10-30-2017

State v. Kraly Appellant's Brief Dckt. 44892

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. SHANE KRALY, Defendant-Appellant,	)	S.Ct. No. 44892 Boundary Co. No. CR-2016-334

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First Judicial District of the State of Idaho
In and For the County of Boundary

HONORABLE BARBARA A. BUCHANAN
Presiding Judge

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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal in a criminal case. This Court should vacate the judgment and sentence for Count II (Injury to Child) because there was insufficient evidence to show the child was in the care or custody of the appellant.

B. *Procedural History and Statement of Facts*

1. Pretrial proceedings

An Amended Information charged Shane Kraly with four offenses: 1) nonforcible Rape of M.M., a seventeen-year-old, when Mr. Kraly was thirty; 2) Injury to Child, by injecting M.M. with methamphetamine; 3) Possession of Methamphetamine; and 4) Possession of Drug Paraphernalia. R 197-198.

2. The trial

M.M. was eighteen at the time of trial, but seventeen on April 27, 2016, the day of the allegations. T pg. 144, ln. 13-20. Prior to that day, she sent out friend requests from her Facebook account and Mr. Kraly responded a few weeks later. T pg. 147, ln. 12-19. She told Mr. Kraly that she was nineteen. T pg. 149, ln. 22. He claimed to be twenty-five. T pg. 150, ln. 1.

They began texting. On April 27, they exchanged a series of text messages, some of which were sexually explicit. T pg. 154 - 165. State's Exhibit 1. She told Mr. Kraly that she could not leave her house because she was wearing a court-ordered GPS tracking device. She followed that news with the question "[W]ould

you sleep with me?" T pg. 156, ln. 20-23. Mr. Kraly replied: "I mean, no offense, but do you even know what I look like?" T pg. 157, ln. 1-2. She said that she had seen his photograph on Facebook, noting that "I like sex." T pg. 157, ln. 3-4. Mr. Kraly said that he liked sex too. *Id*., ln. 8. They agreed to meet at her place and have sex. T pg. 160, ln. 16-19. M.M. offered to give Mr. Kraly gas money. T pg. 163, ln. 20.

M.M. slept in a shed on her parents' property. State's Exhibit 5. When Mr. Kraly arrived, he offered her methamphetamine. She initially refused but later agreed to inject some in her anus using a needle-less syringe. She could not recall if Mr. Kraly did the injection or if she did it herself. T pg. 178, ln. 7-10. Mr. Kraly injected himself in the arm. T pg. 182, ln. 6-10. Later, Mr. Kraly injected some into M.M.'s arm. Over the course of the night, they had mutual oral sex, vaginal and anal intercourse, and used more methamphetamine. T pg. 183, ln. 10 - pg. 185, ln. 19. M.M. said that Mr. Kraly was not wearing a condom. T pg. 184, ln. 19-24.

That morning, M.M. skipped school. They injected more methamphetamine and went to the parking lot of the Kootenai River Inn where they ran into M.M.'s parole officer. She told her parole officer that Mr. Kraly's first name was Robert or Richard, instead of Shane. T pg. 210, ln. 210. M.M. was taken into custody for violating the terms of her pre-trial release. T pg. 210, ln. 4-20.

After M.M. was questioned by the probation office, she had a medical examination. T pg. 212, ln. 14-19. Dr. Susan Leyeux did not observe any bleeding or trauma to M.M.'s vaginal walls, or marked tenderness in the uterus or ovary

areas. There was no evidence of bleeding or tears in the rectum. T pg. 240, ln. 6-pg. 242, ln. 25. No evidence was presented that any of Mr. Kraly's DNA was recovered during the examination.

Mr. Kraly's truck was searched at the Casino. T pg. 356, ln. 21-23. Methamphetamine and drug paraphernalia was found inside a Toy Story Nintendo game case. Ex. 21; R 297; T pg. 359, ln. 10-16. A syringe was find inside M.M.'s shed. T pg. 384, ln. 6-12.

Denver Hart, an inmate awaiting sentencing on a second degree murder conviction, testified for the state. He claimed that Mr. Kraly admitted giving methamphetamine to M.M. He also claimed Mr. Kraly knew M.M. wasn't 18, but explained that since M.M asked him for sex first and was so insistent about it he had sex with her anyway. T pg. 427, ln. 7 - pg. 529, ln. 15.

The jury found Mr. Kraly guilty of all counts and also found that he was a persistent violator. R 231-232.

3. The sentencing

The court imposed concurrent fifteen-year sentences, with five-years fixed, for Counts I and II, and a concurrent five-year fixed sentence for Count III. R 276-278. A timely Notice of Appeal was filed. R 281.

III. ISSUE PRESENTED ON APPEAL

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?

IV. ARGUMENT

A. *Introduction*

A finding of guilt will be overturned on appeal where there is not 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. The Court considers the evidence in the light most favorable to the prosecution. *State v. Morales*, 146 Idaho 264, 266, 192 P.3d 1088, 1090 (Ct. App. 2008). Idaho's substantial evidence rule is similar, but not identical, to the federal rule, mandated by the Fourteenth Amendment's due process clause, which requires the reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

Here, there was not sufficient evidence to sustain the conviction for Count II under either the Idaho or federal rule.

Count II of the Amended Information charged Mr. Kraly with violating I.C. § 18-1501(1), which provides in pertinent part:

> Any person who . . . *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.

Id (emphasis added). The Amended Information alleged that Mr. Kraly, "under

circumstances likely to produce great bodily harm or death, [did] wilfully cause or permit the person or health of [M.M.] to be injured while having care and/or custody of the child" by "injecting methamphetamine into the child[.]" R 78. Jury Instruction 19 required the jury to find, *inter alia*, that Mr. Kraly "had the care or custody of [M.M.]" R 257.

As explained below, the evidence here is not sufficient to sustain the conviction on Count II under both the Idaho and federal tests because there was no evidence presented that M.M. was under the care or custody of Mr. Kraly.

B. *There is insufficient evidence to prove Mr. Kraly had the care or custody of M.M.*

The Supreme Court interpreted the care or custody clause of the Injury to Child statute in *Beers v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 155 Idaho 680, 691, 316 P.3d 92, 103 (2013). Heidi Beers, a minor, was attending a campout organized by ward members of her church when she was injured after jumping from a bridge into the Payette River. Her parents brought suit against Corporation of the President of the Church of Jesus Christ of Latter-day Saints and fourteen individual defendants. One of the claims was based upon I.C. § 6-1701 (tort actions in child abuse cases) against the individual defendants. The district court denied the defense motion for summary judgment as to the statutory claim against five individual defendants, who were present when Heidi was injured. The Supreme Court reversed, holding that the child was not in the care or custody of the individual defendants.

The Supreme Court explained that I.C. § 6-1701(1)(d) provides that an action may be brought on behalf of any child against anyone who has "[i]njured a child as defined in section 18-1501, Idaho Code." But, that claim failed because the individuals owed no duty of care toward the child, which could only arise if there was a "special relationship" between the child and defendant or the defendant has assumed a duty of care toward the child. Since neither of those circumstances were present, "none of the Ward members had 'the care or custody of' Heidi. Therefore, I.C. § 18-1501(2) imposed no duties and the district court erred by denying their motion for summary judgment." *Beers*, 155 Idaho at 692, 316 P.3d at 104.

Likewise here, Mr. Kraly did not have care or custody of M.M. due to a "special relationship." "A special relation exists between the actor and a third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection." *Turpen v. Granieri*, 133 Idaho 244, 248, 985 P.2d 669, 673 (1999), *quoting* RESTATEMENT (SECOND) TORTS § 315 (1966)). However, Mr. Kraly did not have control over M.M. or a legal duty to protect her. Thus, liability may not be imposed due to a "special relationship." *Beers*, 155 Idaho at 686, 316 P.3d at 98.

Further, as is manifest from the facts of the case, Mr. Kraly did not assume a duty of caring for M.M. Thus, the conviction may not be sustained on this basis either as "[l]iability for an assumed duty . . . can only come into being to the extent that there is in fact an undertaking." *Beers*, 155 Idaho at 688, 316 P.3d at 100.

In sum, M.M. was not in the "care or custody" of Mr. Kraly as that term is defined in *Beers*.

Moreover, prior to the *Beers* case, the Court of Appeals noted that "[t]he injury to child statute does not define 'care or custody.' Furthermore, Idaho case law has not defined these terms as they relate to the elements of the statute proscribing injury to child." *State v. Morales*, 146 Idaho at 266-67, 192 P.3d at 1090-91. Consequently, the Court looked "to the ordinary meaning of the word and the context in which it is used," noting that "'Care' is defined as 'CHARGE, SUPERVISION, MANAGEMENT: responsibility for or attention to safety and well-being.' WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 338 (1993)." *Id., citing People v. Culuko*, 78 Cal. App. 4th 307, 92 Cal. Rptr. 2d 789, 808 (Cal. Ct. App. 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") and *State v. Jones*, 937 P.2d 310, 314 (Ariz. 1997) (using the same dictionary definition above to conclude that "both 'custody' and 'care,' as they relate to A.R.S. § 13-3623, imply accepting responsibility for a child in some manner"). Under the ordinary meaning of "care or custody" within the context of I.C. § 18-1501(2), Mr. Kraly did not have the care or custody of M.M. Thus, the conviction may not be sustained under the rationale of *Morales* either.

As the state failed to present any evidence that M.M. was in the care or

custody of Mr. Kraly, the conviction for Count II violates the due process clauses of the state and federal constitutions. *State v. Morales*, *supra*; *Jackson v. Virginia*, *supra*.

V. CONCLUSION

In light of the above, Mr. Kraly asks the Court to vacate the judgment and sentence on Count II of the Amended Information.

Respectfully submitted this 30th day of October, 2017.

/s/ Dennis Benjamin
Dennis Benjamin
Attorney for Appellant

CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 30th day of October, 2017.

/s/Dennis Benjamin
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