

NO. 36153-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL H. PLANT

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAR 21 PM 12:39
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable James J. Stonier

REPLY BRIEF OF APPELLANT

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PM 3-20-08

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT PLANT TOUCHED A.N. FOR THE PURPOSE OF SEXUAL GRATIFICATION.

The state argues that “there is sufficient indicia the Defendant touched A. N. for the purposes of sexual gratification,” relying on State v. Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992) and State v. Price, 127 Wn. App. 193, 110 P.3d 1171 (2005), affirmed by, 158 Wn.2d 630, 146 P.3d 1183 (2006). Brief of Respondent (BOR) at 14-15.

Although the state cites the facts of Price, it fails to provide any analysis of how Price applies to this case. BOR at 11. Clearly, Price is distinguishable, as argued in appellant’s opening brief. See Brief of Appellant at 8 - 9. In Price, there was visible evidence of child molestation because of redness and swelling of the vagina, but here, there was no physical evidence that Plant had touched A.N. Price, 127 Wn. App. at 202.

The state argues further that Plant was not a usual caretaker of A.N., thus, under Powell, “any skin-to skin touching of the sexual parts is automatically assumed to be for the purpose of sexual gratification.” BOR at 14. The state’s reliance on Powell is misplaced because Powell had no

relationship with the alleged victim's mother and had never been expressly entrusted with the care of the child. Powell, 62 Wn. App. at 916. Unlike Powell, Plant and A.N.'s mother, Susan Norbury, were close friends for three years and he slept over at their house numerous times. 4RP 352-53. Plant was like a father or uncle to A.N. and babysat her a day or two before the incident. 4RP 353-54. Norbury testified that there were no prior instances of inappropriate touching and she trusted Plant with A.N. 4RP 395. Norbury acknowledged that she "trusted him more to be a babysitter for her daughter" than her oldest son, Blake. 4RP 395.

Furthermore, the state's assertion that "the touching sexually aroused" Plant is unsubstantiated by the record because Norbury never stated or even implied that Plant was sexually aroused by A.N. 4RP 362-65. When asked whether Plant had an erection when he exposed himself, Norbury replied, "No, I didn't look that long." 4RP 370. Contrary to the state's claim that Plant was "feeling sexually amorous just prior to the touching of A.N.," the record reflects that they "were just joking around and being silly and giggling and stuff. . . ." 4RP 360-61. The state therefore mistakenly relies on State v. Gary J.E., 99 Wn. App. 258, 265, 991 P.2d 1220 (2000), where the undisputed facts revealed that on at least two occasions, the child touched his father's penis, causing in the father a physical reaction equated with sexual gratification. BOR at 14.

Reversal is required because no rational trier of fact could find beyond a reasonable doubt that Plant touched A.N. for the purpose of sexual gratification.

2. REVERSAL IS REQUIRED BECAUSE PLANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The state argues that a voluntary intoxication instruction was not warranted because “[t]here wasn’t any testimony as to the defendant’s level of intoxication at the time of the touching. . . .” BOR at 19. The record reflects otherwise. Norbury testified that Plant came staggering into the house drunk, “I mean he could barely stand up. He was wreaking of booze.” 4RP 355-56. Norbury “kinda reprimanded him because I told him, you know, I don’t like even the smell of booze around the kids.” 4RP 356. Norbury scolded Plant again after she awoke when she heard A.N. tell Plant to stop:

Because I said, You know what? I have really had it you know? You won’t let her sleep. She is only six years old. She needs to go to sleep. Now you are waking me up, and this is bull crap, and if you are going to keep waking people up, and I told you when you came in, if you’re drunk, you shouldn’t be in here. I don’t like the smell around us. You knew the rules when you first came here, and if you smell you have got to go.

4RP 365.

The record substantiates that Plant was still in a drunken state at the time of the alleged touching. Consequently, the state's reliance on State v. Harris, 122 Wn. App. 547, 90 P.3d 1133 (2004), is misplaced because unlike in Harris, there was evidence that drinking affected Plant's ability to form the requisite intent.

The state argues additionally that this case is like State v. Mriglot, 88 Wn.2d 573, 564 P.2d 784, affirmed by, Wn.2d 573, 564 P.2d 784 (1977), "because the defendant's evidence was speculative and conjectural as to how the alcohol affected Plant at the time of the crime." BOR at 20-21. To the contrary, in Mriglot, our Supreme Court concluded that Mriglot was not entitled to a voluntary intoxication instruction because the only evidence of intoxication at the time of the crime was based on the defendant's own testimony, which was no more than a scintilla. Mriglot, 88 Wn.2d at 577-78. Here, Norbury was the state's primary witness, and she provided substantial evidence that Plant was drunk and she had seen him drunk "a lot." 4RP 355-56.

It is evident that the jury found Norbury credible and believed her testimony that Plant was drunk. Given the high level of Plant's intoxication, as described by Norbury, the record substantiates that defense counsel's performance was deficient in failing to argue a diminished capacity defense based on voluntary intoxication because Plant

was entitled to a voluntary intoxication instruction. Plant was prejudiced by the deficient performance because there is a reasonable probability that but for counsel's failure to raise a voluntary intoxication defense, the outcome would have been different.

Reversal is required because Plant was denied his constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn. 2d 222, 225-26, 743 P.2d 816 (1987).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse and dismiss Mr. Plant's conviction.

DATED this 20th day of March, 2008.

Respectfully submitted,


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Attorney at Law

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Amie Hunt, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 20th day of March, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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