IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. GEORGE SANDRU, Appellant.	)	No. 62529-2-I DIVISION ONE UNPUBLISHED OPINION FILED: November 16, 2009

Appelwick, J. — Sandru appeals his conviction for first degree child molestation, arguing the trial court erred by refusing to instruct the jury on the lesser included offense of fourth degree assault. Although the legal prong of the lesser included offense analysis was satisfied, there was insufficient evidence to support the factual prong. The trial court did not abuse its discretion. We affirm.

FACTS

The State charged George Sandru with three counts of child molestation in the first degree for conduct he had with his son, J.S.

Sandru and Elvira Stanus-Ghib had one child, J.S., during their marriage. J.S. was born on October 6, 1997, and was 10 years old at the time of trial. Sandru and Stanus-Ghib divorced, and the terms of the parenting plan established that J.S. would

live a majority of the time with Sandru. J.S. testified at trial about the various incidents he had with his father. J.S. explained that Sandru would make J.S. give him back massages, going lower and lower until J.S.'s hands were "like next to his back private part, his butt." J.S. also testified that Sandru touched his private parts when he put J.S. to bed, moving his hand in a circular motion over his penis.

J.S. testified that, when Sandru's adult sons were living with Sandru for a while, J.S. shared Sandru's bed so these sons could have the other bedroom. In an incident that occurred just shortly before J.S.'s mother called the police to report the abuse, Sandru asked J.S. to come to bed with him. Sandru held J.S. next to his body and put J.S.'s feet between Sandru's legs. Sandru was lying on his side, pressed against J.S.'s back. J.S. testified that he could feel Sandru's "private part a little," and that he "could feel his nuts with my legs." J.S. finally told his mother about the incidents, because he did not want any of it to happen again.

Sandru testified in his own defense, denying that he had ever touched J.S. in an inappropriate manner.

The jury found Sandru guilty of one count of first degree child molestation as charged. Sandru was acquitted on the second and third count. The trial court sentenced Sandru to 66 months of incarceration. Sandru timely appealed.

DISCUSSION

I. Lesser Included Offense

Sandru argues the trial court erred when it denied his request to instruct the jury on the lesser included offense fourth degree assault.

A trial court should instruct the jury on a lesser included offense if two conditions are met. State v. Workman, 90 Wn.2d 443, 447, 584 P.2d 382 (1978). First, under the legal prong, each of the elements of the lesser offense must be necessary elements of the offense charged. Id. at 447–48. Second, under the factual prong, the evidence in the case must clearly support an inference that the defendant committed the lesser crime. Id. at 448. Under this second prong, a defendant is entitled to a lesser included offense instruction if, construing the evidence in a light most favorable to him, a jury could find the lesser offense was committed instead of the charged offense. State v. Allen, 127 Wn. App. 945, 950, 113 P.3d 523 (2005).

We review de novo the legal prong of a request for a jury instruction on a lesser included offense. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). We review a trial court's refusal to give a requested instruction, when based on the facts of the case, for an abuse of discretion. Id. at 771–72. A trial court abuses its discretion if it bases its decision on an erroneous view of the law or applies an improper legal standard. State v. Kinneman, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

The State correctly concedes the legal prong is met. In State v. Stevens, 158 Wn.2d 304, 310–11, 143 P.3d 817 (2006), the court held that second degree child molestation necessarily includes the elements of fourth degree assault. Because the only difference between first and second degree child molestation is the respective age of the victim, the holding in Stevens applies squarely here. Compare RCW 9A.44.086, the child must be between 12 and 14 years old, and .083, the child must be less than 12 years old.

The parties dispute only the factual prong. Sandru argues that the evidence supported an inference that he touched J.S. without consent and that the touching was offensive, so the jury should have been allowed to consider fourth degree assault. The State responds that, because Sandru categorically denied that any touching occurred, there was no evidence from which to conclude that Sandru had committed fourth degree assault.

Sandru testified in his own defense, denying that he had touched J.S. in an inappropriate manner. Specifically, he denied the following acts: putting his hand on J.S.'s upper thigh, putting his hand on J.S.'s penis and rubbing it, asking J.S. to give him a back rub, putting his hand on J.S.'s butt, or positioning J.S.'s body while sleeping in the same bed so that J.S.'s feet and body touched Sandru's genitals.

Because Sandru consistently denied having the contact that J.S. described, it would have been inconsistent with Sandru's own testimony to instruct the jury on fourth degree assault. Fourth degree assault necessarily includes either an attempt or threat to touch or an actual touching. Clark v. Baines, 150 Wn.2d 905, 908 n.3, 84 P.3d 245 (2004). Sandru does not point to any evidence in the record to support an inference that his behavior could be characterized as an assault. Construing the evidence in a light most favorable to Sandru, a jury could not find fourth degree assault was committed, because Sandru denied ever touching J.S. at all.

The trial court did not abuse its discretion in refusing to give the lesser included offense instruction.

II. Extrinsic Evidence

Sandru also contends the jury considered extrinsic evidence during deliberations. Extrinsic evidence is information outside all the evidence admitted at trial, either orally or by document. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990). If the jury has considered extrinsic evidence, a new trial is warranted when the defendant has been so prejudiced that only a new trial can insure the defendant receives fair process. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

During the evidentiary portion of the trial, the parties stipulated that the jury could listen to a recorded interview of a defense witness. The court gave the jurors a transcript to assist them in listening to the testimony. The court then collected the transcripts after the recording finished. A few days later, the jurors told the court they had made notes on their copies of the transcripts. The parties agreed to allow the jurors to copy their notes from the transcripts, and to remove the transcripts before deliberations. The court then told the jury, "The transcripts are not evidence, but your notes are. We will pass those transcripts back to you. You can take any of those notes and transfer them to your notepads so you can refer to them during deliberations."

The court's written instructions to the jury stated, "The evidence you are to consider during deliberations consists of the testimony you have heard from witnesses, stipulations and the exhibits I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." Further, the court instructed the jury specifically on the use of notes before the evidentiary portion of trial began: "You should not assume that the notes are

more or less accurate than your memories. They're simply a tool to assist you during deliberations."

First, the notes were not extrinsic evidence. To the contrary, the jurors were entitled to consider the notes they had made on the transcripts. Further, despite the court's errant remark, Sandru has not met his high burden to demonstrate that it caused prejudice, given the specific directions the court gave to the jury before the evidentiary portion of the trial and in the jury instructions.

We affirm.

Appelwick, J.

WE CONCUR:

Dwyer, A.C.J. Cox, J.