

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28522-7-III

Respondent,

Division Three

v.

JACQUILLYN A. BONNER,

UNPUBLISHED OPINION

Appellant.

Sweeney, J. — The State must produce sufficient evidence to support the elements of the crime charged—here, third degree child molestation. The State produced ample evidence of sexual contact to support the challenged elements of that crime. We therefore affirm the conviction.

FACTS

Z.T.B. is a 15-year-old boy. He moved into a Spokane apartment complex with his father and stepmother on July 18, 2007. Jacquillyn Bonner is a 23-year-old woman. She lived in the same apartment complex. Ms. Bonner and Z.T.B. began a physical relationship shortly after they met.

Z.T.B.'s father saw Z.T.B. and Ms. Bonner kissing in the apartment complex's pool on July 30. Z.T.B. admitted to his parents that he and Ms. Bonner had kissed. His mother called the police. Z.T.B. told Officer Adam Potter that Ms. Bonner "had touched his penis, his butt and his legs" since he had moved into the apartment complex. Report of Proceedings—Jury Trial (RP-JT) at 93. On September 19, Z.T.B. told Detective Bill Marshall that his relationship with Ms. Bonner started on the apartment complex stairs where the two kissed for the first time. He said he then visited Ms. Bonner's apartment about 12 times where they kissed, he touched her breasts, and she performed fellatio upon him once and manually masturbated him several times.

The State charged Ms. Bonner with committing one count of third degree child molestation and one count of third degree child rape "during July 2007." Clerk's Papers (CP) at 1. At trial, Z.T.B. testified that Ms. Bonner once performed fellatio upon him on her couch in her apartment. He also said she manually masturbated him at least five or six times in her apartment. He admitted he did not tell Officer Potter that Ms. Bonner fellated him, denied that he touched Ms. Bonner's breasts, and said he kissed Ms. Bonner in front of a neighbor girl, R.W. R.W. testified that she saw Z.T.B. touch Ms. Bonner's breasts; that she saw them "all over each other" in the swimming pool, "chest to chest"; and that she once saw them go into Ms. Bonner's apartment. RP-JT at 64, 68-69. R.W.

did not see Z.T.B. and Ms. Bonner have any “face-to-face contact.” RP-JT at 65.

The State argued that R.W.’s testimony was “evidence of a physical relationship” between Z.T.B. and Ms. Bonner. RP-JT at 202. It argued that Z.T.B.’s testimony that Ms. Bonner touched his penis on several occasions was evidence of sexual contact and that “[t]he case boils down to a clear and direct credibility issue between the principals.” RP-JT at 198.

The court instructed the jury that it had to unanimously agree on the act that constituted child molestation to find Ms. Bonner guilty of the crime:

[O]ne particular act of Child Molestation in the Third Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act ha[s] been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the Third Degree.

CP at 39 (Instruction 9). The jury found Ms. Bonner guilty of third degree child molestation and not guilty of third degree child rape.

DISCUSSION

Ms. Bonner contends that the evidence is not sufficient to support the sexual contact element of third degree child molestation. She argues that substantial evidence of sexual contact requires that a victim describe the time, number, and type of sexual contacts alleged. *State v. Jensen*, 125 Wn. App. 319, 327, 104 P.3d 717 (2005). Ms. Bonner contends that no special verdict required the jury here to indicate which act supports the crime and that her conviction

must be reversed if the evidence failed to support any one of the criminal acts alleged:

Where multiple alleged acts form the basis of a charge, if the evidence regarding at least one of the acts is insufficient to support the conviction and the reviewing court cannot conclude which of the acts provided the basis for the jury's verdict, the court must reverse the conviction.

Appellant's Br. at 17-18 (citing *State v. Kinchen*, 92 Wn. App. 442, 452, 963 P.2d 928 (1998)). She claims that the evidence here does not show that each act alleged by the State was sexual contact.

A challenge to the sufficiency of the evidence implicates the State's burden of production, not the State's burden of persuasion. *State v. Henjum*, 136 Wn. App. 807, 810, 150 P.3d 1170 (2007). So our task is to determine whether the State produced evidence, which if believed, would be sufficient to support the elements of third degree child molestation. We consider the State's evidence and all reasonable inferences from that evidence to be true. *Jensen*, 125 Wn. App. at 325. And we defer to the fact finder on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Longuskie*, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

Sufficiency of the Evidence—Sexual Contact

We must affirm Ms. Bonner's conviction if evidence supports each act of sexual contact:

A person is guilty of child molestation in the third degree when the person has . . . *sexual contact* with another who is at least fourteen years old but

less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

RCW 9A.44.089(1) (emphasis added). “Sexual contact” is “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” RCW 9A.44.010(2).

There is ample evidence that Ms. Bonner had the requisite sexual contact with Z.T.B. Z.T.B. testified that Ms. Bonner manually masturbated him with her hand at least five times on her couch in her apartment between July 18 and July 30. He testified that she performed fellatio on him one time on her couch in her apartment between July 18 and July 30. Sexual contact includes any touching of a person’s sexual parts. RCW 9A.44.010(2). Evidence that Ms. Bonner touched Z.T.B.’s penis to perform masturbation and fellatio upon him, then, is sufficient evidence of sexual contact.

Ms. Bonner argues, nonetheless, that there was insufficient evidence of sexual contact because (1) Z.T.B.’s testimony was inconsistent; (2) Z.T.B.’s testimony did not specify the dates or details of the alleged contacts; and (3) testimony that Z.T.B touched Ms. Bonner’s breasts, that the two were chest-to-chest, and that the two kissed does not show that those acts constituted sexual contacts.

First, it is the jury’s task to decide how persuasive the State’s evidence was. *Henjum*, 136 Wn. App. at 810. So we defer to the jury’s resolution of conflicting testimony or any inconsistencies in the

testimony. *Longuskie*, 59 Wn. App. at 844.

Second, a child victim’s testimony is sufficient evidence of sexual contact if it describes the type, number, and date of each sexual contact alleged when the case involves a resident child molester. *State v. Hayes*, 81 Wn. App. 425, 438, 914 P.2d 788 (1996). Z.T.B. did not live with Ms. Bonner. He, nevertheless, recalled the dates and details of the sexual contact with enough specificity for a reasonable jury “to determine what offense, if any, ha[d] been committed.” *Id.*

Finally, the State did not argue that the evidence of Z.T.B. touching Ms. Bonner’s breasts and of the two kissing and standing chest-to-chest was sexual contact. It argued instead that the evidence corroborated Z.T.B.’s story—it showed that Z.T.B. and Ms. Bonner had a physical relationship. *See* RP-JT at 202.

In sum, the State presented evidence of “sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator.” RCW 9A.44.089 (1). And the court required the jury to agree on the act that satisfied the requirements of the statute, “[Y]ou must unanimously agree as to which act ha[s] been proved.” CP at 39 (Instruction 9). That is all that is required. And we presume the jury followed the court’s instruction. *In re Pers. Restraint of Hegney*, 138 Wn. App. 511, 522, 158 P.3d 1193 (2007).

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We, therefore, affirm Ms. Bonner's third degree child molestation conviction.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

WE CONCUR:

Sweeney, J.

Kulik, C.J.

Brown, J.