

65547-7

65547-7

NO. 65547-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH MARTIN,

Appellant.

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

The Honorable Vickie Churchill, Judge

OPENING BRIEF OF APPELLANT

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ISLAND COUNTY
CLERK OF SUPERIOR COURT
VICKIE CHURCHILL
JUDGE

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's convictions.
2. Prosecutorial misconduct denied appellant a fair trial.
3. Defense counsel was ineffective for failing to object to irrelevant and highly prejudicial evidence.

Issues Pertaining to Assignments of Error

1. Appellant was convicted of molesting his granddaughter. In addition to proving that appellant touched an "intimate part" on his granddaughter, the State was required to produce additional evidence the touching was for the purpose of gratifying a sexual desire. There was no such evidence. Must appellant's convictions be vacated?

2. It is misconduct for a prosecutor to misstate the evidence or argue facts not in evidence. At trial, the prosecutor violated these prohibitions regarding an important element of the State's proof. Did this deny appellant a fair trial?

3. A prosecution witness testified that the complaining witness and her brother had lived with appellant, but CPS removed the children from his home. Defense counsel failed to object to this

irrelevant and highly prejudicial evidence. Did this also deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Island County Prosecutor's Office charged Kenneth Martin with two counts of Child Molestation in the First Degree. Count one alleged that Martin committed the offense against his granddaughter, C.R., sometime between June 1, 2008 and July 31, 2008. CP 46. Count two alleged similar conduct sometime between August 1, 2008 and August 31, 2008. CP 47. A jury found Martin guilty on both counts, the court imposed a minimum standard range sentence of 89 months, and Martin timely filed his Notice of Appeal. CP 1-2, 7, 28-29.

2. Trial Evidence

Kenneth and Aida Martin are C.R.'s maternal grandparents. RP 46, 64. For a period of time, C.R. and her brother lived with the Martins, but the children eventually moved out of the Martin home and moved in with their paternal grandparents, Sharon and Richard Osorio. RP 46-47, 63.

Sometime in early June 2009, when C.R. was 11 years old, she went to visit her great grandparents – Betti and Bert Letrondo.

According to Sharon Osorio, after C.R. returned from that visit, she began coming into Osorio's bedroom to sleep at night, which was unusual. RP 47-49.

In August 2009, C.R. went on an overnight trip with her mother's side of the family, including Kenneth and Aida Martin. RP 49-50. Upon her return, C.R. continued to come into Osorio's bedroom at night. RP 50. Osorio asked C.R. what was bothering her and, based on what C.R. said, she contacted police. RP 50-51.

C.R., who was 13 years old by the time of trial, testified that when she visited her great grandparents at their home in the summer of 2008, she also spent time with her grandfather, Kenneth Martin. RP 65-66. During the visit, after mowing the lawn for her great grandparents, C.R. decided to take an afternoon nap in a spare bedroom inside the home. RP 67-68. C.R. was wearing a short-sleeved shirt over a tank top and a sports bra under the tank top. RP 68-69. She could not recall what type of pants she was wearing. RP 68-69.

According to C.R., she awoke to find her grandfather's hand under her shirt. RP 69-70. When asked to describe the location of Martin's hand, she said it was in her "chest area," but indicated that he had not reached her sports bra. Rather, he was just "getting

there” when she woke up. RP 70. She also testified that Martin had his hand on her inner thighs, closer to her crotch than to her knees, but he did not touch her crotch. RP 70. According to C.R., she told Aida Martin and her mother about the incident. RP 74-75.

As to the second incident, charged in count two, C.R. testified she was with her extended family on vacation at Birch Bay. RP 71. She stayed in a condo with several family members, including Kenneth and Aida Martin. RP 72. She lay down in the bedroom for a nap and once again awoke to find her grandfather touching her. RP 74-75. According to C.R., Martin put his hand up her shirt again. She could not recall exactly where he touched her; rather, she could only say he touched her skin somewhere in her “breast area” and that she was again wearing a tank top and sports bra under her shirt. RP 76-77, 80, 85. C.R. testified that she told Martin to leave and reported what had happened to Aida Martin, but Aida did nothing about it. RP 77-78. Eventually, she told Osorio and then spoke to police. RP 79.

Beyond Osorio and C.R., the only other trial witness was C.R.’s older brother, T.R. RP 54. According to T.R., his sister said she did not want to go on the trip to Birch Bay because she knew that Martin was going to be there. RP 58.

At the close of the State's case, defense counsel moved to dismiss both counts based on the State's failure to prove the "sexual contact" element of child molestation. RP 95-96, 98. The trial court initially agreed the evidence might not be sufficient, but ultimately denied the motion. RP 100-102.

In closing argument, relying on the statutory definition of "sexual contact," defense counsel argued the State had not proved the element beyond a reasonable doubt because it had failed to prove Martin's purpose in touching his granddaughter was to gratify a sexual desire. RP 121-123, 126-127.

Although there was no evidence to support the argument, during the State's closing, the deputy prosecutor repeatedly told jurors that Martin placed his hand under C.R.'s sports bra and rubbed her breasts. RP 117-119. Defense counsel did not object to these misstatements of the evidence.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN MARTIN'S CONVICTIONS.

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

Martin was convicted on two counts of Child Molestation in the First Degree. Under RCW 9A.44.083:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(1) (emphasis added).

“Sexual contact” 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.” RCW 9A.44.010(2). “Contact is ‘intimate’ within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the touching was improper.” State v. Jackson, 145 Wn. App. 814, 819, 187 P.3d 321 (2008).

In determining whether the State has successfully proved sexual contact, this Court looks at the totality of the circumstances. State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009). Direct contact with genital organs or breasts is sexual contact as a matter of law. In re Welfare of Adams, 24 Wn. App. 517, 521, 601 P.2d 995 (1979). Whether parts of the body in close proximity to “the primary erogenous zones” are “intimate parts” is for the jury to determine. Harstad, 153 Wn. App. at 21. But “in those cases in which the evidence shows touching through clothing, or touching of intimate parts other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification.” State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992).

Moreover, whether there is a familial relationship also impacts the State's proof requirements. "Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification." Powell, 62 Wn. App. at 917. This inference does not apply, however, where the accused and the complaining witness are related. See State v. Wilson, 56 Wn. App. 63, 68, 782 P.2d 224 (1989) (not applying inference where father accused of molesting daughter), review denied, 114 Wn.2d 1010 (1990).

a. Count One

Count one did not involve direct contact with genital organs or breasts. Rather, C.R. claimed that when she awoke from a nap at her great grandparents' home, Martin's hand was under her shirt, in her "chest area." RP 70. C.R. never testified that Martin touched her skin. Rather, C.R. also wore a tank top and sports bra, and her testimony establishes only that Martin placed his hand underneath her outer shirt, but not over her sports bra, when she awoke. RP 70 (indicating Martin "was getting there"). She also testified that Martin had his hand on her inner thighs. RP 70. She could not recall what type of pants she wore, but did not dispute she was wearing "pants" at the time. RP 68-69.

Even if one assumes the areas of contact qualify as “other intimate parts,” at most the State provided evidence on count one that Martin touched his granddaughter over her clothing. Therefore, the State was required to produce “some additional evidence of sexual gratification.” Powell, 62 Wn. App. at 917. And it failed to do so.

There is no evidence that Martin said anything to C.R. indicating the touching was sexual, no evidence of threats, no warnings not to tell, no evidence of nudity, and no evidence that Martin was sexually aroused. And the touching occurred in a household where others were present. See RP 66-68 (C.R.’s great grandparents and her mother present in the one-story home). The circumstances in Martin’s case stand in stark contrast to cases in which the State successfully produced additional evidence of sexual gratification beyond touching over clothing.

For example, in State v. Harstad, in addition to touching one victim’s upper inner thigh, the defendant rubbed the victim in that area and whispered “let me see your pussy,” which provided sufficient additional proof of sexual purpose. Harstad, 153 Wn. App. at 19, 21-22. And for a second victim, in addition to touching her upper thighs, the defendant’s additional acts of moving his hand

back and forth across her thighs and simultaneous heavy breathing provided the additional proof necessary for conviction. Id. at 19-20, 22-23.

Other cases with sufficient proof similarly involved additional and unambiguous evidence of intended sexual gratification. See, e.g., State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (defendant placed child on his lap and rubbed “zipper area of boy’s pants for 5 to 10 minutes.”); State v. Whisenhunt, 96 Wn. App. 18, 24, 980 P.2d 232 (1999) (unrelated adult repeatedly reached over seat on bus to touch five-year-old girl through clothing in vaginal area); State v. Brooks, 45 Wn. App. 824, 826-827, 727 P.2d 988 (1986) (semen found on child’s face, chest, stomach, and clothing); State v. Johnson, 28 Wn. App. 459, 461-462, 624 P.2d 213 (1981) (although defendant did not touch victim’s genitals, fact he exposed himself while placing victim on his lap provided sufficient additional proof of sexual motivation), aff’d, 96 Wn.2d 926 (1982); Adams, 24 Wn. App. at 520-521 (in addition to touching victim’s hips, defendant helped lower victim’s pants, and “outstretched himself prone upon her and rocked as if trying to work his way in.”).

As noted above, a second reason not to simply infer a sexual purpose from Martin’s contact with C.R. is that they are

family. In fact, Martin and his wife previously served as C.R.'s primary caretakers. See Wilson, 56 Wn. App. at 68 (no inference of sexual gratification for touching family members). In Wilson, that the defendant touched his daughter's private area while they were located in an area not easily observed, that his daughter was completely naked, and that he also was partially undressed provided sufficient additional evidence – beyond the touching – of sexual motivation. Wilson, 56 Wn. App. at 68-69. There was no similar evidence here.

Because the State failed to offer sufficient evidence of sexual contact, Martin's conviction on count one must be reversed and the charge dismissed. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice).

b. Count Two

The evidence is also insufficient for count two. C.R. testified that while the family vacationed at Birch Bay, she awoke to find her grandfather touching her. RP 71-75. Specifically, C.R. claimed that her grandfather put his hand up her shirt again. But she could not recall exactly where he touched her and could only say he

made contact with her skin somewhere in her “breast area.”¹ RP 76-77, 85.

As with count one, missing from the State’s proof is “additional evidence of sexual gratification” necessary when a defendant is accused of inappropriately touching a family member and where the touching does not involve direct contact with genital organs or breasts. As with count one, there was no evidence of sexual conversation, no evidence of threats, no warnings not to tell, no evidence of nudity, and no evidence of sexual arousal. And, as before, the contact occurred in close proximity to other family members. See RP 77-78 (multiple family members just down the hall in the condo). Therefore, Martin’s conviction on count two must also be reversed and the charge dismissed.

2. PROSECUTORIAL MISCONDUCT DENIED MARTIN A FAIR TRIAL.

A prosecutor is a quasi-judicial officer, obligated to seek verdicts free of prejudice and based on reason. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096

¹ Before ultimately testifying that she could not point to the precise location of the touching, C.R. tried to identify the area where she had been touched and apparently pointed to an area mid-chest, between her breasts. RP 76-77, 96, 127.

(1969). A prosecutor has a special duty in trial to act impartially in the interests of justice and not as a "heated partisan." State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). A prosecutor may "strike hard blows, [but] [s]he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935).

It is misconduct for a prosecutor to misstate the evidence. State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026 (1991). Yet, that is precisely what the deputy prosecutor did during closing argument at Martin's trial.

Although the evidence merely established that Martin had touched C.R.'s general "chest area" (count one) and general "breast area" (count two), the prosecutor summarized the evidence far differently. Regarding count one, she said:

The only reasonable inference for that touching is for the purpose of sexual gratification. There is no other reason for a grown man to approach a sleeping 11-year-old child, who is alone, and stick his hand underneath her little sports bra and rub. There is no other reasonable explanation than for purposes of sexual gratification.

RP 117 (emphasis added). Still discussing count one, the prosecutor continued:

There is no other reason for a man to touch an 11-year-old child, while she is sleeping and alone, underneath her sports bra, on her skin, except for the purpose of sexual contact.

RP 117-118 (emphasis added).

Moving on to count two, the deputy prosecutor made a similar representation regarding the evidence:

And I submit to you that, just as for Count I, it is the same for Count II. There is no reason for a grown man to put his hand under an 11-year-old's sports bra and rub when she is asleep and alone except for purposes of grat – sexual gratification.

RP 119 (emphasis added).

The prosecutor made the same argument in rebuttal:

And I ask you again: Would a reasonable person think that a man sticking his hand up a sports bra or a regular bra, an 11-year-old girl literally who is sleeping and alone, rubbing it, is for an innocent purpose?

RP 130 (emphasis added).

The problem with these arguments, of course, is that there was never any testimony that Martin stuck his hand underneath C.R.'s sports bra and rubbed her naked breasts. These were misstatements of the evidence on the critical issue at trial: whether there had been sexual contact, i.e., touching done for sexual gratification. And under the prosecutor's repeated misstatements

of the evidence, there could be no doubt that sexual contact had occurred. See Adams, 24 Wn. App. at 521 (direct contact with breasts is sexual contact as a matter of law).

Unfortunately for Martin, his attorney did not object to any of the prosecutor's misstatements of the evidence. Even in the absence of an objection, however, reversal is still required where the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

The misconduct here was flagrant. The misrepresentation was repeated four times. And only ill intention can explain why a seasoned prosecutor would stray from the actual evidence at trial on such a critical point. Perhaps the deputy prosecutor was recalling something from a pretrial interview with C.R. See RP 79-80 (prosecutor interviewed C.R. after police contacted). Or perhaps the argument was based on nothing at all. It is impossible to know.

But whatever the source of this argument, no curative instruction could have fixed it. The misstatements were directed at the only real issue in dispute. One or more jurors likely concluded

either that the prosecutor's summary of the evidence was correct or the summary was based on information the prosecutor learned elsewhere. Either way, an instruction would not suffice. A new trial is the only adequate remedy.

3. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE THAT CPS HAD REMOVED C.R. FROM MARTIN'S HOME.

As previously discussed, C.R. and T.R. lived with Kenneth and Aida Martin before moving in with Sharon and Richard Osario. RP 46-47, 63. During the deputy prosecutor's examination of Sharon Osario, Osario revealed that Child Protective Services had removed C.R. and her brother from the Martin home:

Q: Yes. And how is that [C.R.] comes to live with you?

A: CPS took the children back in -- I -- I don't remember the year. Maybe 2003 --

Q: Mm-hmm.

A: -- 2004. They resided with Wayne and Aida for a time. And then CPS called me and asked if I could take the children, that they were being removed from the Martins. I don't know why. And I said, "Yes, of course I'd take them."

Q: Have they been with you ever since?

A: Ever since.

RP 47. Defense counsel failed to object or move to strike this evidence concerning CPS. This was ineffective and denied Martin a fair trial.

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

The first prong of the test requires a showing that counsel's representation fell below an objective standard of reasonableness and may be satisfied by showing that defense counsel failed to object to inadmissible evidence prejudicial to the defendant. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions), overruled on other grounds, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); State v. Dawkins, 71 Wn. App. 902, 907-

10, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes).

Defense counsel's failure to object to evidence of the CPS removal qualifies. Evidence must be relevant to be admissible. ER 402. Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if relevant, however, evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" ER 403. Evidence is unfairly prejudicial if "likely to stimulate an emotional response rather than a rational decision." State v. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Moreover, evidence must also comply with ER 404(b), which forbids the admission of prior bad acts for the purpose of showing criminal propensity. ER 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

Evidence that CPS removed C.R. from Martin's home was not relevant to any fact of consequence at trial. On the other hand,

its improper prejudicial impact was significant. It conveyed to jurors that something inappropriate occurred at the Martin home, requiring CPS intervention and a new home for C.R. and her brother. The evidence was not that CPS was simply finding a more suitable placement. Rather, the evidence was that the children "were being removed from the Martins." RP 47.

Not only was this evidence inadmissible under ER 401, 402, and 403, it was dangerous and inadmissible propensity evidence under ER 404(b). Without an objection or motion to strike, jurors were free to conclude that Martin probably engaged in inappropriate contact with C.R., forcing CPS to find a new placement. In a case where jurors were asked to decide if C.R. had been molested, this placed the weight of CPS behind the State's arguments for conviction. It was a significant mistake.

In order to show prejudice, Martin need not show that counsel's deficient performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability that the outcome would have been different but for the mistake, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v.

Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Based on the argument earlier in this brief, this Court should find that the evidence was insufficient to find Martin guilty of child molestation based on insufficient proof of sexual contact. But even if this Court were to disagree, it would be apparent that the conduct in these cases fell on the outer periphery of sufficient evidence. And in such a case, jurors' knowledge that CPS removed C.R. from Martin's home was sufficient to alter the outcome.

Defense counsel did mention the CPS removal during closing argument, raising the question whether counsel deliberately failed to object to this evidence as a tactic. Specifically, defense counsel reminded the jury that CPS had removed the children from the Martin home and that Osario willingly took them in. RP 125-126. Defense counsel then argued that this went to the witnesses' credibility – how much they remembered and whether there were reasons “for people to say things or not say things.” RP 126.

It is not at all clear what defense counsel was suggesting with this obtuse argument. If the suggestion was that one, some, or all of the State's witnesses were lying because of the CPS removal, that connection was never established in any coherent fashion.

Although legitimate trial strategy cannot form the basis for an ineffective assistance claim, trial strategy must be just that -- legitimate. Whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in criminal law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Even if counsel's failure to object to the CPS evidence was tactical, it was incompetent. Its only consequence was to allow jurors to conclude that CPS had stepped in to protect C.R.

On this additional ground, both convictions must be reversed.

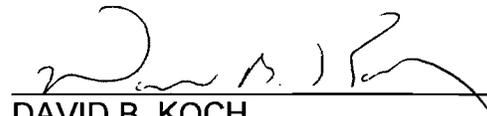
D. CONCLUSION

The evidence is insufficient to sustain Martin's convictions. They must be reversed and the charges dismissed. Alternatively, Martin is entitled to a new trial based on prosecutorial misconduct and ineffective assistance of defense counsel.

DATED this 30th day of November, 2010.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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