1-23-2018

State v. Kraly Respondent's Brief Dckt. 44892

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44892**
Plaintiff-Respondent,	)	
	)	**Boundary County Case No.**
v.	)	**CR-2016-334**
	)	
SHANE A. KRALY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BOUNDARY

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Shane A. Kraly appeals from his judgment of conviction for rape, injury to a child, possession of a controlled substance, and possession of paraphernalia. He claims the jury verdict for count II, injury to a child, is unsupported by sufficient evidence.

Statement Of The Facts And Course Of The Proceedings

Kraly and M.M. met on Facebook. (Tr., p. 145, L. 21 – p. 147, L. 21.) M.M., who was 17, told Kraly she was 19. (Tr., p. 149, Ls. 17-24.) Kraly, who was 30, told M.M. he was 25. (Tr., p. 149, L. 25 – p. 150, L. 1; p. 381, Ls. 6-11.) After exchanging text messages they agreed that Kraly would come over and spend the night and they would have sex. (Tr., p. 156, p. 20 – p. 159, p. 17.)

Kraly drove to M.M.'s residence that evening. (Tr., p. 165, Ls. 1-13; p. 167, Ls. 1-5.) M.M. lived with her father, but her bedroom was in a separate building on the property, not connected to the main house. (Tr., p, 167, Ls. 1-22; p. 169, Ls. 4-10.)

After some small talk in her room, Kraly asked M.M. whether she wanted to use meth. (Tr., p. 170, Ls. 1-6; p. 172, Ls. 2-8.) She testified that she "kind of freaked out," and responded "like, 'No not really.'" (Tr., p. 172, Ls. 9-10.) M.M. testified that she did not "accept that offer" to do meth "and chill together," and that she had not done meth before. (Tr., p. 172, Ls. 19-22.) Following this exchange, Kraly sat on top of M.M. and gave her a backrub. (Tr., p. 176, Ls. 10-23.) Kraly then put a syringe without a needle into M.M.'s anus and injected her with methamphetamine. (Tr., p. 177, L. 8 – p. 179, L.

4.) As Kraly did this he told M.M. what he was doing, and told her "what to do once the syringe" was inserted. (Tr., p. 178, L. 21 – p. 179, L. 12.)

M.M. testified that after she was injected with methamphetamine her head hurt "really bad" and she "didn't care" about her surroundings. (Tr., p. 180, Ls. 3-25.) She testified that she was "really tired and confused." (Tr., p. 182, Ls. 14-15.) Kraly told her "to like trust him and it won't hurt," and, using the same needle he had just injected himself with, injected M.M. with more methamphetamine in the arm. (Tr., p. 182, L. 2 – p. 183, L. 7.) Throughout the night Kraly repeatedly injected M.M. with methamphetamine (Tr., p. 187, Ls. 4-25) and the two had sex until the following morning (See Tr., pp. 183-94).

That morning, M.M. was still high and "didn't want to go to school." (Tr., p. 194, Ls. 17-23.) Kraly drove them to a store for coffee and cigarettes, then drove them to the River Inn casino. (Tr., p. 195, L. 3 – p. 196, L. 2.) Shortly after arriving at the casino they left and drove to a secluded location off the side of the road. (Tr., p. 196, Ls. 4-12.) While there, and while still in the truck, Kraly again injected M.M. with methamphetamine in her arm. (Tr., p. 200, Ls. 19-24; p. 206, Ls. 6-21.) Kraly and M.M. then drove back to the casino and "literally just sat" in the truck. (Tr., p. 207, Ls. 8-12.)

As it happened, during this entire encounter M.M. was wearing an ankle monitor per the terms of a juvenile-court release order. (Tr., p. 156, Ls. 20-22; p. 301, L. 22 – p. 302, L. 3.) Using the ankle monitor's GPS coordinates, law enforcement tracked M.M. to the parking lot and discovered her and Kraly in his truck. (Tr., p. 299, Ls. 17-20; p. 300, Ls. 12-18; pp. 304-18.) Kraly was arrested and charged with rape, injury to a child, possession of methamphetamine, and possession of drug paraphernalia. (R., pp. 196-

200.) After trial, the jury found Kraly guilty of all counts, and he admitted to a persistent violator enhancement. (Tr., p. 528, L. 13 – p. 529, L. 6.)

The district court sentenced Kraly to concurrent 15-year sentences on the rape and injury to child charges, fixing five years. (R., pp. 276-79.) Kraly was also sentenced to a concurrent five-year fixed sentence on the methamphetamine charge and received credit for time served on the paraphernalia charge. (R., pp. 277-80.) He timely appealed. (R., pp. 281-83.)

ISSUE

Kraly states the issue on appeal as:

> Is there sufficient evidence to support the jury verdict on the Injury to Child count given the absence of any evidence that M.M. was in the "care or custody" of Mr. Kraly?

(Appellant's brief, p. 3.)

The state rephrases the issue as:

Has Kraly failed to show there was not substantial evidence from which the jury could conclude M.M. was in Kraly's care or custody?

ARGUMENT

Kraly Has Failed To Show There Was Insufficient Evidence From Which The Jury Could Have Concluded M.M. Was In His Care Or Custody

A. Introduction

Kraly contends on appeal there was insufficient evidence from which the jury could have concluded M.M. was in his care or custody when he injected her with methamphetamine. (Appellant's brief, pp. 5-7.) Therefore, he argues, the state presented insufficient evidence to sustain a conviction for injury to a child. (Appellant's brief, pp. 5-7.)

But "care or custody"—in the context of Idaho Code Section 18-1501(1)—means more than formal, parent-child custody. Interpreting the "care or custody" phrase, the Idaho Supreme Court has looked to, among other things, whether the defendant controlled or supervised the minor. See Beers v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 316 P.3d 92 (2013). And other jurisdictions have found that defendants with minor children in their vehicles have control or custody over those children. See, e.g., State v. Anspach, 627 N.W.2d 227 (Iowa 2001).

Construing the facts and inferences to uphold the jury verdict, because the evidence showed that Kraly had control over M.M. when injected her with methamphetamine in her bedroom and inside his vehicle, there was substantial evidence from which the jury could have concluded M.M. was in Kraly's care or custody.

B. Standard Of Review

Idaho's appellate courts "will not overturn a judgment of conviction, entered upon a jury verdict, where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt." State v. Oliver, 144 Idaho 722, 724, 170 P.3d 387, 389 (2007) (citing State v. Sheahan, 139 Idaho 267, 77 P.3d 956 (2003)). Reviewing courts therefore view evidence "in the light most favorable to the prosecution, and we do not substitute our judgment for that of the jury regarding the credibility of the witnesses, the weight of the evidence, and the reasonable inferences to be drawn from the evidence." Oliver, 144 Idaho at 724, 170 P.3d at 387; State v. Knutson, 121 Idaho 101, 822 P.2d 998 (Ct. App. 1991); State v. Hart, 112 Idaho 759, 761, 735 P.2d 1070, 1072 (Ct. App. 1987). The facts, and inferences to be drawn from those facts, are therefore construed in favor of upholding the jury's verdict. See Oliver, 144 Idaho at 724, 170 P.3d at 387; see also Hart, 112 Idaho at 761, 735 P.2d at 1072. Consequently, "[w]here there is competent although conflicting evidence to sustain the verdict, this court cannot reweigh that evidence or disturb the verdict." State v. Merwin, 131 Idaho 642, 644-45, 962 P.2d 1026, 1028-29 (2002); State v. Hoyle, 140 Idaho 679, 684, 99 P.3d 1069, 1074 (2004).

C. Kraly Was Exerting Control Over M.M. When He Injected Her With Methamphetamine In Her Bedroom And In His Vehicle; This Was Substantial Evidence From Which The Jury Could Conclude She Was In His Custody

As set forth in the Idaho Code,

> [a]ny person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer,

> or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding one (1) year, or in the state prison for not less than one (1) year nor more than ten (10) years.

I.C. § 18-1501(1) (emphasis added). The central issue in this case is what it means to "have[] the care or custody of any child."

The Idaho Court of Appeals has construed "care or custody" by looking to its "ordinary meaning … and the context in which it is used":

> "Care" is defined as "CHARGE, SUPERVISION, MANAGEMENT: responsibility for or attention to safety and well-being." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 338 (1993). *See also People v. Culuko*, 78 Cal.App.4th 307, 92 Cal.Rptr.2d 789, 808 (2000) (holding that there is "'no special meaning to the terms "care and custody" beyond the plain meaning of the terms themselves. The terms "care or custody" do not imply a familial relationship but only a willingness to assume duties correspondent to the role of a caregiver.'") [citations omitted].

State v. Morales, 146 Idaho 264, 267, 192 P.3d 1088, 1091 (Ct. App. 2008). Thus, where an uncle lived with his nephew, "admitted to watching the children" from time to time, took the nephew to the hospital on a prior occasion, and took the nephew to the hospital for the abusive injuries at issue, the jury could have found that the child "was in Morales's care." Id.

The Idaho Supreme Court has similarly made clear that "having the care or custody of any child" does not simply refer to a parent-child relationship or other formal legal custody. In Beers v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints, 155 Idaho 680, 316 P.3d 92 (2013), the Court examined "care or custody" as

part of a larger inquiry into the plaintiffs' civil suit against the church and various individual Ward members.

Heidi Beers was a teenager who participated in a church-organized campout. Id. at 683, 316 P.3d at 95. Heidi's parents did not attend, but they allowed her to ride up to the campout with a friend. Id. After Heidi arrived she and approximately 20 other children went with Bradley Day, a supervising adult, to a bridge. Id. Day had promised the children he would take them there if they had their parent's permission. Id. That evening, several children jumped from the bridge to the river below, but Heidi did not. Id.

Heidi returned to the bridge the next day. Id. Two adults were present, one of whom, Garrett Haueter, "told everyone to jump in the location that had been checked" for rocks and obstructions. Id. at 684, 316 P.2d at 96. The other adult, Sharolyn Ririe, admitted to Heidi that she herself would "be afraid to jump" due to a fear of heights. Id. Heidi was likewise afraid; but she worked up the courage and jumped anyway. Id. Heidi jumped in an area that had not been inspected and fractured her ankle when she hit the water. Id.

Heidi and her parents sued the church and several individual defendants for negligence. Id. A threshold question was "whether the [church] or the Ward members owed a duty" toward Heidi. Id. at 685, 316 P.2d at 97. The Court concluded there were two potential bases for finding "an affirmative duty of care": 1) a special relationship between the individual defendants and Heidi, or 2) an assumed duty towards Heidi. Id. at 686, 316 P.2d at 98.

The Court affirmed the district court's finding that there was no special relationship between Heidi and the individual defendants:

> As explained above, a special relationship requires a right and an ability to control the conduct of the third party. There is no evidence that the Ward members had such a relationship with Heidi. None of the nine individual Respondents can be said to have had custody of Heidi at any time during the campout, let alone at the time of her injury. Heidi's parents did not speak to anyone regarding her attendance at the Ward campout. When Heidi decided to go down to the bridge, she did so without seeking or obtaining permission from any of the individual Ward members. The facts do not demonstrate that any of the Ward members exercised the level of control over Heidi that would justify imposing a duty based on a special relationship. Thus, the district court properly determined that the Ward members did not owe Heidi a duty because there was no special relationship.

Id. at 689, 316 P.2d at 101.

The Court then looked to whether any of the actions of the individual defendants "may have given rise to an assumed duty to Heidi." Id. at 689-90, 316 P.2d at 101-02. The Court found there was no assumed duty, first because most of the defendants were "not present at the bridge when Heidi was injured," or in one case had nothing to do with the bridge jumping. Id. Those defendants had therefore not assumed a duty. Id. As for Bradley Day, who took the children to the bridge the prior evening, the "duty to act is limited to the discrete episode in which the aid is rendered," and would not have extended to the following day. Id. at 690, 316 P.2d at 102. Sharolyn Ririe, who admitted her own fears of jumping, and who asked some of the children if they had checked for rocks, did not assume a duty, insofar as there was no "reasonable inference that Sharolyn Ririe was supervising the bridge jumping in general, or Heidi in particular, much less that Heidi could reasonably rely upon her supervision." Id. at 689, 316 P.2d at 101. Lastly, even

Garrett Haueter, who was the most involved person "present at the bridge when Heidi was injured," had not assumed a duty:

> He testified that he witnessed some of the youths check the water for hazards as well as for depth. He also warned the jumpers that only a specific area under the bridge had been inspected. Of all the defendants, Garrett Haueter had the most active role on the bridge when Heidi was injured. *However, the district court found that his actions did not rise to the level of undertaking supervision*. The district court stated that "Garrett relayed information about where the river had been inspected. He never personally inspected the area nor did he direct the inspection of the area. *Furthermore, there is no indication that he exercised control over where the jumpers actually jumped.*"

Id. at 690, 316 P.2d at 102 (emphasis added). The Court concluded that "[i]ndicating where the bridge and river had been inspected did not constitute assumption of the duty to direct, control, supervise, or prevent any person from jumping from the bridge." Id. Accordingly, "Garrett Haueter did not assume a duty to Heidi." Id.

The Court next considered whether the defendants had committed "civil child abuse." Id. at 685, 690-92, 316 P.2d at 96, 102-04. This related inquiry arose because Heidi had also sued under I.C. § 6-1701, which incorporates the criminal injury to child statute as a civil action. See id. at 691, 316 P.2d at 103. Thus, to determine whether the individuals had violated the "civil child abuse" statute, the court looked to I.C. § 18-1501(2) and analyzed whether Heidi was in the defendants' "care or custody." Id. at 691-92, 316 P.2d 103-04.

Referring back to its analysis of the duties owed by the individual defendants, the Court held that none of the defendants had the "care or custody" of Heidi:

> …[R]elying on the broad definition of "willfully," [the Beers's] theory is that the Ward members willfully caused or permitted Heidi to be injured or to be placed in such situation that her health was endangered. The difficulty for the Beerses is that the statute does not impose a duty upon

> the general public to act in such a way as to protect children from injury or exposure to dangerous conditions. *Under the plain text of the statute, this duty only extends to those "having the care or custody of [the] child." As previously discussed, none of the Ward members had "the care or custody of" Heidi.*

Id. at 692, 316 P.2d at 104 (emphasis added). Because the Court previously found no special relationship or assumed duty, there was likewise no "care or custody" at issue, and I.C. § 18-1501(2) likewise "imposed no duties." Id.

Applying these standards here, there was substantial evidence that Kraly had custody over M.M, insofar as he was exerting his control over M.M., and control over the situation. M.M. testified that, when asked whether she wanted to do crystal meth, she "kind of freaked out," and "was like, 'No, not really.'" (Tr., p. 172, Ls. 7-12.) When asked whether she accepted his "offer" to "use[] it with him" and "just like chill together," she testified she did not accept his offer. (Tr., p. 172, Ls. 13-20.) When asked whether she had "done crystal meth before then," M.M. testified she had not. (Tr., p. 172, Ls. 21-22.) M.M. further testified that needles "terrify the crap out of me" and that she hated them. (Tr., p. 173, Ls. 6-8.)

When Kraly injected M.M. with methamphetamine he was exerting control over her in several senses. He injected her despite her expressed reservations: she testified that she told him "no," she did not really want to do meth, and that she did not accept his offer to do meth. (Tr., p. 172, Ls. 7-20.) While M.M. admittedly testified that Kraly did not "hold [her] down and forcefully" inject her with methamphetamine (Tr., p. 281, Ls. 12-17), she nevertheless testified that Kraly told her "what to do" while he injected her, which she complied with. (Tr., p. 179, Ls. 7-12.) He also had a "discussion" with M.M. about methamphetamine and "how to use it." (Tr., p. 181, Ls. 6-12.)

Moreover, because M.M. was injected with methamphetamine her regard for the situation diminished and she became increasingly heedless of what was happening. (See Tr., p. 180, Ls. 3-25.) She testified she was aware of her surroundings but because of the meth she "didn't care." (Tr., p. 180, Ls. 20-25.) She testified that she felt "really tired and confused," to which Kraly said "to like trust him and it won't hurt"—and then injected her with the same needle he had just used on himself. (Tr., p. 182, Ls. 14-23.) He continued to inject her as the night went on. (Tr., p. 187, Ls. 11-25.)

Thus, unlike the absent or uninvolved adults in Beers, Kraly was altogether dominating the situation and controlling M.M.: he was physically present, supervising the drug use, and instructing the tired, confused, and first-time meth-using minor to "trust him" as he injected her with methamphetamine. These factors alone would be enough to create a duty owed to M.M., and show substantial evidence she was in his custody.

Kraly asserts as a matter of fact that M.M. "initially refused but later agreed to inject some in her anus using a needle-less syringe." (Appellant's brief, p. 2.) However, he provides no citation to the record showing that M.M. "agreed" to the initial injection. (See Appellant's brief, p. 2.)[1] While M.M. admittedly testified that Kraly did not hold her down and forcibly inject her, she also testified that she told him "no," she did not really want to do meth, and did not accept his offer to do meth. (Tr., p. 172, Ls. 5-20.) M.M. also testified that she "just finally said yes" to using methamphetamine after Kraly

[1] Kraly also mistakenly states that M.M. "could not recall if Mr. Kraly did the injection or if she did it herself." (Appellant's brief, p. 2 (citing Tr., p. 178, Ls. 7-10).) This is incorrect; the testimony Kraly cites is M.M.'s response that she not recall who lifted her skirt up. (Tr., p. 178, Ls. 5-10.) M.M. consistently testified that it was Kraly who injected her with methamphetamine. (See, e.g., Tr., p. 177, Ls. 22-24; p. 178, Ls. 3-20; p. 179, Ls. 13-15; p. 179, L. 24 – p. 180, L. 8.)

repeatedly asked her to; but she clarified that "he kept … asking" and that "I kind of gave up on saying no" and it was "like no wasn't good enough." (Tr., p. 281, L. 22 – p. 282, L. 4.) Construing the evidence in favor of upholding the jury verdict, "giving up on saying no" is far better evidence of resignation and surrender, rather than any "agreement" to be injected with methamphetamine. This testimony further shows the extent to which Kraly influenced and exerted control over M.M.'s decisions that evening.

Furthermore, M.M. also was in Kraly's custody because Kraly injected her while she was inside his truck. Several courts have found that a minor's presence inside a defendant's vehicle is evidence of custody or control. For example, in State v. Anspach, the defendant drove recklessly with four small children in his truck. 627 N.W.2d at 230. The defendant argued, among other things, that "he did not have the right of control over the children" and therefore "cannot be guilty of child endangerment." Id. at 234.

The Iowa Supreme Court disagreed, noting first that the statute there specifically applied to persons having "custody or control over a child.[2]" Id. at 231. To exert "control," as defined by the court, was "[t]o exercise authority or dominating influence." Id. at 234. Applying that definition, the court concluded whatever control the children's

[2] Unlike Idaho's statute, the Iowa child endangerment statute distinguishes between individuals with "custody *or control*" over a minor child. Iowa Code § 726.6 (emphasis added). Accordingly, the Anspach Court contrasted "custody" and "control": "[A]n individual could have 'control' over a child without also having ordinary custody of a child. 'Control' only refers to the state of having restricting or governing power over someone, while 'custody' implicates not only a power of oversight but also a responsibility for the care of an individual. Therefore, the reach of section 726.6 is broader than section 726.3 [which just talks about custody]." Anspach, 627 N.W.2d at 234 (quoting State v. Johnson, 528 N.W.2d 638, 641 (Iowa 1995)).

guardians initially had, "was surrendered to [defendant] when they placed the children in his truck cab, got in the truck bed, and allowed him to drive." Id. As the driver, the defendant "was the only one in charge of the situation at this time; [the guardians] were in no position to prevent his actions." Id. Moreover, the defendant had control "over the instrumentality contributing to the risk to the children in the truck," insofar as he was the driver of the truck. Id. at 235. The court thus concluded the defendant "was in control of his actions and the consequences of his driving," and therefore he "had control over the children in the truck as required by the statute." Id.; see also State v. Friend, 630 N.W.2d 843 (Iowa 2001) (where defendant "was not charged with overseeing his nephew's welfare while in Iowa," but "was in control of the truck immediately before the officer stopped it," and therefore, "he was also in 'control' of his nephew for purposes" of the child endangerment statute).

Likewise, in Snow v. Commonwealth of Virginia, 537 S.E.2d 6 (Va. App. 2000), an defendant transporting his juvenile nephews was found to have custody over them, because "[h]e knew that the father was detained in police custody when he voluntarily took control of the vehicle and drove away knowing that the juveniles were in the vehicle." 537 S.E.2d at 10. The Snow Court held "on these facts, appellant was a 'person responsible for the care' of the juvenile occupants of the motor vehicle.'" Id. (holding that "we find that one may become a person 'responsible for the care of a child' by a voluntary course of conduct and without explicit parental delegation of supervisory responsibility or court order").

Here, M.M. was similarly under Kraly's control, and therefore in his custody, while inside his truck. Kraly had no "explicit delegation of parental authority" from

M.M.'s father to take her out of school and drive her to the casino. (Id.; see Tr., p. 194, L. 22 – p. 195, L. 16.) Kraly, as the driver, had the ability to determine where to drive and when to do it. Like the minor passengers in Anspach, Friend, and Snow, M.M. was plainly in Kraly's custody insofar as she was physically inside the vehicle he was in control of, and being transported by him. When Kraly injected M.M. with methamphetamine, while she was still inside his truck, she was in his custody.

Construing the facts and inferences to uphold the jury's verdict, there was sufficient evidence that M.M. was in Kraly's custody when he injected her with methamphetamine; both in her bedroom, and in his truck. Consequently, there was sufficient evidence from which the jury could have found Kraly guilty of injury to a child.

CONCLUSION

The state respectfully requests this Court affirm the judgment of conviction.

DATED this 23rd day of January, 2018.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 23rd day of January, 2018, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

DENNIS BENJAMIN
NEVIN, BENJAMIN, McKAY & BARTLETT LLP

at the following email addresses: db@nbmlaw.com and lm@nbmlaw.com.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd