

66837-4

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NO. 66837-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY SANDVIG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Joseph Wilson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to a unanimous jury.

Issue Pertaining to Assignment of Error

Appellant was charged with two counts of second degree child rape, one count of child molestation and one count of third degree child rape. He was convicted of all four charges. The jury was instructed it had to be unanimous on which acts constituted the second degree child rape charges and that each charge had to be supported by a separate act. There was no similar instruction, however, regarding the third degree child rape charge and the complaining witness describe multiple acts that could have supported the guilty verdict. Was appellant denied his right to a unanimous jury verdict on third degree child rape charge?

B. STATEMENT OF THE CASE

1. Procedural Facts

Jeffrey Sandvig was charged by amended information with two counts of second degree child rape (Counts I and II), one count of second degree child molestation (Count III) and one count of third degree child rape (Count IV). CP 79-80. T.W. (DOB: 7/13/1993) is the named victim in all four counts. Id. The charges correspond to T.W.'s age. Counts I, II and III allege the acts occurred between July 13, 2005 and July 12, 2007, when T.W. was 12 years old but less than 14 years old. Id. Count IV

alleges the act occurred between July 13, 2007 and July 12, 2009, when T.W. was 14 years old but less than 16 years old. Id.

A jury found Sandvig guilty on all counts. CP 22-25. Sandvig was sentenced to a minimum term of 245 months on Counts I and II, 116 months on Court III and 60 months on Count IV. CP 3-19. The sentences were ordered to run concurrent. Id.

2. Substantive Facts¹

Sandvig and Tara Tollefson, who knew each other as children, entered into a relationship in 1996 and began living together. RP 195. T.W., Tollefson's daughter, was three years old when Sandvig and Tollefson started living together. RP 196. In 2002, Sandvig and Tollefson had a son, E.S. RP 197. Tollefson worked days and Sandvig worked nights, so Sandvig was T.W and E.S.'s primary caretaker during the day. RP 206, 212.

Sandvig's relationship with both T.W. and Tollefson started to change when E.S. was born. RP 68, 204-05. T.W. admitted after E.S. was born she did not get along with Sandvig. RP 68. T.W. thought Sandvig was too strict and had too much influence over her mother. RP 149-150. Sandvig would not let T.W. play with other children, except the children that lived next door, he did not allow her to participate in after school

¹ Although the trial took more than one day, the verbatim report of proceedings are sequentially numbered.

activities and he made her watch E.S. while Sandvig slept during the day. RP 149-152. T.W. also felt Sandvig was not as strict with E.S. and he was mean to Tollefson, which made T.W. mad. RP 150-151.

T.W. testified that when she was 12 years old, Sandvig started taking more of an interest in her. RP 71, 75. She claimed it was then that Sandvig began molesting her.

T.W. remembered she came home from school one day and went into Sandvig's bedroom to talk with him. RP 76. She got under the blankets with Sandvig, who was wearing boxer shorts, and he started to rub his penis against her butt. He asked her to take her clothes off, which she did, and he grabbed her breast and put her hand on his penis. RP 77-81. He also put his fingers in her vagina. RP 81, 127. He then had her lay on her stomach and he put his penis between her butt cheeks and eventually ejaculated on her back. RP 81-82.

About a week later Sandvig asked T.W. to come into his bedroom and stroke his penis with her hand. RP 85-86. While she was doing that, he lifted her shirt and played with her breasts until he ejaculated in her hands. RP 86-87. Over the course of time, Sandvig put his penis between T.W.'s butt cheeks on numerous occasions. RP 97.

When she was still 12 years old, T.W. recalled an incident where she was on the couch with Sandvig and he got on his knees and put his

penis in her mouth. RP 89-90. T.W.'s mother came home, however, so he put his penis back in his pants. RP 90-91. T.W. recalled another time when Sandvig put his penis in her mouth while she was in his bedroom sitting on his bed and he ejaculated in her mouth. RP 93-94. T.W. said on another occasion about this same time, Sandvig once put his penis between her breasts and ejaculated on her neck. RP 97. According to T.W, when she was between the ages of 12 and 13 years old, Sandvig put his penis in her mouth on four occasions and digitally penetrated her at least five times. RP 89, 92, 94, 127-128.

When T.W. was either 13 or 14 years old Sandvig once partially penetrated her vagina with his penis. RP 95-96, 100. On another occasion he also partially penetrated her anus with his penis. RP 101-102.

The family moved to an apartment when T.W. was 15 years old. T.W. remembered during the summer she was in Sandvig's bedroom and he put his penis between her butt cheeks and ejaculated on her back. RP 134. Later that year, T.W. came home from school and Sandvig had her come into his bedroom, take her clothes off and he digitally penetrated her. RP 135. He then commented that her vagina looked different so T.W. confessed she had lost her virginity to her boyfriend. RP 136-137.

According to T.W., Sandvig also used a vibrator on her. RP 114-115. And, when she was 15 years old, Sandvig started to use a massager

on her vagina. RP 110-114. He also took naked pictures of her, watched pornography with her and he had her read a story once about a man who would ejaculate on his stepdaughter's underwear. RP 104-109, 125.

T.W. testified in January, 2010 Sandvig again put his penis between her butt cheeks then took her into the bathroom where he ejaculated on her chest. RP 138. T.W. got mad at him and he responded by telling her that he did not ask her to do things like that with him much anymore. RP 138.

Then, in March 2010, Sandvig went into T.W.'s bedroom, laid on her bed with her and told her he wanted to snuggle. RP 138. T.W. told him to leave and got mad at him. They got into an argument and both started crying. RP 138-139. Sandvig told T.W she must hate him because she did not want to give him what he wanted. RP 142.

T.W. said she finally refused to engage in further sex acts with Sandvig because he was telling her mother she was sleeping around and out of control. RP 142-143. He was also telling Tollefson she was a bad mother because she did not have a tight enough leash on T.W. RP 143. After their argument, T.W. called her mother at work and said she was going to her cousin's house. RP 144. When her mother picked her up, T.W. told her that she could not stand Sandvig anymore. RP 145.

When Tollefson spoke with Sandvig about the argument with T.W. he said T.W. was disrespectful and he wanted T.W. to find somewhere else to go after school. RP 234. The following Sunday T.W. told Tollefson she and Sandvig fought because of what Sandvig tried to get her to do and that he was trying to do things to her that she did not want. RP 146. Sandvig admitted she lied to Tollefson about what actually happened between her and Sandvig. RP 171.

T.W. said that when she performed sex acts with Sandvig he would give her money and take her shopping and buy her things. RP 97-99. T.W. liked the attention and her body liked what she and Sandvig were doing. RP 129. If she refused him, however, Sandvig would not talk to her and yell at Tollefson about how horrible T.W. was and that he did not want to be around her. RP 130-131.

C. ARGUMENT

BECAUSE THE JURY MAY HAVE BASED ITS GUILTY VERDICT ON AN ACT THAT WAS INSUFFICIENT TO PROVE CHILD MOLESTATION, REVERSAL IS REQUIRED.

T.W. testified to a multiple acts of sexual intercourse and molestation over a four year period. The two second degree child rape charges and the second degree child molestation charge were alleged to have occurred between July 13, 2005 and July 12, 2007, when T.W. was between the ages of 12 and 14. The jury was instructed it had to be

unanimous on which act constituted each count of second degree child rape (Counts I and II) and the act had to be separate and distinct for each count and from the second degree child molestation charge alleged in Count III. CP 36, 38, 39, 44.

Count IV, the third degree child rape was alleged to have occurred between July 13, 2007 and July 12, 2009. Although T.W. testified to multiple acts, the jury was not instructed it needed to be unanimous as to which act constituted the charge and the State did not elect a specific act it was relying on to support the charge. Moreover, in closing argument the State directed the jury to a number of acts it could find supported the third degree child rape charge. RP 435-436.

An accused has the right to a unanimous jury. Const. art. 1, § 22; U. S. Const. amend. 6; State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). To ensure unanimity where the state introduces evidence of multiple acts but charges one offense, the Washington Supreme Court allows the state two options. The state may elect the act it relies on, or the court may instruct on unanimity. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009).

If neither option is taken, however, the state cannot prove the verdict was unanimous. A court's failure to follow one of these options, therefore, is constitutional error. State v. Coleman, 159 Wn.2d 509, 511-

12, 150 P.3d 1126 (2007); State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572; U.S. Const. amend. 6; Const. art. 1, § 22. It is constitutional error because some jurors may have relied on one act or incident and some jurors a different act resulting in a lack of unanimity on all of the elements necessary for a valid conviction. Bobenhouse, 166 Wn.2d at 893. The issue can be raised for the first time on appeal. Id., 166 Wn.2d at 892 n. 4 (citing State v. Huyen Bich Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008)).

Here, T.W testified to at least three acts when she was over 14 years old that jurors could have relied on to support Count IV.² T.W. testified about an incident where she was in Sandvig's bedroom and he put his penis between her butt cheeks and ejaculated on her back. RP 134. She testified to another separate incident where Sandvig he digitally penetrated her. RP 135. And, she testified to an incident where Sandvig used a massager on her vagina. RP 110-114.

Because the jury was not instructed it had to unanimously agree which act supported the charge, some jurors could have relied on the one act and some jurors could have relied on the another act. Thus, the State's

² The relevant difference between the second degree child rape charges (Counts I and II) and the third degree child rape charge (Count IV) was T.W.'s age. An element of second degree rape of child is that the child is between ages of 12 and 14. RCW 9A.44.076. An element of third degree rap of a child is that the child is between the ages of 14 and 16. RCW 9A.44.079.

failure to elect which act it was relying on to support the charge and the court's failure to instruct the jury it had to be unanimous on which act supported the charge violated Sandvig's constitutional right to jury unanimity.

The failure to give a multiple acts unanimity instruction is analyzed under the constitutional harmless error standard. Bobenhouse, 166 Wn.2d at 893. The error is presumed prejudicial and requires reversal unless the prosecution proves the error harmless beyond a reasonable doubt. State v. VanderHouwen, 163 Wn.2d 25, 38-39, 177 P.3d 393 (2008); Coleman, 159 Wn.2d at 512. The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. Coleman, 159 Wn.2d at 512 (citing Kitchen, 110 Wn.2d at 411-12). The state does not meet its burden unless it convinces this Court that no rational juror could have a reasonable doubt regarding either of the incidents. Kitchen, 110 Wn.2d at 409, 412.

Sexual intercourse is an element of third degree child rape. RCWA 9A.44.079. Under RCW 9A.44.010(1) "[s]exual intercourse" ... occurs upon any penetration, however slight, and ... [a]lso 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, ... and [a]lso 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.” The court instructed the jury on the definition of sexual intercourse in substantially the same language as the statute, including that part of the definition that refers to penetration by an object. CP 40.

Jurors could have found the incidents with the massager constituted sexual intercourse under the penetration with an object part of the definition. On the other hand, because T.W. testified Sandvig put the massager on her vagina but did not indicate whether it penetrated her vagina, a rational juror could have had a reasonable doubt that those incidents constituted sexual intercourse. A conviction based on insufficient evidence cannot support a guilty verdict. State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

Here, a reasonable jury could have based a guilty verdict on an act that was not "sexual intercourse." This possibility requires reversal. See State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (retrial necessary when jury may have relied on legally insufficient alternative means). Thus, the error was not harmless and the conviction on Count IV should be reversed.

D. CONCLUSION

Because it is reasonably probable jurors either did not unanimously agree on which act constituted third degree child rape or unanimously agreed to rely on an act that could not sustain the conviction, this Court should reverse Sandvig's third degree child rape conviction.

DATED this 3 day of August, 2011

Respectfully submitted,

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DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66837-4-I
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JEFFREY SANDVIG,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3RD DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] JEFFREY SANDVIG
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SIGNED IN SEATTLE WASHINGTON, THIS 3RD DAY OF AUGUST 2011.

x *Patrick Mayovsky*

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