

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Plaintiff and Appellee,)	
)	Case No. 20030590-CA
v.)	
)	F I L E D
Edwin Valdez,)	(October 27, 2005)
)	
Defendant and Appellant.)	2005 UT App 454

Third District, Salt Lake Department, 021913348
The Honorable Ann Boyden

Attorneys: Linda M. Jones, Salt Lake City, for Appellant
Mark L. Shurtleff and Karen A. Klucznik, Salt Lake
City, for Appellee

Before Judges Bench, Davis, and Orme.

ORME, Judge:

Edwin Valdez appeals his convictions on three counts of aggravated sexual abuse of a child. Recognizing an obvious problem in the jury instructions, Valdez has endeavored to wedge the problem into familiar legal pigeonholes. He argues that the jury instructions violated both the jury unanimity requirement, see Utah Const. art I, § 10; State v. Tillman, 750 P.2d 546, 562-65 (Utah 1987) (Tillman I), and the prohibition against ex post facto laws. See U.S. Const. art. I, § 9, cl. 3; Utah Const. art I, § 18.¹

¹Valdez also argues that the trial court erred by admitting into evidence a tape recording made of the victim's end of the conversation during a telephone conversation between Valdez and the victim. We see no error, however, considering Valdez was initially protected from the admission of the recording. The trial court excluded the recording from the State's case-in-chief, and only after Valdez "opened the door" with his own testimony was the recording admitted for rebuttal purposes. And the admission was coupled with limiting instructions as requested by defense counsel.

We do not see a recognized unanimity problem in the instant case. Instead, the challenged jury instructions here parallel those of Tillman I, listing multiple aggravating factors together as one element of the charge and using the identical unanimity instruction. See Tillman I, 750 P.2d at 562-63. In later analyzing the Tillman I instructions, the Utah Supreme Court concluded that "[t]he instructions given were not perfect on this point, but they did not violate the rule [on unanimity]." Tillman v. Cook, 855 P.2d 211, 221-22 (Utah 1993), cert. denied, 510 U.S. 1050 (1994).

It is also far from clear that there actually was an ex post facto application of a criminal law here. We simply do not know whether the jury used an aggravating factor that was not applicable at the time of an incident for which Valdez was found guilty. If the jury convicted him for activities it determined happened on or after May 4, 1998, there is no ex post facto error because it is uncontested that Valdez was the victim's stepfather at the time and "occupied a position of special trust" under the amended statute. Utah Code Ann. § 76-5-404.1(4)(h) (2003). Likewise, if the jury determined the conduct happened on or after April 29, 1996, and that the conduct included digital penetration, the resulting conviction is proper. See id. § 76-5-404.1(4)(j). Unfortunately, given that the jury instructions did not tie these aggravating factors to their effective dates and that a special verdict form was not used, it is impossible to tell whether Valdez was properly found guilty of aggravated sexual abuse of a child. If he was found guilty of offenses committed prior to April 29, 1996, he could not have been found guilty of the aggravated offense, as a matter of law.

The real problem in this case, then, is that the jury instructions were incomplete. "The trial court has a duty to instruct the jury on the law applicable to the facts of the case," and this duty is not fulfilled if "the instructions given . . . were so general that they could have misled and confused the jury." State v. Potter, 627 P.2d 75, 78 (Utah 1981). When instructing the jury on alternative aggravating factors, it was plain error for the court not to tie each aggravating factor to the effective date of the amendment. Without such an instruction, "the jury lacked the proper framework within which it could meaningfully evaluate the necessary elements of the crime charged." State v. Winward, 909 P.2d 909, 914 (Utah Ct. App. 1995).

As an appellate court, "we have the authority to modify criminal judgments on appeal. And like other courts having this power, we may enter judgment on a lesser included offense when an error has tainted the conviction for the greater offense." State v. Dunn, 850 P.2d 1201, 1211 (Utah 1993). The prejudicial error

in this case goes only to the aggravating factors of the crime. The jury's determination that Valdez was guilty of three counts of sexual abuse of a child still stands. Accordingly, we vacate the convictions for three counts of aggravated sexual abuse of a child and enter judgments of conviction against Valdez for three counts of sexual abuse of a child. We remand for the trial court to resentence Valdez in light of his modified convictions.²

Gregory K. Orme, Judge

WE CONCUR:

Russell W. Bench,
Associate Presiding Judge

James Z. Davis, Judge

²In addition to his three convictions for aggravated sexual abuse of a child, Valdez was also convicted of one count of attempted rape of a child. That conviction and resulting sentence are not affected by our decision.