74358-9

No. 94883-6

74358-9

FILED
January 9, 2017
Court of Appeals
Division I
State of Washington

NO. 74358-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

HAI MINH NGUYEN,

Appellant.

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

The Honorable Mary E. Roberts, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. NGUYEN'S CONVICTIONS FOR FIRST AND SECOND DEGREE CHILD MOLESTATION VIOLATE DOUBLE JEOPARDY UNDER THE PRECEDENT OF THIS COURT

a. Because the same act of oral-genital contact may constitute both child rape and child molestation under the definitions of "sexual intercourse" and "sexual contact," in this context child rape and child molestation are the same in law and the same in fact

The State acknowledges that this court's decision in State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), controls and that this court would have to "disagree with the Land analysis" to rule in its favor. Br. of Resp't at 10-11, 13. But there is no basis to disagree with Land because its reasoning is logical and clear: when oral-genital contact is involved, child rape and child molestation "are the same in fact and in law because all the elements of rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape." Land, 172 Wn. App. at 600.

A plain reading of the statutory definitions of "sexual intercourse" and "sexual contact" provided to Nguyen's jury confirms the logical correctness of Land. Child molestation requires "sexual contact," which means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." CP 37; RCW 9A.44.010(2). Child rape requires "sexual intercourse," which

by statutory definition includes any act of "sexual contact between persons involving the sex organs or one person and the mouth or anus of another whether such persons are of the same or opposite sex." CP 36 (emphasis added); RCW 9A.44.010(1)(c) (emphasis added). The double jeopardy issue arises only in circumstances of oral-genital and anal-genital contact—these types of contact fall within the definition of "sexual contact" and within the definition of "sexual intercourse," but fall short of the penetration defined in RCW 9A.44.010(1)(a) and (b). In the context of oral-genital or oral-anal contact, then, the sexual contact necessary for molestation and the sexual intercourse necessary for child rape are indeed the same in law and fact. The Land court's reasoning on this issue is clear, logical, and correct.

The State claims child molestation and child rape are not the same in law because child molestation contains an element of sexual gratification whereas child rape does not, relying primarily on State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993). Br. of Resp't at 8-9. However, the Jones court did not consider what is at issue here—that child rape, when predicated on RCW 9A.44.010(1)(c)'s definition, requires proof of sexual contact which in turn requires proof of sexual gratification. RCW 9A.44.010(1)(c) defines sexual intercourse (an essential element of child rape) as "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." (Emphasis added.) The "sexual intercourse" definition incorporates the definition of "sexual contact" in RCW 9A.44.010(2), which requires "touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." (Emphasis added.) Therefore, when sexual intercourse consists of sexual contact rather than penetration of the vagina or anus—that is, oral-genital or anal-genital contact per RCW 9A.44.010(1)(c)—the State must prove this sexual contact was done for the purpose of gratifying sexual desire. Child rape and child molestation, in this context, are the same in law.

The State also relies on State v. French, 157 Wn.2d 593, 141 P.3d 54 (2006), for the proposition that child molestation and child rape are dissimilar in law. Nguyen acknowledges that the French court did say that when determining whether child molestation was a lesser included offense of child rape. However, the French court did not consider the issue in the context of a double jeopardy claim and, in any event, overlooked the full statutory definitions of sexual contact and sexual intercourse and how they overlap.

According to the French court, "Sexual contact, an element of child molestation, therefore continues to require a showing or purpose or intent [because it requires proof of sexual gratification]; rape of a child does not." 157 Wn.2d at 611. As discussed, this is incorrect. The court overlooked that

one manner of sexual intercourse requires proof of sexual contact, which in turn requires proof of purpose of gratifying sexual desire. The French court failed to recognize how one manner of committing child rape—sexual contact by way of oral-genital or genital-anal contact—requires a showing of sexual gratification. Though not all child rapes require proof of sexual gratification, child rapes committed by oral-genital and genital-anal sexual contact do.

The French court also stated, "Rape of a child also requires a finding of penetration whereas child molestation does not." 157 Wn.2d at 611. Wrong again. Rape of a child does not require a finding of penetration. Rape of a child requires a finding of sexual intercourse, but sexual intercourse may be accomplished by oral-genital or genital-anal contact rather than by penetration. RCW 9A.44.010(1)(c). The French court missed an entire definition of sexual intercourse through which rape of a child can be committed. The French court was mistaken when it stated that rape of a child requires a finding of penetration. Under a basic reading of RCW 9A.44.010, penetration is legally sufficient to prove child rape but it is not legally necessary.

The State misses this point when it asks this court to disregard Land based on "a comparison of the legal elements of the two crimes, not by considering just one portion of a definitional term in isolation from its other

portions." Br. of Resp't at 10-11. The Land court *did compare* the legal elements of child rape and child molestation and correctly concluded that, when oral-genital contact is involved, the elements to be proven are identical. Contrary to the State's claim, the Land court did not "look beyond the elements of the two offenses," Br. of Resp't at 10, but looked directly at the elements of the two offenses and determined they overlapped when committed by oral-genital contact. The State's argument that the elements are different is inconsistent with this court's decision in Land and must be rejected. The failure to instruct the jury that they must find separate and distinct acts of child rape and child molestation requires dismissal of the child molestation convictions.

b. A prosecutor's closing argument cannot overcome a double jeopardy violation

As Nguyen predicted, the State relies on the prosecutor's closing argument to assert "it was manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense, and that each of the four counts was based on a separate act." Br. of Resp't at 13; Br. of Appellant at 11-13. However, the Washington Supreme Court has held that a prosecutor's election of specific acts in closing does not cure a double jeopardy violation. State v. Kier, 164 Wn.2d 798, 813-14, 194 P.3d 212 (2008).

In Kier, the State asserted second degree assault and first degree robbery convictions did not merge because they were committed against two different victims. Id. at 808. The court analogized "to a multiple acts case" and concluded it was unclear whether the jury believed Kier committed the crimes against the same or different victims. Id. at 811. Because the instructions and the evidence at trial permitted the jury to consider a single person as the victim of both the assault and the robbery, the verdict was ambiguous. Id. at 814. Therefore, the court concluded that the assault conviction merged into the robbery conviction. Id.

In Kier, the prosecutor argued in closing that Hudson was the victim of the robbery and Ellison was the assault victim. Id. The State thus asserted that the risk the jury would believe Ellison was the robbery victim "was eliminated because the prosecutor made a 'clear election' of which act supported each charge, as is allowed in a multiple acts case." Id. at 813. The court refused to consider the State's closing argument in isolation because the evidence suggested that both men were victims of the robbery and the instructions did not specify that Hudson alone was to be considered the robbery victim. Id. "While the prosecutor at the close of the trial attempted to require this finding, the jury was properly instructed to base its verdict on the evidence and instructions and not on the arguments of counsel." Id. The Kier court therefore found a double jeopardy problem because the

instructions allowed the jury to find either man to be the victim of the robbery and assault "notwithstanding the State's closing argument." Id. at 814.

Kier controls. The prosecution's election of specific conduct does not. This court must look to the presentation of evidence and the jury instructions to resolve this case. T.P. alleged numerous types of sexual contact: penile penetration, digital penetration, oral-genital contact, and oral and digital contact with the breasts. RP 140, 144-46, 151-54, 163-64. There were far more alleged acts than there were charges. Cf. State v. Mutch, 171 Wn.2d 646, 651-52, 254 P.3d 803 (2011) (the five alleged incidents that lined up perfectly with five charges made it apparent that "if the jury believed [the alleged victim] regarding one count, it would as to all").

Several of the acts involved penetration and oral-genital contact, which the State argued constituted the child rapes, and several of the acts involved touching of breasts, which the State argued were the child molestations. But the jury instructions drew no such distinction. The presentation of the evidence drew no such distinction. The State fails to explain how the incidents were demarcated between sexual intercourse and sexual contact for the jury, except in its closing argument, which is not evidence and was inconsistent with the jury instructions. This distinguishes this case from State v. Peña Fuentes, 179 Wn.2d 808, 825, 318 P.3d 357

(2014), where the jury instructions supported the prosecutor's division of the charged conduct into two categories—"the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation." The prosecutor did not make the same distinction between penetration (which is necessarily child rape to the exclusion of child moletation) and the other acts.

As in Kier, the jury instructions did not specify that only the breast contact acts, and no others, were to be considered for the child molestation charges. As in Kier, the jury was instructed that it must disregard "any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 28. Because it is presumed that jurors follow the trial court's instructions, this court must presume that the jury disregarded or was unpersuaded by the State's election. Kier, 164 Wn.2d at 813; State v. Ervin, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

The prosecutor's election of specific conduct that constituted child molestation does not prevent the double jeopardy error. The possibility remains that Nguyen's jury relied on the same two acts of oral-genital contact to convict him for both the rapes and the molestations. This violates Nguyen's right to be free from double jeopardy and requires dismissal of both child molestation convictions. State v. Borsheim, 140 Wn. App. 357, 371, 165 P.3d 417 (2007).

2. THE PROHIBITION ON SEXUALLY EXPLICIT AND EROTIC MATERIALS IS UNCONSTITUTIONALLY VAGUE AND UNRELATED TO THE CRIME

The State acknowledges there is no controlling law that supports its position. Br. of Resp't at 26. Yet the State provides no competing statutory analysis to explain how the statutory definitions of "sexually explicit material" (RCW 9.68.130(2)), "sexually explicit conduct" (RCW 9.68A.011(4)), and "erotic material" (RCW 9.68.050(2)) adequately delineate what is allowed from what is proscribed. Implicit in the State's failure to respond to Nugyen's statutory analysis is a recognition that the statutory definitions indeed lead to inconsistent results. The State assures Nguyen and this court that "'[s]exually explicit' and 'erotic' are not indecipherable phrases for ordinary people," but does not explain how or why this is so. An explanation is needed given the incredibly broad prohibition on *all* sexually explicit and erotic materials at issue here.

The State's discussion of the crime-relatedness of the prohibition illustrates the problem with its broad-strokes reasoning. According to the State, the community custody condition prohibits "materials that primarily involve sexual arousal and sexual objectification" and "materials that sensationalize and celebrate the sexual objectification of others," and therefore relates to the crime. Br. of Resp't at 27-28. Were the condition limited to such materials, the State might be correct that it is not intolerably

vague. But the condition contains no limits. The condition carries a very real risk that reading a certain book, viewing a certain film or painting, or listening to a certain song will result in violation. The various statutory definitions exacerbate this risk rather than mitigate it. Indeed, the statutory definitions virtually guarantee arbitrary enforcement. The condition prohibiting all possessing, viewing, using, or accessing sexually explicit and erotic materials is unconstitutionally vague.

Nor is the condition crime-related. The State does not and cannot point to any evidence in the record that connect the circumstances of the crime to sexually explicit materials. Rather than attempt to do so, the State claims that this condition is just automatically crime-related in every case involving a sex crime. The State's position is at odds with this court's decision in State v. Kinzle, 181 Wn. App. 774, 785, 326 P.3d 870 (2014), which struck a similar condition "because no evidence suggested that such materials were related to or contributed to [Kinzle's] crime."

In a statement of additional authority, the State relies on Division Three's recent decision, State v. Magana, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 7377339 (Dec. 20, 2016). There, the court concluded, without any attempt at analysis, "Because Mr. Magana was convicted of a sex offense, conditions regarding access to X-rated movies, adult book stores, and sexually explicit materials were all crime related and properly imposed." Id.

at *5. This does not represent valid legal reasoning but a throwback to overly simplistic contemplations of sexuality. It assumes that the commission of a sex crime renders an offender incapable of nondeviant sexuality. It exempts a set of crimes—sex crimes—from the requirement that a community custody conditions must relate to the crime. Because no evidence in this record connects Nguyen's alleged crimes to his possession, use, access, or viewing of sexually explicit materials, this community custody condition must be stricken.

B. CONCLUSION

Nguyen's first degree child molestation and second degree child molestation convictions violate double jeopardy. They must be dismissed. Nguyen also asks that the unconstitutionally vague and/or non-crime-related community custody conditions be stricken from the judgment and sentence.

DATED this 9th day of January, 2017.

Respectfully submitted,

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