

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

In re Personal Restraint)
Petition of)
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)
MANSOUR HEIDARI,)
Petitioner.)
_____)

No. 63040-7-1

STATE'S
SUPPLEMENTAL
RESPONSE TO
PERSONAL RESTRAINT
PETITION

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A. ISSUE PRESENTED.

1. Whether this personal restraint petition should be granted in part because application of the incorrect seriousness level can be established on the face of the judgment and sentence.

2. Whether this personal restraint petition should be granted where insufficient evidence supports the conviction for Count IV.

B. SUPPLEMENTAL STATEMENT OF THE CASE.

Mansour Heidari was found guilty by jury trial of rape of a child in the first degree (Count I), child molestation in the second degree (Count IV) and child molestation in the third degree (Count

V). Appendix A. The judgment and sentence reflects that the date of the crime for Count I was 3/29/95 to 3/28/99. Appendix A.¹ The judgment and sentence properly reflects the time period that was charged in the Amended Information and that was presented to the jury in the Court's Instructions to the Jury. Appendix D, Appendix E, Instruction 11. The jury entered a verdict of guilty as to Count I. Appendix F.

C. SUPPLEMENTAL ARGUMENT.

1. THIS PETITION SHOULD BE GRANTED IN PART BECAUSE THE JURY WAS NOT INSTRUCTED TO FIND THAT THE CRIME OCCURRED AFTER THE EFFECTIVE DATE OF THE INCREASED PENALTY.

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1); see In re Personal Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction. RCW 10.73.090(3)(b). The judgment

¹ Appendices A-C, referenced herein, were attached to the State's Response to Personal Restraint Petition filed on May 18, 2009.

became final in this case on December 9, 2005. This petition was filed more than one year later.

The one-year time limit only applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). Facial invalidity has been interpreted to include those documents signed as part of a plea agreement as well as the judgment and sentence itself. State v. Robinson, 104 Wn. App. 657, 17 P.3d 653 (2001). Where the defendant has been convicted by jury trial, facial invalidity has been interpreted to include judgment and sentence and the verdict forms. State v. Ammons, 105 Wn.2d 175, 189, 713 P.2d 719, 718 P.2d 796 (1986). In In re Hinton, 152 Wn.2d 853, 858, 100 P.3d 801 (2004), the supreme court implied that the facial invalidity of a judgment and sentence may also be shown by related documents in the court file.

Heidari contends that his standard range was miscalculated because the wrong seriousness level was used in regard to Count I. In 1997, RCW 9.94A.515 (formerly 9.94A.320) was amended and the seriousness level for rape of a child in the first degree was

raised from XI to XII. Laws of 1997, ch. 340, sec. 1. The effective date for the change was July 27, 1997. Thus, for a portion of the time period charged in Count I, 3/29/95 to 7/26/97, the seriousness level for rape of a child in the first degree was XI. For the other portion of the time period, 7/27/97 to 3/18/97, the seriousness level was XII. In sentencing Heidari, the court assigned a seriousness level of XII to Count I, resulting in a standard range of 162 to 216 months.²

In State v. Parker, 132 Wn.2d 182, 191, 937 P.2d 575 (1997), the defendant was charged with committing the crimes during a five-year period. The seriousness level of the crimes increased during the fourth year of the period. The court held that use of the increased penalties without requiring the State to prove to the jury that the acts occurred after the effective date of the increased penalties violated the ex post facto clauses of the state and federal constitutions. Id. at 192, n.14.

Pursuant to Parker, the ex post facto clause was violated when the court sentenced Heidari to the higher seriousness level without requiring the jury to find that the crime occurred after the effective date of the statutory change. Pursuant to Hinton, this is

² A seriousness level of XI would have resulted in a standard range of 146-194

an error that can be established on the face of the judgment and sentence with reference to the jury instructions that are contained in the court file. This petition should be granted in part and remanded for resentencing on Count I only with a seriousness level of XI.

2. PETITIONER IS CORRECT THAT INSUFFICIENT EVIDENCE SUPPORTS HIS CONVICTION ON COUNT IV FOR THE COMPLETED CRIME OF CHILD MOLESTATION IN THE SECOND DEGREE; ONLY ATTEMPTED CHILD MOLESTATION IN THE SECOND DEGREE WAS PROVEN AT TRIAL.

Heidari contends that the evidence was insufficient to support his conviction for Count IV, child molestation in the second degree. This claim is not time-barred because it falls within the exception to the time bar provided by RCW 10.73.100(4) for claims that the evidence was insufficient to support the conviction.

In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of

months. Former RCW 9.94A.310(1).

the State. State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993). Therefore, a conviction will not be overturned unless there is no substantial evidence to support it. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The trier of fact may rely on circumstantial evidence alone, even though it is also consistent with innocence. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987).

Heidari contends that there was no substantial evidence of sexual contact because the victim testified that she avoided putting her mouth on Heidari's penis. Heidari is the victim's uncle. RP 10/9/02 285, 331. The victim testified that when she was in the sixth grade, she was at the Heidari's home when he abused her. RP 10/9/02 354. She was in Heidari's bedroom playing with her aunt's makeup when Heidari emerged from the bathroom wearing a robe. RP 10/9/02 357-58. He sat down on the edge of the bed and told the victim to "come over here," and pulled her leg toward him. RP 10/9/02 358. He then pulled his robe away and exposed his penis to her. RP 10/9/02 358. She testified that his penis was erect and described the appearance of a circumcised penis. RP 10/9/02 359-60. Heidari put his hand on the victim's head and tried to push her down toward his penis. RP 10/9/02 360-61. She

moved her head to the side and ultimately ran out of the bedroom.

RP 10/9/02 361. This testimony served as the basis for Count IV.

RP 10/15/02 629-30.

The conduct proven at trial does not establish the completed crime of child molestation in the second degree. The victim was clear that her mouth did not touch Heidari's penis. There is no indication that any other part of her body touched Heidari's penis. Heidari touched the victim's head in an attempt to force her to perform fellatio, but the head is not an intimate part of the body even under these circumstances. The evidence established the crime of attempted child molestation in the second degree, not the completed crime.

A number of cases have held that when an appellate court finds the evidence insufficient to support a conviction for the charged offense, it will direct a trial court to enter judgment on a lesser degree of the offense charged when the lesser degree was necessarily proven at trial. State v. Garcia, 146 Wn. App. 821, 193 P.3d 181 (2008) (extensive citation of cases). RCW 10.61.003 provides that the jury may find a defendant guilty of a lesser degree or an attempt of the crime charged. Where the verdict returned establishes that the State necessarily proved an attempt to commit

the charged crime, this Court may remand for entry of judgment on the attempted crime. An attempt is committed when the defendant takes a substantial step toward commission of the crime with the intent to commit the crime. RCW 9A.28.020(1). By finding the defendant guilty of the completed crime, the jury necessarily found that Heidari acted with the intent to commit the crime and took a substantial step toward its commission. This Court should remand for entry of judgment as to attempted child molestation in the second degree as to Count IV.

D. CONCLUSION.

This petition should be granted and remanded for resentencing.

DATED this 10th day of September, 2009.

Respectfully Submitted,

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King County Prosecuting
Attorney

by 
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APPENDIX D

No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits

admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or ^{by} the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

No. 2

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

No. 3

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No. 4

The defendant has entered a plea of not guilty on each count. That plea puts in issue every element of the crime charged in each count. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 5

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

No. 6

A person commits the crime of Rape of a Child in the First Degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

No. 7

Sexual intercourse 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.

No. 8

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

No. 9

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

No. 10

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

No. 11

To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of March 29, 1995 through March 28, 1998, the defendant had sexual intercourse with Beeta Zadegan;

(2) That Beeta Zadegan was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Beeta Zadegan; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count I.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count I.

No. 12

A person commits the crime of Rape of a Child in the Second Degree when that person has sexual intercourse with another person who is less than fourteen years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

No. 13

To convict the defendant of the crime of Rape of a Child in the Second Degree, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of March 29, 1995 through June 30, 1998, the defendant had sexual intercourse with Beeta Zadegan;

(2) That Beeta Zadegan was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Beeta Zadegan; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to count III.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to count III.

No. 14

There are allegations that the defendant committed acts of rape and child molestation on multiple occasions. To convict the defendant on any count, one or more particular acts must be proved beyond a reasonable doubt on that count; you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt as to each count.

No. 15

A person commits the crime of Child Molestation in the First Degree when that person has sexual contact with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

No. 16

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

No. 17

To convict the defendant of the crime of Child Molestation in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates March 29, 1995 through March 28, 1998, the defendant had sexual contact with Beeta Zadegan;

(2) That Beeta Zadegan was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Beeta Zadegan; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count II.

No. 18

A person commits the crime of Child Molestation in the Second Degree when that person has sexual contact with another person who is less than fourteen years old and who is not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

No. 19

To convict the defendant of the crime of Child Molestation in the Second Degree as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates March 29, 1995 through June 30, 1998, the defendant had sexual contact with Beeta Zadegan;

(2) That Beeta Zadegan was less than fourteen years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Beeta Zadegan; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count IV.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count IV.

No. 20

A person commits the crime of Child Molestation in the Third Degree when that person has sexual contact with another person who is at least fourteen years old but less than sixteen years old and who is not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

To convict the defendant of the crime of Child Molestation in the Third Degree as charged in Count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of March 29, 2000 through March 29, 2001, the defendant had sexual contact with Beeta Zadegan;

(2) That Beeta Zadegan was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;

(3) That the defendant was at least forty-eight months older than Beeta Zadegan; and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count V.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count V.

No. 22

The defendant is not compelled to testify, and the fact that the defendant has not testified cannot be used to infer guilt or prejudice him in any way.

No. 23

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

No. 24

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and verdict forms A, B, C, D, and E.

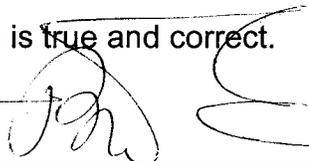
You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdicts.

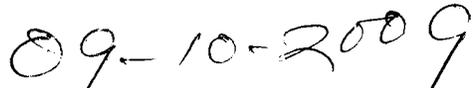
CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Mansour Heidari, at the following address: DOC# 847716, Monroe Corrections Center, P.O. Box 888, Monroe, WA 98272 , the petitioner, containing a copy of the State's Supplemental Response to Personal Restraint Petition in In re Personal Restraint of Heidari, No. 63040-7-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington


Date

2009 SEP 10 PM 4:38
STATE OF WASHINGTON