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NO. 68806-5-1

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

STATE OF WASHINGTON,

Respondent,

v.

J. M. M. (DOB: 03/06/97);

Appellant.

FILED
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STATE OF WASHINGTON
2013 MAR 21 PM 3:35

BRIEF OF RESPONDENT

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I. ISSUES

All essential elements must be included in a criminal information. A juvenile was charged with first-degree child molestation, for having had “sexual contact” with a child less than 12 years old and at least 36 months younger than the offender. 1 CP 93-94. Sexual contact is defined as “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). Was the information constitutionally deficient for not having also included the definition of “sexual contact,” when case authority consistently holds sexual gratification is a term defining “sexual contact,” rather than a separate essential element of the crime?

II. STATEMENT OF THE CASE

The juvenile court’s Findings of Fact and Conclusions of Law, 1 CP 12-17, are attached, and provide a sufficient factual basis for this Court’s review. In brief, on October 8, 2010, K.P. (DOB: 3/5/05, then age 5) was being baby-sat by J.M.M. (appellant here, juvenile respondent below; DOB: 3/6/97, then age 13). 1 CP 12-13. The two were alone. 1 CP 13. Appellant J.M.M. told K.P. that he was going to put his pee pee in K.P.’s butt. He pulled, or caused K.P. to pull, K.P.’s pants down. Appellant then positioned

K.P. and slid towards K.P. in order to touch K.P.'s bare bottom with appellant's clothed penis. 1 CP 13-14. Afterwards appellant told K.P. not to tell anyone. 1 CP 14. K.P. disclosed to his mother within 1 - 1½ hours of the incident. 1 CP 15.

K.P. disclosed the incident to a child interview specialist three days after the incident. Ex. 3, pp. 8-15. He also testified to the incident at fact-finding. (Vol. 1, Verbatim Record of Trial Proceedings for April 17, 2012 (hereafter "1 Trial RP") 91, 95-98, 110.¹ He recalled, "I was trying to get away, and he [appellant J.M.M.] was pulling me back saying no, I don't want you to go away." 1 Trial RP 97.

The juvenile court found appellant had intentionally choreographed the positioning of K.P.'s body, "demonstrating [appellant's] intent to have sexually gratifying contact with K.P." 1 CP 14. It found appellant J.M.M. guilty of first-degree child molestation. 1 CP 17. This appeal followed, challenging the adequacy of the charging document. No challenge to the document was raised below.

¹ Trial proceedings comprise three volumes, pages sequentially numbered, for April 17, 18, and 19, 2012.

III. ARGUMENT

A. THE CHARGING DOCUMENT IS SUFFICIENT BECAUSE IT ALLEGED ALL ESSENTIAL ELEMENTS OF THE CRIME, INCLUDING "SEXUAL CONTACT."

1. A Defendant Has A Due-Process Right To Adequate Notice Of The Charge Lodged Against Him. A Charging Document Challenged For Sufficiency Post-Verdict Is Liberally Construed.

A defendant has a due process right to be given notice of the offense charged. State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989). All essential elements of a crime must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); State v. Davis, 119 Wn.2d 657, 661, 835 P.2d 1039 (1992).

An information which is "not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial." State v. Davis, 119 Wn.2d at 661 (quoting State v. Kjorsvik, 117 Wn.2d at 102; accord, State v. Brown, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). Liberal construction to determine the sufficiency of a charging document follows a two-part test: (1) whether the essential elements appear in any form, or can be found by any fair construction, in the information; and (2) whether a defendant was nonetheless actually

prejudiced by any inartful language used. Brown, 169 Wn.2d at 197–98. If the first prong is not satisfied, actual prejudice need not be shown. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000); City of Auburn v. Brooke, 119 Wn.2d 623, 636, 836 P.2d 212 (1992) (one does not reach question of prejudice unless there is some language in the document, however inartful, relating to the necessary elements).

The first prong of this test is satisfied if there is "some language in the document giving at least some indication of [any] missing element." State v. Kjorsvik, 117 Wn.2d at 105-06. To satisfy the second prong, a defendant must show that he was nonetheless prejudiced by having been deprived of requisite notice to prepare an adequate defense. State v. Hopper, 118 Wn.2d 151, 822 P.2d 775 (1992). The reviewing court examines the information as a whole, according to common sense and including implied facts, to determine if the accused is reasonably apprised of the elements of the crime charged. Kjorsvik, 117 Wn.2d at 105–08; State v. Witherspoon, 171 Wn. App. 271, ___, 286 P.3d 996, 1007 (2012).

2. Precedent Holds That While “Sexual Gratification” Must Be Proved, It Is Part Of The Definition Of The Element Of “Sexual Contact,” Not An Additional And Separate Essential Element Of Child Molestation.

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 (emphasis added). “Sexual contact” as defined at RCW 9A.44.010(2) “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.”

The charging document here included all the RCW 9.94A.083 statutory elements, including “sexual contact,” but not the definition of “sexual contact” at RCW 9.94A.010(2). 1 CP 93-94. For the first time on appeal, appellant asserts this is error, and requires reversal, without the necessity of any showing of prejudice.

For jury trials, the standard “to convict” instruction for the crime lists but does not define “sexual contact.” WPIC 44.21. Instead, a separate pattern instruction does. WPIC 45.07. So instructing a jury is sufficient. State v. Veliz, 76 Wn. App. 775, 779,

888 P.2d 189 (1995). This is so because sexual gratification is a term defining “sexual contact,” rather than a separate essential element of the crime of child molestation. State v. Lorenz, 152 Wn.2d 22, 30-35, 36, 93 P.3d 133 (2004) (citing earlier cases in accord).

Two Court of Appeals cases addressed the “essential elements” issue in the context of juvenile-court nonjury fact-finding proceedings. Compare State v. BJS, 72 Wn. App. 368, 372, 864 P.2d 432 (1994) with State v. T.E.H., 91 Wn. App. 908, 915, 960 P.2d 441 (1998). In BJS, Div. III held in a juvenile proceeding that sexual gratification is a crucial element to the crime of first degree child molestation which must be set forth in the JuCR 7.11(d) written findings of fact by the judge. BJS, 72 Wn. App. at 372. In T.E.H., on the other hand, this Court held that sexual gratification is not a crucial element but, rather, a definitional term that clarifies the meaning of “sexual contact”. T.E.H., 91 Wn. App. at 915. Nonetheless, it held sexual gratification must be shown, and was shown on the facts before it. Id. at 916. Addressing both cases, the Supreme Court in Lorenz found it was the BJS court that erred:

In order to allow a reviewing court to ascertain whether the court has followed the law, JuCR 7.11(d) requires that the findings “state the *ultimate facts* as

to each *element* of the crime” (emphasis added). The BJJ court erred in conflating an ultimate fact (sexual gratification) with an essential element (sexual contact). The result of BJJ is not in error as it was appropriate to require the finding of sexual gratification because it was an ultimate fact as to the essential element of sexual contact. Only the language of BJJ listing sexual gratification as an essential element is in error.

Lorenz, 152 Wn.2d at 32 (emphasis in original).

The appellant ignores Lorenz and T.E.H. Instead, he cites Stevens, French, and Edwards for what he describes as the “well-settled” proposition that intent of sexual gratification is an essential non-statutory *element*. BOA 4-5. But these cases discussed what must be shown to prove child molestation in the contexts of jury instructions, lesser-included crimes, and what constitutes “manifest error.” They did not address the sufficiency of the charging document. To the extent they have relevance at all to the inquiry here, they support the State’s position.

French held that child molestation was not a lesser-included crime of child rape, because the former requires a showing of purpose or intent, while the latter does not. State v. French, 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006). It explained Lorenz had not removed a mental element (as the defendant there argued) but simply had held that the phrase “for the purpose of sexual

gratification” is “merely a definition of the sexual contact element, and therefore does not need to be separately listed in the to-convict instructions.” Id. The French court explained the State was not thereby relieved of its burden of proving a defendant acted “for the purpose of sexual gratification.” Id.

In Stevens, the Supreme Court reaffirmed its holding in Lorenz, explaining that “while sexual gratification is not an explicit *element* of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification.” State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006) (emphasis added). Since intent remained relevant, the defendant was entitled to instructions on voluntary intoxication and on fourth-degree assault as a lesser-included crime. Id. at 310-12.

In Edwards, a jury was instructed on the statutory elements of child molestation, and on the definition of “sexual contact” as “any touching of the sexual or other intimate parts . . . done for the purpose of gratifying sexual desires [.]” State v. Edwards, 171 Wn. App. 379, ___, 294 P.3d 708, 711-13 (2012). The defendant argued for the first time on appeal that the jury should have been instructed that the State had to prove any act was volitional. Id. Div. II agreed that “[t]o prove sexual contact, an element of child molestation, the

State must prove a purpose or intent to gratify sexual desires.” Edwards, 171 Wn. App. at ___, 294 P.3d at 713. But because Edwards was permitted to argue that his conduct had not been for the purpose of sexual gratification, the Edwards court held he could not show manifest error. Edwards, 171 Wn. App. at ___, 294 P.3d at 714.

There is no dispute that the State, to prove the “sexual contact” element of child molestation, must show that the act comprising such contact was done with the intent or for the purpose of sexual gratification. Stevens, 158 Wn.2d at 309-10; French, 157 Wn.2d at 610-11; Lorenz, 152 Wn.2d at 32; Edwards, 171 Wn. App. at ___, 294 P.3d at 713; T.E.H., 91 Wn. App. at 915-16. But the cases also consistently hold that the “sexual gratification” definition of sexual contact is not a separate nonstatutory *element*, implied or otherwise. Id. It is hard to see, then, how Stevens, Edwards and French support the appellant’s claim of error.

The “true threat” harassment cases are more germane. RCW 9A.46.020 makes it a crime if a person “knowingly threatens” to “cause bodily injury immediately or in the future to the person threatened,” and “by words or conduct places the person threatened in reasonable fear that the threat will be carried out.”

But to avoid infringement of protected speech, the harassment statute prohibits only “true threats.” State v. Schaler, 169 Wn.2d 274, 283–84, 236 P.3d 858 (2010). In Allen and Atkins, this Court held that “true threat” is merely the definition of the element of threat, and thus need not be included in the charging document. State v. Allen, 161 Wn. App. 727, 750-51, 755, 255 P.3d 784 (2011), aff’d, ___ Wn.2d ___, 294 P.3d 679, 688-89 (2013); State v. Atkins, 156 Wn. App. 799, 805, 236 P.3d 897 (2010); accord, State v. Tellez, 141 Wn. App. 479, 483-84, 170 P.3d 75 (2007) (construing analogous telephone harassment statute). The same result obtains here.

Appellant ignores these cases, too. Instead, his position is that anything the State must prove – at least if it is part of the mens rea – is an element the State must charge. BOA 5. No authority supports such a broad proposition.

Here, all essential elements, including the element of “sexual contact,” were included in the charging document. 1 CP 93-94.

Because all essential elements were included, liberal construction of the information under Kjorsvik’s first prong is not required. But even if liberal construction were necessary (a point not conceded), the term “sexual contact” certainly comprises “some

language in the document giving at least some indication of [any] missing element." See State v. Kjorsvik, 117 Wn.2d at 105-06.

Lastly, assuming (again, without conceding) that the charging document's language is sufficient only if liberally construed, and that its language yet remains inartful, the appellant has not shown prejudice to meet Kjorsvik's second prong. Neither J.M.M. nor his counsel appeared to have expressed any confusion or questions about the charge at arraignment (2 CP __, sub 08, minute entry for 9/21/11) or at four subsequent hearings to continue (2 CP __, sub 16, minute entry for 11/2/11; 2 CP __, sub 18, minute entry for 12/7/11; 2 CP __, sub 22, minute entry for 1/18/12; and 2 CP __, sub 24, minute entry for 3/7/12). Trial counsel's child hearsay and trial memorandum did not evince any confusion or misunderstanding about the charge either. 1 CP 41-61. No bill of particulars was ever sought. And, in closing, defense trial counsel argued "sexual contact' had not been proved, because sexual motivation had not been shown. 2 Trial RP 238-39, 242-45. There was, thus, never any surprise over what the State had to prove. The appellant was not deprived of sufficient notice to prepare an adequate defense. He was convicted at a fair trial.

IV. CONCLUSION

The order of adjudication of guilt, and imposing a standard-range juvenile sentence, should be *affirmed*.

Respectfully submitted on March 20, 2013.

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By: 

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SONYA KRASKI
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SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY
JUVENILE DIVISION

THE STATE OF WASHINGTON,

Plaintiff,

v.

MACSWEENEY, JASON M
DOB: 03/06/1997

Defendant.

No. 11-8-01109-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
BENCH TRIAL

This matter came before the court on April 17, 2012, April 18, 2012 and April 19, 2012, for a bench trial. The court considered the testimony of witnesses, the exhibits introduced into evidence (exhibits 1, 3, 4, 7, 8 and 10), and the arguments of counsel. Being fully advised, the court now makes the following findings of fact and conclusions of law.

A. Findings of Fact.

1. K.P. was born on March 5, 2005. On October 8, 2010, he was 5 years old and in his second month of Kindergarten. He is now 7 years old.

[10/12]

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2. The Respondent, Jason M. MacSweeney, was born on March 6, 1997. On October 8, 2010, the Respondent was 13 years old. He is now 15 years old.

3. The respondent is more than 36 months older than K.P. (almost exactly eight years older than K.P.); not married to K.P. and not in a State Registered Domestic Partnership with K.P.

4. On October 8, 2010, K.P. was at the Respondent's home in the City of Arlington, County of Snohomish, State of Washington.

5. The respondent was left to babysit K.P. for approximately two hours while the respondent's mother and K.P.'s mother went grocery shopping.

6. The boys were at the respondent's home alone during this time.

7. During this time, the boys played video games, among other things, and there was an incident where K.P. fell into a coffee table and hurt his head. K.P. has a strong memory of this event, even today.

8. At a point after the coffee table incident, but before the moms returned home, the respondent and K.P. were both sitting on the ground doing an activity.

9. During this time, the respondent told K.P. that he was going to put his pee in K.P.'s butt.

10. The respondent then either pulled K.P.'s pants down or caused K.P. to pull his own pants down so that K.P.'s bare buttocks were exposed.

11. The respondent was seated on the floor with his legs on the floor out in front of him in a V shape.

12. K.P. described his own position differently at trial than he did in the child interview conducted on October 11, 2010. The court finds that K.P.'s memory of the event three days after it occurred is more likely to be accurate than his memory on April 17, 2012, when he testified. ^{The Court further} And finds the statements K.P. made to his mother and Stephanie Kearney and to Ashley Wilske as the most reliable evidence of what occurred

in this case due to the time lapse of almost a year and a half between these disclosures and trial. That is not to say that the court finds that K.P.'s testimony on April 17, 2012 regarding the positions is inaccurate or unreliable. Both statements may be accurate. It's possible that the boys were situated in a variety of positions.

13. ~~Critically, though,~~ the position described to Ms. Wilske is a position that was intentionally choreographed, ^{demonstrating Respondent's intent to have sexually gratifying contact with K.P.} K.P. described lying on his back with his feet in the air so that his naked bottom ^{was facing} ^{faced} the respondent's groin area. The respondent then slid K.P. toward the respondent so that his bottom was on top of the respondent's clothed penis. This is not a position that the boys would have been in inadvertently.

14. The contact was of sufficient length and intensity that K.P. felt the respondent's penis through the respondent's pants.

15. K.P. did not experience physical pain or discomfort from the contact but did perceive the contact to be "nasty".

16. The respondent also told K.P. not to tell anyone about the contact.

17. There was no legitimate reason for the respondent to cause K.P.'s pants to be pulled down.

18. K.P.'s naked buttocks increased the respondent's ability to appreciate the feel of K.P.'s buttocks on his own genitalia.

19. The statement the respondent made that he was going to put his pee pee in K.P.'s butt, ^{coupled with} the actions of causing K.P.'s pants to be pulled down, ^{his respondent's} actions of choreographing the position of K.P.'s body and his body so that K.P.'s bare bottom, which is an intimate part of K.P.'s body, was in contact with the respondent's groin area, which is an intimate and sexual part of the respondent's body even if the touching was through clothing, for a sufficient length of time for K.P. to be able to feel and identify the respondent's penis, are all facts the Court relies upon in finding that the touching of K.P.'s intimate part to the respondent's intimate part was for the purposes of

sexual gratification and, thus, that the respondent had intentional sexual contact with K.P. on October 8, 2010.

20. K.P. is a very forthright and honest witness and the court finds him very credible and reliable.

21. K.P. had no motive to lie about this. K.P. liked the respondent and had fun with the respondent.

22. K.P. made his initial disclosure approximately one to one and a half hours after the sexual assault occurred and very soon after he was away from the respondent and in a safe environment with his mother and the respondent's mother.

23. K.P. demonstrated that he has an exceptionally good sense of personal safety and boundaries for a child of his age.

24. The evidence also shows that K.P. did not expect his mother's reaction. She was very upset by what he said. K.P. did not fully appreciate the wrongfulness of the respondent's actions until he saw his mother's reaction. He has been clear that he was not hurt during the sexual assault.

25. K.P. knew the behavior was "nasty" but was too young to appreciate that the respondent was engaged in behavior for the respondent's own sexual gratification.

26. K.P.'s mother has been careful to follow the directions she was given to let K.P. talk about the sexual assault, if he chose to, but not to coach or suggest matters to him.

27. ~~The Court heard argument that defense counsel was surprised by K.P.'s statement during the March 2012 defense interview that he was raped by Jason when he spent the night in his room. The Court denied the State's motion to amend the complaint to add a charge of raping the child in the first degree based on that disclosure, and so that issue is not before me except insofar as it relates to K.P.'s~~

~~credibility and to Jason's lustful disposition.~~ The Court finds that K.P.'s statements regarding a second instance of sexual contact between he and Jason are credible and support a finding of Jason's lustful disposition toward K.P. It's uncontroverted that K.P. spent one night in Jason's room. He described behavior that is consistent with K.P.'s statements to his mother that, ^{quote} "Jason said he was going to put his peepee in my butt." ~~closed quote~~ K.P. also made a statement to Ashley Wilske that he could always feel Jason's peepee when it's in his butt, or something to that effect, which may be an indication that there was an earlier sexual contact between K.P. and Jason. That said, the Court's mindful that K.P. was adamant when he was interviewed by Ashley Wilske that Jason had only touched him on one occasion, ^{and} that nastiness had never happened before. While the Court recognizes that for many children disclosure is a process that may occur over months or years or not at all and that that process was evident in the defense interview with K.P. where it took quite a long time and skillful questioning by both Ms. Mann and the defense interviewer to bring K.P. back around to talk about the events of October 8, 2010, the certainty with which K.P. stated on October 11, 2010, that he had never been touched by Jason on any other occasion, cause the Court to not specifically rely on the earlier touching as one of the findings of fact in support of today's disposition of the charge. It is not necessary.

28. The court incorporates herein ^{its oral} ~~the~~ findings of fact and conclusions of law on competency and child hearsay in this case.

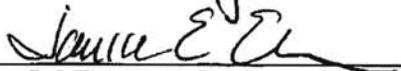
[10/16]

B. Conclusions of Law.

1. The court has jurisdiction over this proceeding.

2. The respondent is guilty of the offense of Child Molestation in the First Degree, as charged.

DONE IN OPEN COURT this 18th day of May, 2012.



JUDGE JANICE E. ELLIS

Presented by:



CINDY A. LARSEN, #26280
Deputy Prosecuting Attorney

Copy received this 18th day of May, 2012.

Approved as to form.



CAROLINE MANN # 17790
ATTORNEY FOR RESPONDENT