

68745-0

68745-0

NO. 68745-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

NORMA DEDIOS,

Appellant.

2013 JUL 12 PM 2:08
COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Whether the evidence produced at trial is sufficient to support the defendant's conviction for communicating with a minor for immoral purposes.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Norma Dedios, with rape of a child in the second degree (count I), rape of a child in the third degree (count II), and communicating with a minor for immoral purposes (count III) based on multiple incidents of sexual contact with S.R. (who was 13 and 14 years old when the relevant events occurred) in the summer of 2009. CP 1-6, 131-32. A jury trial on these charges occurred in February and March 2012 before the Honorable Harry McCarthy.

At the conclusion of the trial, the jury was unable to reach a verdict on count I, acquitted on count II, and found Dedios guilty of count III. CP 163-65; RP (3/2/12) 13-16. The trial court imposed a sentence of 364 days with all but 60 days suspended. CP 177-81. Dedios now appeals. CP 182-86.

2. SUBSTANTIVE FACTS

Dedios met 13-year-old S.R. in June 2009 after befriending S.R.'s mother, who worked in a Goodwill store where Dedios shopped frequently. RP (2/15/12) 50-53, 80-82. One day, Dedios offered S.R. and his mother a ride home from the store. During the drive, S.R.'s mother told Dedios that S.R. was rebellious, and Dedios offered to help. RP (2/15/12) 53-54; RP (2/22/12) 88-90. Dedios and S.R.'s mother exchanged phone numbers, and the two families began socializing. RP (2/22/12) 91-92.

S.R. soon began spending a lot of time with Dedios and her family; he came over to their house almost every day. RP (2/22/12) 93-95, 100. S.R. played with Dedios's two young sons; Dedios stated that he also followed her around the house a lot and acted like a "kiss-butt." RP (2/22/12) 101-02.

The first time S.R. spent the night at Dedios's house was after he had an argument with his parents; he called Dedios and asked her to pick him up at Crossroads Mall. RP (2/15/12) 83-86. S.R. slept on a fold-out bed in the playroom. Dedios slept on the fold-out bed with S.R. because she claimed she did not want anything to happen between S.R. and Dedios's 12-year-old daughter, D. RP (2/15/12) 87-89. Sometime during that night, S.R.

and Dedios kissed, but the testimony conflicted as to who initiated the kiss. Dedios claimed that S.R. kissed her. RP (2/22/12) 124. S.R. testified that Dedios kissed him, and that he was surprised. RP (2/15/12) 89.

On another occasion not long after that, S.R. again spent the night at Dedios's house. This time, S.R. stayed in Dedios's bedroom. Dedios again told S.R. that she did not want anything to happen between him and D. RP (2/15/12) 90-91. S.R. and Dedios began kissing and touching, and then they had penile/vaginal intercourse. RP (2/15/12) 92-96. S.R. testified that he and Dedios had sexual intercourse numerous times that summer, both before and after his 14th birthday. RP (2/15/12) 97-98.

Dedios and S.R. engaged in other activities of a sexual nature as well. On one occasion, when S.R. was using the computer, Dedios bent over him and claimed that she wanted to see if D. had a MySpace page. Dedios kissed and touched S.R., and allowed him to touch the intimate parts of her body. RP (2/15/12) 103-05.

During this same time frame, after Dedios and S.R. had had sexual intercourse, S.R. also had sexual intercourse with Dedios's

daughter, D. RP (2/15/22) 27. S.R. maintained that D. consented to have sex with him. RP (2/15/22) 28-29.

A few days later, Dedios walked in on S.R. and D. hugging in the kitchen, and Dedios ordered S.R. to leave. RP (2/22/12) 145-46. After that, D. disclosed to Dedios that she and S.R. had had sexual intercourse. Dedios was very disappointed with D. RP (2/22/12) 147-49. D. also told Dedios that after S.R. had sex with her, he told D. that he "liked" Dedios. RP (2/22/12) 150-51. This made Dedios angry, and she called S.R.'s mother and demanded that S.R. apologize to D. RP (2/22/12) 151-53.

The day that S.R. was supposed to come over and apologize to D., Dedios left the house beforehand because she claimed she needed to buy milk. RP (2/22/12) 152-53. As Dedios was driving, she saw S.R. in Crossroads Park, so she stopped and got out of the car. RP (2/22/12) 154-55. Dedios and S.R. spoke about what had transpired between S.R. and D., and S.R. said he was sorry. RP (2/22/12) 155. S.R. put his head on Dedios's shoulder, and then he and Dedios kissed. RP (2/22/12) 158-59. Then they got into the car, which was parked at a nearby 7/Eleven. Dedios and S.R. kissed again in the car, and S.R. put his hand down Dedios's shirt and touched her breast. Ex. 10, pg. 25-26.

Dedios said she grabbed his wrist and told him "no." Ex. 10, pg. 26.

D. eventually told Dedios that she had not consented to have sex with S.R., and Dedios called the police the following day to report that D. had been raped. RP (2/22/12) 170-71. Detective Charley Vance with the Bellevue Police Department was assigned to investigate the case. RP (2/16/12) 93. During the course of the investigation, Vance received a report from Child Protective Services that S.R. had disclosed to a counselor that he and Dedios had had sexual intercourse. RP (2/16/12) 101-02. Vance took an audio-recorded statement from Dedios, and asked her whether she had had sexual intercourse with S.R. Dedios denied it. Ex. 5, pg. 18. Instead, Dedios claimed that S.R. had come into her bedroom on two occasions and touched her breasts and crotch without her permission. Ex. 5, pg. 14-17.

Later that day, Dedios called Detective Vance and told him she had something else to tell him. RP (2/21/12) 38. Dedios returned to the Bellevue Police station and gave an additional audio-recorded statement. RP (2/21/12) 39. During this statement, Dedios said that S.R. had kissed her the first night he stayed at her house. Ex. 5, pg. 23-24. Dedios also admitted that when she met

S.R. in Crossroads Park, S.R. hugged her and kissed her on the neck and mouth. Ex. 5, pg. 25. Dedios stated that she "kissed him back," meaning that S.R. "put his tongue in [her] mouth" and she "did the same." Ex. 5, pg. 25. Dedios admitted that after kissing S.R. in the park, they kissed again inside her car, and S.R. put his hand inside her bra and touched her breast. Ex. 5, pg. 25-26. Dedios said she grabbed his wrist and told him "no." Ex. 5, pg. 26. Dedios admitted that the attention she received from S.R. made her feel more attractive. Ex. 5, pg. 28-29.

Dedios was later interviewed again by Bellevue Police Detective Robert Thompson.¹ This interview was video- and audio-recorded. Ex. 10. During this interview, Dedios admitted that S.R. had fondled her breasts, buttocks, and vagina for up to 30 minutes while S.R. was sitting at the computer; however, Dedios claimed that she did not consent to the touching, and that she was only trying to see if D. had a MySpace page. Ex. 10, pg. 5-9. Dedios also admitted to kissing S.R. in the car at 7/Eleven. Ex. 10, pg. 11. Eventually, Dedios admitted to Detective Thompson that she had vaginal intercourse with S.R. in her bedroom on one occasion when S.R. was spending the night. Ex. 10, pg. 15-18. Dedios admitted

¹ This interview involved a polygraph examination, but the recording of the interview was redacted to remove any references to the polygraph test.

that she wanted “attention” and “someone to care about” her.

Ex. 10, pg. 16.

At trial, Dedios claimed that S.R. had raped her, and that none of the instances of touching or kissing were consensual.

RP (2/22/12) 124, 130-34, 138, 158-60, 167-70.

C. ARGUMENT

THE EVIDENCE PRODUCED AT TRIAL SUPPORTS THE JURY’S VERDICT FINDING DEDIOS GUILTY OF COMMUNICATING WITH A MINOR FOR IMMORAL PURPOSES.

Dedios’s sole claim on appeal is that the evidence produced at trial is insufficient to sustain her conviction for communicating with a minor for immoral purposes. Specifically, Dedios claims that the State failed to prove that she “acted with the purpose or motive of gratifying her own personal desires,” or that she “communicated with S.R. about illegal sexual activity.” Appellant’s Opening Brief, at 12-19. This claim should be rejected. The evidence established that Dedios allowed S.R. to fondle the intimate parts of her body on two occasions during the course of her sexual relationship with S.R. This evidence is more than sufficient to sustain the jury’s verdict, and thus, this Court should affirm.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any rational jury could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Furthermore, the reviewing court defers to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75.

Circumstantial evidence is not to be considered any less reliable or probative than direct evidence in reviewing the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). To the contrary, a defendant's criminal intent "may be inferred from circumstantial evidence, or from conduct, where the intent is plainly indicated as a matter of logical probability." State v. Billups, 62 Wn. App. 122, 126, 813 P.2d 149 (1991) (citations omitted). In sum, under these deferential

standards, any question as to the meaning of the evidence should be resolved in favor of the conviction whenever such an interpretation is reasonable.

A person commits the crime of communicating with a minor for immoral purposes (CMIP) when that person communicates with a person under the age of 18, whether by spoken words or by conduct, for immoral purposes of a sexual nature. RCW 9.68A.090(1); State v. Schimmelpfennig, 92 Wn.2d 95, 103-04, 594 P.2d 442 (1979). Put another way, “the statute prohibits communication with children for the predatory purpose of promoting their exposure to and involvement in sexual misconduct.” State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993). Accordingly, Dedios’s conviction must be affirmed if the evidence shows that she engaged in communicative conduct for the purpose of involving S.R. in sexual misconduct.

As a preliminary matter, Dedios seems to suggest that a question from the jury regarding the requisite intent for CMIP and an affidavit from a juror stating that the jury struggled with the issue of intent should have some effect on this Court’s analysis. See Appellant’s Opening Brief, at 9-10. But as the trial court correctly observed, such matters inhere in the verdict and cannot be

considered. RP (4/4/12) 13-14; Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651 (1962) (holding that jurors' thought processes inhere in the verdict and cannot be reviewed). Moreover, Dedios further suggests that "the CMIP statute treads close to the arena of constitutionally protected speech" and "must be narrowly construed." Appellant's Opening Brief, at 12. But as the Washington Supreme Court has held, "[t]he State may legitimately prohibit speech of a harmful sexual nature to minors, even where that speech is protected by the First Amendment with regard to adults." Schimmelpfennig, 92 Wn.2d at 101 (citing Ginsberg v. New York, 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195 (1968)). Accordingly, no protected speech is at issue and no narrow construction is required. To the contrary, the CMIP statute "incorporates within its scope a relatively broad range of sexual conduct involving a minor." State v. Jackman, 156 Wn.2d 736, 748, 132 P.3d 136 (2006). Dedios's suggestion to the contrary should be disregarded.

In this case, the State argued to the jury that a conviction for CMIP could be based on two specific incidents established by the evidence: 1) when Dedios allowed S.R. to fondle her breasts, buttocks, and vagina while she claimed that she was trying to look

at her daughter's MySpace page on the computer; and 2) when Dedios and S.R. kissed and S.R. fondled Dedios's breast while they were sitting in her car near Crossroads Park. RP (2/29/12) 66-69, 79-82. In both instances, Dedios engaged in a course of conduct with S.R. from which any rational juror could infer Dedios's "predatory purpose of promoting [S.R.'s] exposure to and involvement in sexual misconduct." McNallie, 120 Wn.2d at 933. Indeed, it is difficult to imagine what other purpose could be served by engaging in such conduct with a 13- or 14-year-old child.

Moreover, the evidence also included Dedios's confession that she had sexual intercourse with S.R. Ex. 10, pg. 15-16. Dedios admitted to Detective Thompson that she had sex with S.R. because she wanted "attention" and "someone to care about" her. Ex. 10, pg. 16. In addition, S.R. testified that he and Dedios had sexual intercourse numerous times throughout the charging period. RP (2/15/12) 94-97. This evidence further demonstrates the sexual purpose behind Dedios's conduct in allowing S.R. to fondle the intimate parts of her body, and it further supports the jury's verdict

for CMIP.² In sum, the evidence produced at trial amply supports Dedios's conviction, and her claim on appeal is without merit.

Nonetheless, Dedios argues that the evidence is insufficient to establish the necessary mens rea for CMIP. More specifically, she argues that her sole motivation during the computer incident was to see D.'s MySpace page, and thus, her conduct lacked a predatory purpose of involving S.R. in sexual misconduct. Appellant's Opening Brief, at 15-16. Similarly, Dedios argues that she had no improper motive during the incident in the car because she stated that she grabbed S.R.'s arm and told him to stop when he reached inside her shirt and touched her breast. Appellant's Opening Brief, at 16. Accordingly, Dedios argues that "the State did not prove beyond a reasonable doubt that [her] motive in acquiescing to S.R.'s touching on either occasion was to entice him

² Dedios may argue in reply that this evidence should not be considered because the jury was hung on count I and acquitted on count II. But even when a jury acquits a defendant on one count and convicts on another based on the very same evidence, the fact of an acquittal does not invalidate a conviction so long as the evidence as a whole is sufficient to support the conviction. State v. McNeal, 145 Wn.2d 352, 358, 37 P.3d 280 (2002) (citing State v. Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988)). This principle should apply here as well. It is well-settled that a challenge to the sufficiency of the evidence requires the reviewing court to consider all of the evidence in the light most favorable to the State, and requires the defendant to admit the truth of the evidence and all reasonable inferences that may be drawn from it. Thomas, 150 Wn.2d at 874. Accordingly, *all* of the evidence produced at trial should be considered by this Court, the jury's verdicts (or lack thereof) notwithstanding.

into engaging in illegal sexual activity for her own personal gratification.” Appellant’s Opening Brief, at 16-17.

These arguments should be rejected for several reasons. First, the well-settled standard on appeal requires this Court to draw all reasonable inferences from the evidence in favor of the State and against the defendant. Salinas, 119 Wn.2d at 201. Dedios’s claim that her only motivation was to see if D. had a MySpace page when she leaned over S.R. at the computer and allowed him to touch her breasts, buttocks, and vagina for up to 30 minutes is completely incredible. See Ex. 10, pg. 5-9. In addition, S.R. testified that Dedios initiated the contact by kissing and touching him while he was sitting at the computer. RP (2/15/12) 104. Dedios’s claim fails on this basis alone. Moreover, as to the incident in the car, Dedios admitted that she kissed S.R. and put her tongue in his mouth both in the park and in the car, and that S.R. then put his hand on her breast. Ex. 5, pg. 24-26. Again, Dedios’s claim that she did not have a sexual purpose in engaging in this conduct with a child whom she knew was sexually attracted to her strains credulity. Also, Dedios admitted that S.R.’s advances made her feel more attractive, and that she had sex with S.R. because she wanted “attention” and “someone to care about” her.

Ex. 5, pg. 28-29; Ex. 10, pg. 16. This is further proof of Dedios's improper sexual motives. In sum, when viewing the evidence in the light most favorable to the State, the jury's verdict is entirely rational.

Dedios also argues that her conduct does not constitute "communication" for purposes of CMIP, because she did not "entice [S.R.] into performing illegal sexual activity," and "[a]t most, she passively allowed him to touch her." Appellant's Opening Brief, at 18-19. These arguments should be rejected as well. Again, when viewing the evidence in the light most favorable to the State, Dedios did far more than "passively allow" S.R. to touch her. As S.R. testified, Dedios initiated the first incident by kissing and touching him while he was sitting at the computer. RP (2/15/12) 104. With respect to the incident in the car, Dedios admitted that she kissed S.R. in the park and in the car before he put his hand down her shirt and touched her breast. The kissing in question was sexual in nature; as Dedios herself described it, S.R. "put his tongue in [her] mouth and I um, did the same." Ex. 5, pg. 25. And again, Dedios admitted that she had sexual intercourse with S.R. Ex. 10, pg. 15-17. From this evidence, the jury rationally concluded that during both incidents, Dedios engaged in conduct that

communicated to S.R. that she was inviting him to engage in sexual misconduct.

In sum, when viewing all of the evidence in the light most favorable to the State, the jury's verdict finding Dedios guilty of CMIP is amply supported by the evidence. This Court should reject Dedios's claim to the contrary, and affirm.

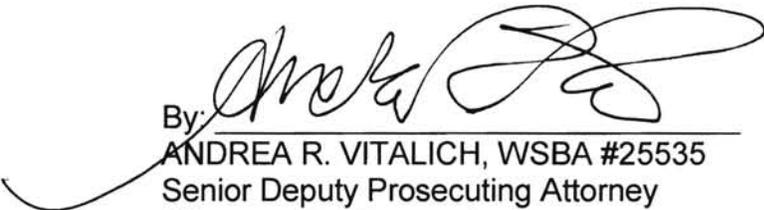
D. CONCLUSION

For the reasons stated above, this Court should affirm Dedios's conviction for communicating with a minor for immoral purposes.

DATED this 11th day of July, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Maureen Cyr, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. NORMA DEDIOS, Cause No. 68745-0-I, in the Court of Appeals, Division I, for 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.

W Brame
Name
Done in Seattle, Washington

7/12/13
Date