

No. 74777-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD L. KIRKWOOD,

Appellant.

FILED
Aug 29, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Raquel Montoya-Lewis

BRIEF OF APPELLANT

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A. SUMMARY OF THE ARGUMENT

Ronald Kirkwood was convicted of four counts of first degree child rape based solely on the testimony of his step-daughter, D.S. D.S. was very specific about the first incident, but her testimony regarding the remaining counts was non-specific, generic testimony that failed to distinguish one act from another. In addition, the trial court imposed a condition of community placement that has been ruled to be void for vagueness. Mr. Kirkwood asks that his convictions for counts II through IV be reversed with instructions to dismiss or, alternatively, reverse the unconstitutional condition and remand for resentencing.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented to support counts II through IV.

2. The sentencing condition of community placement requiring Mr. Kirkwood to avoid places where minors reside or congregate is unconstitutionally void for vagueness.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove each essential element of each of the crimes charged beyond a reasonable doubt. Where the State charges multiple acts of child rape, there must be specific

evidence of each act to survive scrutiny. Here, the State provided specific evidence of only the first act, relying solely on non-specific generic testimony regarding the remaining three counts. Did the State fail in its burden of proving each of the alleged acts, thus requiring reversal of counts 2 through 4 with instructions to dismiss?

2. The trial court's power at sentencing is statutory. By statute, the court may impose "crime-related" prohibitions as a condition of the sentence. A crime related prohibition that fails to provide ascertainable standards of guilt to protect against arbitrary enforcement is void for vagueness and must be stricken. Here, the court imposed a condition of community placement that Mr. Kirkwood avoid places where minors reside or congregate which has been found to be void for vagueness because it has no ascertainable standards for protecting against arbitrary enforcement. Should this provision be stricken as unconstitutional?

D. STATEMENT OF THE CASE

Ronald Kirkwood and Lori Sasse were married in 2000 and Mr. Kirkwood became the step-father to Ms. Sasse's three children, including D.S., born on July 21, 1998. 9/2/2015RP 468.

In December 2013, D.S., who was 17 years old at the time, disclosed an incident where Mr. Kirkwood inappropriately touched her.

9/2/2015RP 385-92. D.S. went on to describe an incident when she was five years old, where Mr. Kirkwood, after giving D.S. a bath, checked her vaginal area for a rash that had arisen. 9/2/2015RP 398-401. D.S. claimed that during his inspection of the rash, Mr. Kirkwood licked her vagina. 9/2/2015RP 402. D.S. was able to describe that this incident happened when the family lived on North Fork Road in Whatcom County, that she was in preschool at that time and that her teacher's name was Mrs. Lindsay. 9/2/2015RP 403. D.S. also claimed that Mr. Kirkwood was wearing an orange work shirt and jeans. 9/2/2015RP 405. D.S. went on to claim this type of sexual abuse continued "periodically" and stopped when she was in the fourth grade. 9/2/2015RP 404-06. D.S. was nonspecific regarding these additional allegations, providing no more specificity than it happened "multiple times" and "periodically." 9/2/2015RP 404-06.

Nevertheless, Mr. Kirkwood was charged with four counts of first degree child rape, each count occurring "on or about the 21St Day of July, 2003 To The 20Th Day of July 2007[.]" CP 1-2. Following a jury trial, Mr. Kirkwood was convicted as charged. CP 80-81; 9/10/2015RP 958.

Prior to sentencing, Mr. Kirkwood moved for the arrest of judgment based on the lack of evidence to support counts II through IV. Mr. Kirkwood noted that, although count I was supported by specific allegations by D.S., the remaining counts were based upon generic testimony by D.S. that lacked any specificity to distinguish between the counts. CP 82-176; 2/3/2016RP 970. Following argument, the trial court issued a written decision rejecting Mr. Kirkwood's motion. CP 180-87.

At sentencing, the trial court imposed several conditions as part of community placement. CP 208-10. One of these crime-related conditions imposed required Mr. Kirkwood to:

3. Avoid all places where minors reside or congregate, including schools, playgrounds, child-care centers, church youth programs, parks and recreational programs, services used by minors, and locations frequented by minors, unless otherwise approved by the Department of Corrections with a sponsor approved by the Department of Corrections.

CP 209.

E. ARGUMENT

1. **There was insufficient evidence presented at trial to support counts II through IV requiring their reversal and dismissal.**

- a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To convict Mr. Kirkwood of first degree child rape, the jury was required to determine that Mr. Kirkwood, in acts separate and distinct

from the other counts, had sexual intercourse with D.S., D.S. was less than twelve years old at the time of the sexual intercourse, D.S. was not married to Mr. Kirkwood, and D.S. was at least twenty-four months younger than Mr. Kirkwood. RCW 9A.44.073.

b. *D.S.'s testimony regarding counts II through IV was so generic and non-specific, there was nothing to distinguish between the counts.*

Although Mr. Kirkwood was charged with four counts of child rape, the State presented evidence of only the first of those counts and the rest were supported by unspecific generalized testimony by D.S. that failed to delineate one from another.¹

In *State v. Hayes*, the Court of Appeals adopted a three-prong test to determine whether generic testimony such as occurred here was specific enough to sustain multiple convictions: the alleged victim must (1) describe the act or acts with *sufficient specificity* to allow the jury to determine what offense, if any, had been committed; (2) describe the number of acts committed with *sufficient certainty* to support each count the prosecution alleged; and (3) be able to describe the general time period in which the acts occurred. 81 Wn.App. 425, 438, 914 P.2d

¹ Mr. Kirkwood's challenge is solely to the sufficiency specific to each count as the trial court instructed the jury using both a *Petrich* instruction and an instruction that the acts in each count had to be separate and distinct from the other charged counts.

788, *review denied*, 130 Wn.2d 1016 (1996), *citing People v. Jones*, 51 Cal.3d 294, 315-16, 792 P.2d 643, 655-56 (1990). The *Hayes* court held that the victim's generic testimony was sufficiently specific *in that case* and sustained the convictions for four counts of child rape. *Id.* But the Court was careful not to hold that generic testimony would always be sufficient to support a conviction, instead noting that "under the facts *of this case*, such evidence was sufficient to support the four counts. *Id.* at 435 (emphasis added). Thus, the facts of *Hayes* are important in applying the test in *Hayes* to Mr. Kirkwood's case.

In *Hayes*, the defendant was charged with four counts of child rape during the same period of time. The victim testified that during a two year period, the defendant "put his private part in mine" about "[t]wo or three times a week." *Hayes*, 81 Wn.App. at 428-29. The victim related that the acts would "last about 30 minutes," that the defendant would get on top of her and move his "private" in and out of her; that she saw something "yellowish white" come out of Hayes's "private," and that he would use paper towels kept under the bed to wipe them both off. 81 Wn.App. at 429. Finally, the victim testified that it hurt and that she bled once, that it would happen in Hayes's bedroom during the day, in the afternoon, and when Nicky was away.

Id. From this testimony, applying the three-part test, the Court concluded the victim's "testimony described the type of act committed, the number of acts committed, and the general time period. Her generic testimony was therefore specific enough to sustain separately each of the four counts charged." *Hayes*, 81 Wn.App. at 439.

Here, the evidence presented to support counts two through four fails under the test enunciated in *Hayes*. Although D.S. was very specific about the first time the sexual conduct happened, her testimony regarding the remaining counts was generic and non-descript:

Q. Once this first incident happened, were there other incidents that were of a similar nature?

A. Yes, multiple.

Q. How many?

A. Not sure, *they just happened just periodically*.

Q: How frequently?

A. Once every couple of weeks, or two times a couple of weeks, depending on how he felt.

Q. Did it happen always in your bedroom?

A. Yes.

Q. Never happened in the bathroom or his bedroom?

A. No.

Q. It never happened while you were away on vacation, or staying with somebody, or anything like that?

A. No.

Q. What's the next incident that's most memorable to you?

A. In regards to?

Q. In regards to any similar touching or contact with Mr. Kirkwood.

A. *Just the repeated times he had performed on me.*

...

Q. Was there ever anything different on these repeated incidents that happened in your room that, anything different or would it all pretty much happen the same way?

A. *Pretty much happened the same way.*

9/2/2015RP 404-06 (emphasis added). Despite repeated prodding by the prosecutor, as opposed to the specificity in *Hayes*, D.S.'s testimony fell far short.

Thus, applying the *Hayes* test here, D.S. was specific regarding the first count but very non-specific regarding the other alleged times, was unable to describe the number of acts other than "repeated times," and was unable to describe the general time period other than "periodically." 9/2/2015RP 404-06. D.S.'s testimony was not "specific

enough to sustain separately each of the four counts charged.” *Hayes*, 81 Wn.App. at 439.

In its written decision denying Mr. Kirkwood’s post-trial motion to dismiss counts II through IV, the trial court relied solely on the non-specific generic testimony by D.S. CP 182-86. This testimony was specific as to count I and generic on the remaining counts where D.S. repeatedly claimed it happened periodically and multiple times without being specific as to when and as to what conduct occurred.

Since counts II through IV are not supported by sufficient evidence, they must be reversed.

c. *Mr. Kirkwood’s convictions must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the convictions for counts 2 through 4, this Court must reverse the convictions with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The imposition of the condition of community placement requiring Mr. Kirkwood to avoid places where minors reside or congregate is unconstitutionally void for vagueness requiring the condition to be stricken.

- a. *Courts possess the authority to impose conditions that are constitutional.*

Under the Sentencing Reform Act (SRA), a court has the authority to impose “crime-related prohibitions” and affirmative conditions as part of a felony sentence. RCW 9.94A.505(8). “‘Crime-related prohibition’ means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). A court may order compliance “with any crime-related prohibitions” as a condition of community custody. RCW 9.94A.703(3)(f).

There is no need to demonstrate that the condition has been enforced before challenging the condition; a preenforcement challenge is ripe for review. *State v. Bahl*, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). Community custody conditions are ripe for review on direct appeal “‘if the issues raised are primarily legal, do not require further factual development, and the challenged action is final.’” *Bahl*, 164 Wn.2d at 751, quoting *First United Methodist Church v. Hearing Exam’r*, 129 Wn.2d 238, 255-56, 916 P.2d 374 (1996).

This court reviews community custody conditions for an abuse of discretion, and will reverse them if they are “manifestly unreasonable.” *State v. Sanchez Valencia*, 169 Wn.2d 782, 791-92, 239 P.3d 1059 (2010). Imposing an unconstitutional condition will always be “manifestly unreasonable.” *Id.* This court does not presume that community custody conditions are constitutional. *Id.*

b. *Crime related prohibition 3 is void for vagueness and must be stricken.*

Under the Due Process Clause of the Fourteenth Amendment, a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Thus, a condition of community custody is unconstitutionally vague if it fails to do either. *Bahl*, 164 Wn.2d at 753.

In *State v. Irwin*, this Court struck the same condition of community custody barring persons from frequenting places where minors reside or congregate on vagueness grounds:

While *Bahl* and *Sansone* involved the intractably undefinable term “pornography,” this case simply requires ordinary people to understand where “children

are known to congregate.” But, as Irwin points out, whether that would include “public parks, bowling alleys, shopping malls, theaters, churches, hiking trails” and other public places where there may be children is not immediately clear. Trial counsel requested that, rather than leave the definition of this condition to the discretion of the CCO, the court should list prohibited places as examples. When presented with this argument at sentencing, the trial court explained that that [sic] Irwin should not “frequent areas of high concentration of children.” But, the final condition did not include that clarification.

...

It may be true that, once the CCO sets locations where “children are known to congregate” for Irwin, Irwin will have sufficient notice of what conduct is proscribed. But, although that would help the condition satisfy the first prong of the vagueness analysis, it would leave the condition vulnerable to arbitrary enforcement. *See Bahl*, 164 Wn.2d at 753, 193 P.3d 678; *Sansone*, 127 Wn.App. at 639, 111 P.3d 1251. The potential for arbitrary enforcement would render the condition unconstitutional under the second prong of the vagueness analysis. *See Bahl*, 164 Wn.2d at 753, 193 P.3d 678. Therefore, this court reverses the trial court, strikes the condition as being void for vagueness, and remands to the trial court for resentencing.

191 Wn.App. 644, 654-55, 364 P.3d 830 (2015) (internal footnotes omitted).

The potential for arbitrary enforcement renders the condition unconstitutional under the second prong of the vagueness analysis. *Bahl*, 164 Wn.2d at 753. The condition in Mr. Kirkwood’s case is the same condition as in *Irwin*. *Irwin* should control, therefore, this Court

must reverse the trial court, strike the condition as being void for vagueness, and remand for resentencing.

3. The Court should exercise its discretion and deny any request for costs on appeal.

Should this Court reject Mr. Kirkwood's arguments on appeal, he asks this Court to order that no costs on appeal be ordered due to his continued indigency. Such a request is authorized under the recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612, review denied, ___ Wn.2d ___ (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, quoting *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, 192 Wn.App. at 388, quoting *Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent "throughout the review" unless there is a finding that the defendant is no longer indigent. RAP 15.2(f); *Sinclair*, 192 Wn.App. at 393. Mr. Kirkwood had previously been found indigent

prior to trial, and there has been no showing that Mr. Kirkwood's circumstances have so changed that he is no longer indigent. In fact, the opposite is true; he has been incarcerated since his arrest.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This Court must then engage in an "individualized inquiry" regarding the defendant's ability to pay. *Id.* at 391, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. Kirkwood asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Kirkwood asks this Court to reverse counts 2 through 4 for insufficient evidence, and order them dismissed. In addition, Mr. Kirkwood asks this Court to strike Crime-Related Prohibition 3 and remand for resentencing. Finally, Mr. Kirkwood asks that no costs be awarded on appeal.

DATED this 29th day of August 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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RONALD KIRKWOOD,)	
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APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING 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:

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SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF AUGUST, 2016.

x _____ 