

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CELESTINO SERRANO HERNANDEZ,
a/k/a CELESTION SERRANO
HERNANDEZ,

Appellant.

No. 65049-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: June 6, 2011

Leach, A.C.J. — A jury convicted Celestino Hernandez of second degree child molestation. Hernandez appeals, claiming this court should reverse his conviction due to the possibility that the jury relied on an act insufficient to constitute the sexual contact element. The court's instructions to the jury included a definition of sexual contact and a unanimity instruction. Because we assume the jury followed those instructions and convicted Hernandez based on the sufficient evidence presented, we reject this claim.

Hernandez also claims the court exceeded its sentencing authority by ordering a substance abuse evaluation as a community custody condition without evidence that drug use contributed to the crime. Because nothing in the record indicates that drug use contributed to the crime, we agree the condition is

overly broad. Accordingly, we affirm the conviction but remand with instructions to modify the substance abuse condition so that it is limited to alcohol evaluation and treatment.

Background

In April 2009, Hernandez attended a barbeque while he looked after his 11-year-old son, A.S. Hernandez began drinking beer around three p.m. A.S. and J.H., a 12-year-old girl, were playing in the apartment complex playground nearby.

Around eight p.m., Hernandez approached J.H. on the playground and told her that he wanted to talk. He took J.H. to a secluded area between apartment buildings and asked her if she wanted some beer. After being pressured, J.H. took a few sips. As she drank, Hernandez put his hand under J.H.'s shirt and rubbed her back. J.H. "gave him a funny look," then left to go play.

About 10 minutes later, Hernandez again told J.H. he wanted to talk. Then he took her between the apartment buildings and offered her beer. When Hernandez handed her the beer and she started to drink, Hernandez put his hand under J.H.'s shirt and rubbed her back. Hernandez then moved his hand out from under the back of J.H.'s shirt and groped her buttocks outside of her jeans. Without saying anything, J. H. left to play.

Later in the evening, Hernandez again called J.H. over from the playground. This time A.S. followed. Hernandez gave A.S. 5 dollars to go

across the street. After A.S. left, Hernandez led J.H. back between the buildings. Hernandez offered J.H. 20 dollars to engage in whatever sex act she wanted. J.H. asked how old Hernandez was, pointed out their age difference, and started to walk away. Hernandez followed, put his arm around J.H., kissed her on the forehead, and told her she was like his daughter now. J.H. thought Hernandez was “a little bit drunk” because she could smell alcohol on his breath, he “couldn’t really walk straight,” and his words were slurred. She went back to find A.S. on the playground.

Later in the evening, Hernandez approached the children and asked them if they needed anything. A.S. asked if they could go to the store, and Hernandez agreed to drive them. As A.S. ran ahead to get the car keys at their apartment, Hernandez grabbed J.H.’s hand and rubbed it against his penis over his pants. J.H. pulled away from Hernandez and started walking faster. When they reached Hernandez’s apartment, his wife would not allow him to drive the children to the store because Hernandez had been drinking. When J.H. realized they were not going to the store, she decided to go home.

Hernandez insisted on walking J.H. to her apartment. While between cars, Hernandez grabbed J.H. and started “dry humping” her. Twice, J.H. tried to get away, but Hernandez pulled her back. The third time she pulled away, J.H. was able to break free. Hernandez followed.

As they approached J.H.’s apartment, Hernandez caught up to J.H. and forced her hand to touch his exposed penis. J.H. pulled her hand away, but

Hernandez forced her hand back to his penis. J.H. pulled her hand away again and quickly walked toward the apartment. As J.H. arrived at the door, Hernandez asked if he would see her the next day.

Once inside her apartment, J.H. told her mother what happened. Her mother called the police. When the police arrived, Hernandez appeared intoxicated. After speaking with J.H. and her mother, the police arrested Hernandez.

The State charged Hernandez with one count of second degree child molestation. At trial, Hernandez denied ever touching J.H. sexually. Hernandez also testified that on the night of the incidents, he drank six to eight beers, felt “more or less” buzzed or “a little drunk,” and that his judgment was impaired by alcohol. The court provided the jury with a unanimity instruction, explaining that to find Hernandez guilty they would have to unanimously agree that one particular act of child molestation occurred. The court also provided a jury instruction that defined the sexual contact element of second degree child molestation.

During closing argument, the State explained,

[Y]ou heard testimony from [J.H.] about the rubbing of her back and then the groping of her bottom. And then as they're crossing the street and walking back to [A.S.'s] apartment, the defendant makes her touch his penis over the pants. And then again as they're walking, as the defendant is walking [J.H.] home, between the cars, he's grinding his penis on her. And then even further than that is when he actually pulls out his penis and makes her touch it.

Each of those could be considered an act of child molestation. All of you only need to agree that one of them

occurred, and you have to all agree as to which occurred in order to convict the defendant.

The jury found Hernandez guilty as charged.

The court imposed a 20-month standard range sentence and 36 months of community custody after release. As a condition of community custody, the court ordered Hernandez to obtain a “substance abuse evaluation” and follow all treatment recommendations.

Hernandez appeals.

Analysis

Hernandez argues this court should reverse his conviction due to the possibility that the jury relied on an act insufficient to constitute the sexual contact element of second degree child molestation. Specifically, Hernandez claims that the State’s failure to elect which act it relied on for conviction, the lack of a special jury verdict form, and the State’s closing argument created the possibility that the jury convicted him based on evidence that he rubbed J.H.’s back or kissed her on the forehead.

Hernandez’s argument fails because we assume the jury followed the court’s instructions.¹ In a case where the evidence indicates that several distinct criminal acts were committed, but the defendant is only charged with one count of criminal conduct, “a unanimous verdict will be assured if either (1) the State elects the act upon which it will rely for conviction, or (2) the jury is instructed

¹ State v. Stark, 48 Wn. App. 245, 251, 738 P.2d 684 (1987) (citing State v. Corwin, 32 Wn. App 493, 495, 649 P.2d 119 (1982)).

that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.”²

For example, in State v. Stark,³ the victim described three separate instances of sexual abuse. Two of the three instances of abuse satisfied the court’s jury instruction concerning the definition of “sexual intercourse” as an element of statutory rape.⁴ The court also instructed that to convict Stark of statutory rape, all 12 jury members would have to agree that he engaged in the same act of sexual intercourse with the victim.⁵ The defendant requested his conviction be reversed due to the possibility that the jury relied on the one act insufficient to constitute sexual intercourse.⁶ We held that because we must assume the court’s jury instructions were followed, “the jury could not have relied on the one act of the three that would not come within the definition of ‘sexual intercourse.’”⁷

At Hernandez’s trial, the State was required to prove each element of second degree child molestation beyond a reasonable doubt. A person commits the crime of second degree child molestation when the person has sexual contact with another person who is at least 12 years old but less than 14 years

² Stark, 48 Wn. App. at 251 (citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) overruled on other grounds State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988)).

³ 48 Wn. App. 245, 250, 738 P.2d 684 (1987).

⁴ Stark, 48 Wn. App. at 250-51.

⁵ Stark, 48 Wn. App. at 251.

⁶ Stark, 48 Wn. App. at 251.

⁷ Stark, 48 Wn. App. at 251.

old, and the perpetrator is not married to the victim and is at least 36 months older than the victim.⁸

Here, similar to Stark, the court instructed the jurors concerning the definition of “sexual contact” included as an element of second degree child molestation. The court instructed, “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.” Hernandez contends that from the several acts of physical contact presented at trial, the jurors could have erroneously relied on evidence that he rubbed J.H.’s back and kissed her on the forehead to convict him. Because we assume the court’s jury instruction that defined sexual contact was followed, the jury could not have relied on any act that did not meet the definition of sexual contact.

The court also instructed that to convict, all 12 jurors must unanimously agree the same act of second degree child molestation was proved beyond a reasonable doubt.⁹ Because the jury was so instructed, there was no requirement that the State elect the act it relied on for conviction or a

⁸ RCW 9A.44.086(1). The only element of the crime at issue on appeal is the element of sexual contact.

⁹ The court instructed,

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant of Child Molestation in the Second Degree, one particular act of Child Molestation in the Second Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the Second Degree.”

requirement for a special jury verdict form.¹⁰ Again, assuming the court's instructions were followed, the jury must have unanimously agreed on an act sufficient to meet the definition of sexual contact as an element of child molestation.

Hernandez attempts to distinguish Stark by arguing the definition of "sexual intercourse" is less ambiguous than the definition of "sexual contact." We decline to engage in this comparison because Hernandez does not dispute that the court's definitional instruction was legally sufficient. Furthermore, Hernandez does not contest that groping J.H.'s buttocks, forcing her hand to rub his penis over his pants, "dry humping" her, and forcing her to touch his exposed penis are all acts sufficient to meet the definition of sexual contact under the instructions provided by the court. Accordingly, we do not find Stark distinguishable.

Hernandez also argues the State's closing argument may have caused the jury to rely on an act that was not sexual contact. During closing, after listing several acts, including Hernandez "rubbing [J.H.'s] back and then the groping of her bottom," the prosecutor said, "Each of those could be considered an act of child molestation." But Hernandez does not argue that this statement caused prejudice or that prosecutorial misconduct occurred. Additionally, the court

¹⁰ Stark, 48 Wn. App. at 251-52 (explaining that if the jury receives a unanimity instruction, there is no requirement the jury specify the act on which it agrees or a requirement the State elect the act upon which it will rely for conviction).

instructed the jury that “the lawyers’ statements are not evidence [and y]ou must disregard any remark . . . that is not supported by the evidence or the law in my instructions.” Assuming the court’s instructions were followed, the State’s closing argument could not have caused the jury to rely on an act that did not constitute sexual contact.

We affirm Hernandez’s conviction.

Community Custody Condition

Hernandez also argues the trial court exceeded its sentencing authority when it required that he undergo a substance abuse evaluation and follow all treatment recommendations as a part of his community custody sentence. This court reviews de novo whether the trial court had statutory authority to impose community custody conditions.¹¹ If the condition is statutorily authorized, we review the sentencing court’s decision to impose the condition for an abuse of discretion.¹²

Under former RCW 9.94A.700(5)(c) (2003), the court had authority to order an offender to “participate in crime-related treatment or counseling services.” And, under former RCW 9.94A.715(2)(a) (2008), repealed by Laws of 2008, ch. 231, § 57 and Laws of 2009, ch. 28, § 42, the court had authority to order offender participation in “rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the

¹¹ See State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

¹² State v. Autrey, 136 Wn. App. 460, 466-67, 150 P.3d 580 (2006).

offender's risk of reoffending, or the safety of the community." But when a court orders an evaluation and treatment under these provisions, the evaluation and treatment must address an issue that contributed to the offense.¹³

Hernandez argues that the substance abuse evaluation condition is too broad because there is no evidence that controlled substances contributed to his offense. We agree. The record demonstrates that alcohol use contributed to Hernandez's crime, but nothing in the record indicates drugs were involved.¹⁴ Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, a trial court can impose a substance abuse evaluation and treatment condition only when controlled substances, as opposed to alcohol alone, contribute to the defendant's crime.¹⁵ Accordingly, we remand for resentencing with instructions to limit the condition to alcohol evaluation and treatment.

¹³ State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003) (holding that a sentencing court erred in ordering alcohol counseling when the evidence showed that methamphetamines, but not alcohol, contributed to the offense).

¹⁴ Hernandez testified that on the night of the incidents he drank six to eight beers, felt "more or less" buzzed or "a little drunk," and that his judgment was impaired by alcohol. J.H. testified that she smelled alcohol on Hernandez's breath, that he "couldn't really walk straight," and that his words were slurred when he spoke. An officer testified that Hernandez was clearly intoxicated at the scene because his speech was slurred, his eyes were glazed, and he staggered. This evidence demonstrates that alcohol use contributed to Hernandez's crime.

¹⁵ Jones, 118 Wn. App. at 207-08.

Conclusion

We affirm the conviction and remand with instructions for the trial court to modify the substance abuse condition so that it is limited to alcohol evaluation and treatment.

Leach, a.c.j.

WE CONCUR:

Jau, J.

Grosse, J.