/11 RP 86. The State now urges this Court to abandon cases from this jurisdiction that condemn “declare the truth” arguments, and cites United States v. Harper, 662 F.3d 958 (7th Cir. 2011), and State v. Curtiss, 161 Wn. App. 673, 250 P.3d 1012 (2011). Br. of Resp. at 13-14. In Harper, however, the prosecutor’s reference to the “truth” was in rebuttal argument and in response to the defense’s reference to “truth” in its own closing argument, and the Court noted that such arguments should be used with caution so as to not confuse the jury regarding the burden of proof. 662 F.3d at 960, 961. In State v. Walker, 164 Wn. App. 724, 733, 265 P.3d 191 (2011), the Court criticized the analysis in Curtiss, insofar as it did not consider Anderson, supra. The State’s invitation to overrule the line of cases culminating in Walker should be declined.

The prosecutor’s closing argument and rebuttal argument that defense witnesses improperly collaborated on their testimony was not a “reasonable interpretation” of the record, as the State

contends. See Br. of Resp. at 15-16. On the contrary, Daniela and Mr. Cisneros testified that they merely discussed the incident, and . Mr. Cisneros testified that he left the house sometime between 1:00 a.m. and 2:00 a.m., even though he told an officer the previous week that he left at 1:00 a.m. 3/17/11 RP 42-47, 115-18. They never explicitly or implicitly testified that they coordinated their testimony. By the State's reasoning, however, any discussion among witnesses reasonably could be seen as improper coordination. This reasoning should be rejected.

The State quotes a portion of the prosecutor's closing argument to support its contention that the prosecutor did not vouch for the credibility of its witnesses. Br. of Resp. at 17. This quote, however, is not the portion of the argument challenged on appeal. Compare 3/21/11 RP 74 with 3/21/11 RP 84, 119. Accordingly, the State's argument is inapt.

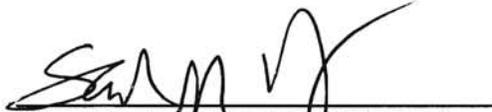
Flagrant, ill-intentioned, and prejudicial prosecutorial misconduct violated Mr. Hernandez's constitutional right to a fair trial, and requires reversal. U.S. Const. amend. V, XIV; Wash. Const. Art. I, sec. 3; State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

B. CONCLUSION

Mr. Hernandez's constitutional right to a fair trial was violated by flagrant, ill-intentioned, and prejudicial misconduct, and the conviction was based on insufficient evidence of sexual gratification. For the foregoing arguments and the arguments set forth in the Brief of Appellant, Mr. Hernandez respectfully requests this Court reverse his conviction for child molestation in the first degree.

DATED this 30th day of March 2012.

Respectfully submitted,



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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67174-0-I
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JONAS HERNANDEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) U.S. MAIL () HAND DELIVERY () _____	
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SIGNED IN SEATTLE, WASHINGTON, THIS 30TH DAY OF MARCH, 2012.

X _____ 

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